

Sir Christopher Rose, Chief Surveillance Commissioner

The oversight role of the CSC

COMMONWEALTH CLUB – 10th February 2009

Furniture makers have known for thousands of years that a three-legged table, chair or stool remains stable however uneven the ground on which it rests. Similarly, the Office of CSC which I hold is dependent on three statutory legs: Police Act 1997, the Regulation of Investigatory Powers Act 2000 (RIPA) and the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA).

My job is to oversee the way in which all Public Authorities, apart from the Security Services, carry out all forms of covert surveillance, apart from intercepts, in England and Wales, Scotland and Northern Ireland. Surveillance is covert if the person surveilled is unaware of it. The covert activity permitted by the 3 Acts with which I am concerned is of 4 kinds: property interference, and intrusive surveillance, both of which can only be carried out by Law Enforcement Agencies (LEAs) and directed surveillance and the use of CHIS (informants) which all public authorities can engage in. Property interference is pretty much what you would expect. Intrusive surveillance is covert, relates to residential premises or a private vehicle and involves the presence of an individual or device on the premises or in the vehicle. Directed surveillance is covert but not intrusive, is for a specific purpose, is likely to obtain private information and is carried out other than by way of immediate response to events or circumstances. Property can now only be interfered with for the prevention or detection of serious crime and when no other means are reasonably available. Directed surveillance and CHIS can only be used by public authorities which are not LEAs for preventing or detecting crime or preventing disorder. I am appointed by the Prime Minister and the First Minister for Scotland and I am answerable only to them. I make an Annual Report to them which is placed before Parliament in Westminster and Edinburgh. This is a public document to which everyone has access. So

although by definition the activity of which I have oversight is covert, my job is not covert nor is the way in which I carry it out.

I operate through the Office of Surveillance Commissioners (OSC) which is funded by the Home Office. The Home Secretary has a statutory duty to provide the staff I need. My independence is assured because I have the same security in office as a High Court Judge: that is, I can only be removed by motions of both Houses of Parliament. The OSC is a surprisingly small organisation and costs taxpayers substantially less than £2 million a year. By happy symmetry, the OSC has three kinds of people: Commissioners, Inspectors and Civil Servants. Commissioners have to be former Supreme Court judges: there is no limit on their number but there are, presently, in addition to me, six Commissioners (three from England and Wales, two from Scotland and one from Northern Ireland) five of whom were, like me, Court of Appeal Judges or the Scottish equivalent. There are three Assistant Commissioners, all of whom were, as the legislation requires, Circuit Judges and one of whom has specialist knowledge of local government. There are six Inspectors five of whom were Senior Police Officers, and a Chief Inspector who was a Colonel in Military Intelligence. There are nine Civil Servants who run the Office and deal with the many administrative aspects, including handling the paperwork from LEAs which receives the attention of Commissioners, one of whom is always on duty.

There is further symmetry because there are three categories of public authority which I oversee – Law Enforcement Agencies, of which there are over sixty, local authorities of all kinds of which there are about 500 and miscellaneous other bodies including the Department of Works and Pensions and several other Government Departments, the Royal Mail, OFT, BBC and the Health and Safety Executive: all are listed in an Annex to my Annual Reports.

Oversight is carried out by a system of regular inspections and, in relation to property interference and intrusive surveillance, a system of notification to or prior authorisation by my Commissioners.

All Law Enforcement Agencies are inspected every year and other bodies every two or three years. The method of inspection is for the Inspectors or Assistant Commissioners, or sometimes both, to carry out inspections which have been pre-arranged. The number of Inspectors who go and the duration of the inspection both vary: a large Police Force may have four or five Inspectors and an Assistant Commissioner there for a week; a small local authority may have one Inspector or Assistant Commissioner for half a day.

The fundamental purpose of covert activity is, usually, to obtain evidence of criminal wrongdoing admissible in court. The ultimate arbiter of admissibility is the Trial Judge who has a discretion to exclude evidence which would be unfair. What is fair is human rights based, that is, the covert activity must be necessary because there are no other practicable means of obtaining the evidence, proportionate to the gravity of what is being investigated and as little collaterally intrusive to others as is possible.

