



Department of Home Affairs Annual Report of the Regulation of Surveillance Commissioner for 2023

April 2024

REGULATION OF SURVEILLANCE ETC. ACT 2006

To: Hon. Jane Poole-Wilson, MHK, Minister for Justice and Home Affairs

REPORT OF STEVEN COREN, REGULATION OF SURVEILLANCE COMMISSIONER FOR THE YEAR ENDING 31ST DECEMBER 2023

Role of the Regulation of Surveillance Commissioner (“the Commissioner”)

1. The Commissioner is appointed by the Department of Home Affairs under section 28(1) of the Regulation of Surveillance Etc. Act 2006 (“the ROSE Act”).
2. I was appointed as Commissioner from 1st January 2023 for a three-year term. This, my first annual report as Commissioner, covers the operation of the ROSE Act for the year ending 31st December 2023.
3. Statutory functions of the Commissioner include the following:
 - scrutinising authorisations for surveillance as soon as practicable;¹
 - approving intrusive authorisations, where the statutory criteria are met;²
 - quashing or cancelling an authorisation, where required;³
 - ordering the destruction of records, where required;⁴ and
 - keeping under review the exercise and performance, by the persons on whom they are conferred or imposed, of the powers and duties conferred or imposed by or under the ROSE Act.⁵
4. Assisting me, as my Deputy Commissioner, is Brendan O’Friel. Readers of the Surveillance Commissioner’s past annual reports (posted on the Department of Home Affairs website⁶) will know that Brendan undertook the role of Commissioner from December 2006 through to December 2022. I take this opportunity to thank Brendan for his outstanding public service in this role. As Commissioner, Brendan earned the trust of the whole spectrum of ROSE Act stakeholders, crafting a bespoke regulatory approach which commanded respect, but which quietly produced results. The Island was most fortunate to have had Brendan undertake this role, and for so long. I also thank Brendan for his practical handover assistance to me.
5. I am delighted that Brendan’s work in this area has continued in his new role as Deputy Commissioner (the role I held since August 2009). The Deputy Commissioner provides cover for any absences of the Commissioner and affords an alternative for scrutiny and authorisation if a conflict of interest arises for the Commissioner in any particular case. Brendan also assists with the annual report and remains available to provide input into the ongoing debate as to the need for legislative reform in this area. Brendan and I meet from time to time to discuss our work and to provide updates to each other. In 2023,

¹ Section 11(5) (authorisation for directed surveillance) of the ROSE Act and section 18(4)(a) (intrusive surveillance).

² Section 19(3)(a).

³ Section 20(1)-(3).

⁴ Section 20(4).

⁵ Section 28(9).

⁶ [Isle of Man Government - Surveillance Commissioner](#)

Brendan also continued to deal with one continuing authorisation which he had overseen previously as Commissioner.

6. It is my practice not only to consider authorisation documentation when provided, but also regularly to meet applicants to discuss the individual authorisation. This enables me to gain an enhanced perspective on operational aspects of the authorisations which I have been scrutinising, to ask questions and to seek further information.
7. In the case of one authorising authority in 2023, I requested that further information be included in its future applications to reference the information base upon which an application had been based. That request was duly actioned, although I keep the extent of information provided under review.

Authorisations during 2023

8. Two intrusive surveillance episodes were authorised during 2023. Both had been cancelled by the end of 2023.
9. Overall, I scrutinised 18 authorisations for directed surveillance during 2023, including the associated cancellations. As indicated above, I regularly discussed individual directed surveillance authorisations with the relevant public authority, usually to request further information. Additional information requested has always been provided. The co-operation from the authorities authorising directed surveillance was always satisfactory.
10. I did not deploy my power to quash any authorisations during 2023. In 2023, one authority self-reported an inadvertent failure to follow procedures in respect of an operation. Investigatory activity had already been suspended and I was promptly and appropriately consulted as to next steps.
11. The number of authorisations in 2023, whilst apparently relatively low, forms part of a trend: namely, a lower number of authorisations than was the case when the ROSE Act was first enacted, but a higher proportion of authorisations actually being implemented.
12. Another important point is that surveillance operations often involve the surveillance of a group of suspects. Thus the number of operations reported does not equate with the number of persons who may be the subject of surveillance. Suspected criminal activity often involves a number of suspects working together and the total number involved may only become apparent when surveillance is undertaken. Surveillance authorisations require the authorising authority to name known individuals on an authorisation. The authorisation may be amended during the operation to add or subtract names as further evidence becomes available.
13. Since April 2022, I have also been undertaking, in parallel, the Interception of Communications Commissioner role. I first reported on work in that role in April 2023 and shall do so again soon. For now, I repeat what I said in my April 2023 report⁷:

