

IRRV SCOTLAND CONFERENCE - 3 DECEMBER 2008

Surveillance Commissioner's Overview - Lord Coulsfield.

Introduction.

The Surveillance Commissioners were established under s.91 of the Police Act 1997 and exercise functions under that Act, the Regulation of Investigatory Proceedings Act 2000 and the Regulation of Investigatory Proceedings (Scotland) Act 2000.

The purpose of this legislation is to legitimise various forms of activity on the part of public authorities which would otherwise be unlawful or doubtfully lawful.

The legislation covers four types of activity:

Property Interference – Police Act 1997 Pt. III.

Interception – RIPA Pt.I

Covert surveillance, which includes the use of informers – RIPA Pt. II, RIP(S)A.

Decryption – RIPA Pt. III. (not brought into effect until 2007)

The Office of Surveillance Commissioners, as its title indicates, is concerned with surveillance. There is a separate system of regulation for interception. Decryption is in an ambiguous position.

Background and history.

Surreptitious law enforcement tactics of observation and eavesdropping may involve unlawful activity, for example surreptitious entry to premises. For some purposes, such as search of premises, the activity could be made lawful by obtaining a warrant from a magistrate, but there are limitations to this, and there remains the problem of how to deal with evidence obtained as a result of unlawful activity; see *R. v Sang* 1980 AC 402: cf *R. v Khan* 1997 AC 558, *Lawrie v Muir* 1950 JC 19.

As a result, it can be difficult to predict whether evidence surreptitiously obtained can be used in court. ECHR adds an extra dimension by reason of:-

- (a) the fair trial requirements of Art. 6 ECHR (*Teixeira de Castro v Portugal* (1998) 28 EHRR 101) and
- (b) the protection of privacy in Art. 8, which requires inter alia that any interference should be “in accordance with law.”

Authorisation.

Police Act 1997 s.92: “No entry on or interference with property or with wireless telegraphy shall be unlawful if it is authorised by an authorisation having effect under this part.”

RIPA s 27 ,(compare RIP(S)A s.5): “(1) Conduct to which this Act applies shall be lawful for all purposes if— (a) an authorisation under this Act confers an entitlement to engage in that conduct on the person whose conduct it is; and (b) that person’s conduct is in accordance with the authorisation.”

Covert surveillance

RIPA and RIPA s.26 only apply to covert surveillance, defined as surveillance "carried out in a manner that is calculated to ensure that persons who are subject to the surveillance are unaware that it is or may be taking place."

The forms of covert surveillance are directed surveillance; intrusive surveillance; and the conduct and use of covert human intelligence sources. RIPA s.26, RIPA s.1.

Directed Surveillance

Directed surveillance is covert surveillance undertaken (a) for the purposes of a specific operation; (b) in a manner likely to obtain private information about a person; (c) otherwise than by way of an immediate response to events or circumstances such that it would not be reasonably practicable to obtain a prior authorisation. RIPA s. 28(2), RIPA s.1(2).

The person granting must be satisfied that the authorisation is necessary in the interests of national security, or for the prevention or detection of crime or disorder, the economic well-being of the UK, public safety, public health, collection of tax or other purpose specified.

The person must also be satisfied that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.

The persons who may authorise DS are Police Superintendents and equivalent ranking officers in other law enforcement agencies, and appropriate officers in a range of other public authorities eg; local authority Assistant Chief Officer, officer responsible for the conduct of an investigation etc. RIPA s.28, RIPA s. 6 and SI 2000/2417

Intrusive Surveillance

Intrusive surveillance is covert surveillance which is carried out in relation to anything taking place on any residential premises or in any private vehicle and which involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device. RIPA s. 26(3). However surveillance by means of a device designed or adapted principally for tracking a vehicle is not intrusive, and surveillance of premises or vehicles carried out by means of a device which is not in the premises or vehicle is not intrusive unless it provides information of as good quality and detail as it would if it were in the premises or vehicle. RIPA s.26 (4) and (5), RIPA s. 10.

The person granting the authorisation must be satisfied that it is necessary in the interests of national security, for the purpose of preventing or detecting serious crime or in the interests of the economic well-being of the UK; and must consider whether the information which is sought could reasonably be obtained by other means.

The person must also be satisfied that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.

The persons who may authorise IS are Chief Constables or equivalent RIPA s.32(6)

Property interference

Authorisation for property interference can be given by a Chief Constable or equivalent ranking officer.etc as for IS. Police Act 1997 s. 93(5).

CHIS

A person is a covert human intelligence source if he establishes or maintains a personal or other relationship with a person for the purpose of covertly obtaining or providing access to information or covertly disclosing information obtained by the use of or as a consequence of the relationship. "Covert" is defined in a way similar to the general definition of covert surveillance. RIPA s.26 (8) and (9), RIP(S)A s. 7.

The authorisation to be granted is authorisation for "the conduct or the use of a covert human intelligence source" RIPA s.29 (1) and (4).

The person authorising a CHIS must be satisfied that the authorisation is necessary in the interests of national security, or for the prevention or detection of crime or disorder, the economic well-being of the UK, public safety, public health, collection of tax or other purpose specified. RIPA s.29: RIP(S)A s.7is similar but more limited..

The person granting the authorisation must be satisfied that the authorised conduct or use is proportionate to what is sought to be achieved by that conduct or use: and also that arrangements have been made to satisfy a number of detailed requirements about the handling, and oversight of the CHIS, for security and welfare, for detailed record keeping and for the security of those records.

The persons who may authorise CHIS are similar to those who can authorise DS, but there are some differences.

Office of Surveillance Commissioners

The Commissioners are established under s. 91 of the Police Act 1997, and s. 2 and 3 of RIP(S)A .They consist of the Chief Commissioner, six ordinary Commissioners, and three Assistant Commissioners. There is a staff of Inspectors and a central office staff. Control of the functioning of RIPA/RIP(S)A is exercised in three ways:

Notification: authorisations for property interference have effect from the time when granted by the AO, but must be notified to a Commissioner, who may cancel the authorisation and give directions about the disposal of any material recovered under it while it was in force. Police Act 1997 s.96.

Prior approval: authorisations for intrusive surveillance do not take effect until they have been approved by a Commissioner and written notice of approval has been given

to the AO. Authorisations for property interference which relate to residential of office premises, or which are likely to uncover matters subject to legal privilege or confidential information also require prior approval. RIPA s. 36, Police Act 1997 s.97. There are provisions for urgent cases.

Inspection: an Inspector visits each police force each year to report on the use of covert surveillance, the standard of applications and authorisations, the adequacy of records and any other relevant matters. There is normally a follow-up visit by a Commissioner to discuss the findings of the Inspector. Similar arrangements apply to other public authorities.

General Issues

Necessity, reasonableness and proportionality. - R v. Sutherland 29 Jan 2002, Nottingham Crown Court.: Gilchrist & Quinn v HM Advocate 2004 SCCR 595.

“Non-authorized” surveillance.

Status drift.