“My experience has been that discharging both Commissioner roles has proved complementary and helpful to an understanding of each. For example, the same individual law enforcement operation may, on occasion, give rise to both an application for directed surveillance authorisation, under the 2006 Act, and also for a warrant under the 1988 [Interception of Communications] Act. If so, I scrutinise, or review, two sets of necessarily overlapping application documents relating to the same operation. In practice, if directed surveillance is authorised (requiring notification to the Regulation of Surveillance Commissioner within two

⁷ [Microsoft Word - Report \(2022\) \(tynwald.org.im\)](https://tynwald.org.im)

days and scrutiny by him as soon as practicable thereafter⁸), I will already have discussed the operation with the relevant agency, whilst undertaking my 2006 Act functions, before later reviewing a warrant under the 1988 Act and/or the Theft Act 1981, relating to the same operation.”

14. Authorised surveillance, subject to the current statutory regulatory regime, continues to play a valuable part in enabling public authorities properly to investigate matters authorised under the ROSE Act. A very high proportion of the authorised surveillance operations resulted in further action by the public authority concerned. In the case of surveillance undertaken by the Isle of Man Constabulary, cases brought to Court in which authorised surveillance has played a part are reported in the Island’s media. Similarly, cases brought to Court by the Treasury involving alleged benefit fraud, in which authorised surveillance has played a part, are likewise reported from time to time.
15. The public authorities given the powers by Tynwald to authorise surveillance have varied since 2006. The current list is found in the Regulation of Surveillance (Prescription of Offices, Ranks and Positions) Order 2020.⁹ Of the seven public authorities eligible to authorise surveillance, two public authorities used their powers in 2023. Consistently with the proportionality principle underlying the ROSE Act, consideration should be given to whether all those authorities which currently retain the power to authorise directed surveillance really need to do so in future. In any event, I encourage those that do retain the power, and who are considering to use it, to engage with the Commissioner at an early opportunity, and to ensure that authorising staff are fully briefed as to the ROSE Act.
16. As with my predecessor’s previous annual reports, I am including an indicator of the value of surveillance to public authorities. Not including any possible deterrent impact on potential offending, the Treasury has reported to me that some £139,235.34 in overpayments have been established and benefit savings have resulted from cases in which authorised surveillance played a significant part in 2023. Whilst such annual savings have varied from year to year, this is a little higher than the 2022 figure.

Developments further afield

17. My Deputy and I follow developments further afield with interest, not least as they may inform best practice here and may feed into options for legislative reform. In past years, it has been our practice to consider the annual report of the UK Investigatory Powers Commissioner and to monitor case-law developments, such as the European Court of Justice Decision in the ***Privacy International*** case (6th October 2020) (Case C 623/17), and judgments of the (UK) Investigatory Powers Tribunal. This practice remains, and in 2023, we noted (for example):
 - the decision of the Investigatory Powers Tribunal of 30th January 2023 in ***Liberty & another v Security Service & another*** [2023] UKIPTrib1.¹⁰ This decision related to non-compliance by the UK Security Service (MI5) over a period of time with statutory safeguards required by UK legislation concerning the acquisition and holding of personal data;
 - the Annual Report of the Investigatory Powers Commissioner 2021 (published in March 2023);¹¹ and

⁸ See sections 11(2)(a) and 11(5) of the 2006 Act.

⁹ [Regulation of Surveillance \(Prescription of Offices, Ranks and Positions\) Order 2020 \(gov.im\)](#)

¹⁰ [Liberty v Security Service judgment \(judiciary.uk\)](#) (see conclusions at paragraphs 160 and 192-193).

¹¹ [HC 910 – Investigatory Powers Commissioner’s Office – Annual Report of the Investigatory Powers Commissioner 2021 \(ipco-wpmedia-prod-s3.s3.eu-west-2.amazonaws.com\)](#). At the time of writing, the 2022 Annual Report (of March 2024)

- the Independent Review of the Investigatory Powers Act 2016 (of Parliament) by Lord Anderson KC of June 2023.¹²
18. Notwithstanding the different statutory regime in the UK, there is much to learn from the above developments. In the context of surveillance, the Anderson Report notably envisages the likely requirement, for the 2030's, for the UK to replace the whole Investigatory Powers Act 2016 – which is, itself, some ten years more recent than our own ROSE Act of 2006. This illustrates the rapid pace of technological change and the need for investigatory powers regulation to keep up.
 19. As Interception of Communications Commissioner, in my Annual Report for 2022 of April 2023, I endorsed the Joint Statement on the Need for Legislative Reform on Investigatory Powers on the Isle of Man of 1st March 2019 issued jointly by Susie Alegre (my predecessor in that role), Brendan O’Friel (my predecessor as Surveillance Commissioner) and Iain McDonald (the former Information Commissioner).¹³
 20. The reports of my predecessor as Surveillance Commissioner likewise commented on the need to review and update our legislation authorising surveillance on the Island, especially in view of technological change, and changes made elsewhere as a result.
 21. The Departmental Plan for the Department of Home Affairs 2023-24¹⁴ envisages the following new legislation:
 - *“the Regulation of Surveillance (Amendment) Bill - to empower the Constabulary to gain access to electronic devices where the person under investigation has refused to co-operate”*; and
 - *“a Bill to replace the Interception of Communications Act (IOCA) 1988 and the Regulation of Surveillance Etc. Act) 2006 – to modernise and reform existing legislation taking into account developments in other jurisdictions”*.
 22. The latest anticipated delivery timeframes for the above Bills are stated, in the 2024/2025 Update to *Our Island Plan* (of March 2024),¹⁵ respectively, to be 2024-2025 and 2025-2026.
 23. The following extract of *Council of Ministers Proceedings* in December 2023 was also noted with interest:¹⁶

***“Investigatory Powers (Amendment) Bill Permissive Extent Clause
Council considered and agreed a paper submitted by the Cabinet Office seeking approval for the UK’s Investigatory Powers (Amendment) Bill to include a permissive extent clause but for the UK Government to be advised that it is not envisaged extension of the UK legislation to the Island will be required.”***

had also just been published: [Annual Report of the Investigatory Powers Commissioner 2022 \(ipco-wpmedia-prod-s3.s3.eu-west-2.amazonaws.com\)](https://ipco-wpmedia-prod-s3.s3.eu-west-2.amazonaws.com)

¹² [Independent review of the IPA 2016 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

¹³ [spfile \(tynwald.org.im\)](https://tynwald.org.im) (see Annexe and paragraphs 25-36 and 40-41).

¹⁴ [department-plan-2023-24_compressed.pdf \(gov.im\)](https://gov.im)

¹⁵ [island-plan-2024-25-final-v1.pdf \(islandplan.im\)](https://islandplan.im)

¹⁶ [extract-of-proceedings-dec-2023.pdf \(gov.im\)](https://gov.im)

Conclusion

24. Overall, I can report a very satisfactory level of compliance in respect of ROSE Act authorisations. Those who in 2023 sought to deploy, or who authorised, investigatory powers under the ROSE Act appeared to me fully to understand the need to consider necessity, lawfulness, proportionality (and appropriateness); and that such powers are, necessarily, exceptional in nature. My experience in 2023 was that the gaps in the current legislative framework, whilst undoubtedly causing operational concern, have been, at least to some extent, offset by a very satisfactory level of advance consideration (or what used to be termed 'anxious scrutiny') as to whether deployment of particular powers was warranted.
25. In conclusion, I wish to thank the various staff with whom I have worked to date in this role, especially within the Constabulary, Treasury and Department of Home Affairs. I also thank all the above for extending a welcome to me and I look forward to being consulted as to the steps ahead.
26. I can confirm that under section 28(4) of the ROSE Act, no matter has been excluded from my report at the request of the Department of Home Affairs under section 28(5).

Steven Coren
Regulation of Surveillance Commissioner
22nd April 2024



Isle of Man
Government

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