Accordingly, the documentary trail which is provided by the authorisation of covert activity needs to show, transparently, but in summary form, the reasoning of those involved in the authorisation process. It should show what application was made and what authorisation granted, stating why, when, where, how and of whom the surveillance is to be carried out, when and in what circumstances authorisation was renewed or cancelled and what was to happen to the product of the surveillance. A Trial Judge will wish to examine the documentary trail and, if necessary, hear evidence about it when deciding whether to admit the product in evidence. It follows that that documentary trail provides the principal focus for examination at inspections on my behalf. I do not have the resources to examine all such documentation, so dip samples of a proportion are carried out and such explanations sought and provided as my Inspectors and Assistant Commissioners require. By this means it can readily be ascertained whether a public authority is authorising covert surveillance properly.

During inspections, Inspectors and Assistant Commissioners will see many and sometimes all of those involved in the authorisation of covert activity and will proffer guidance, for example as to how policy, procedures, documentation and training can be improved. From time to time Guidance in relation to commonly occurring problems is published by the OSC. It contains the views of the Commissioners on matters of law and practice. The most recent such publication was in December 2008 and this is now available electronically to public authorities. It provides what is, I hope, a useful document for those who are involved in the authorisation of covert activity as well as for those inspecting on my behalf. One of my principal aims is to raise standards and this will happen if public authorities follow the published Guidance and the recommendations made in inspection reports.

After every inspection, a written report is sent to me by my Inspectors and Assistant Commissioners. Having read it, I decide whether or not to endorse it and I send it, with endorsement or amendment as appropriate, to the Chief Constable, Director General or Chief Executive of the Public Authority concerned. After every Law Enforcement Agency has been inspected its Chief Constable or Director General receives a visit from me or one of my Commissioners, for the purpose of discussing the contents of the report and the response of the Law Enforcement Agency to that report. Other public bodies do not receive such a visit but I monitor their responses to the report and, when necessary, order a re-inspection.

So far as property interference and intrusive surveillance are concerned, these forms of covert activity can only be carried out by Law Enforcement Agencies. The OSC must be notified of all authorities given by Chief Constables for property interference; and prior approval of one of my Commissioners has to be obtained, save in cases of emergency, for surveillance in a dwelling, hotel bedroom or offices or when knowledge is likely to be acquired of matter which is confidential or subject to legal privilege. There is no similar requirement for my Office to be made aware, contemporaneously, of the authorisation of directed surveillance or of the activities of CHIS both of which can be used by all Public Authorities.

Transparent documentation, showing the reasoning of those involved in authorising directed surveillance on the use of CHIS is required and is examined on inspections.

I have the power to report to the Prime Minister and Scottish Ministers any Public Authority which is not performing to my satisfaction ie. is not achieving or properly seeking to achieve compliance with the requirements of the legislation and the Codes of Practice made under the legislation. That is a power which it is only necessary for me to exercise very rarely: the existence of the power, coupled with a threat to use it, is usually sufficient to clear potentially recalcitrant minds. I require public authorities to inform me promptly if unauthorised surveillance has taken place which required, or may have required, authorisation.

The effectiveness of OSC oversight can be partly gauged by the fact that, during the last 10 years, there have been very few cases in which a trial judge has declined to admit in evidence the product of covert surveillance; and there have been no cases, so far as I am aware, where this has happened in circumstances where proper authorisation had been obtained. Media criticism of Poole Borough Council was misplaced. The covert surveillance of fishermen, for example, led to pleas of guilty in the Crown Court.

It is worth us all bearing in mind that, in our democracy, the law is to be found in Acts of Parliament and decisions of the courts, not in ministerial statements. It is open to Ministers to advise public authorities as to the use which they should make of the covert powers which Parliament has given them. But it is likely to be confusing if Ministers urge public authorities not to use powers given by Parliament against particular activities which are plainly within the legislation.

If, for whatever reason, the government does not wish public authorities to use powers conferred by Parliament, the proper course, it seems to me, is for Parliament to remove those powers. By this means the merits of the powers can be properly debated with knowledge of all relevant factors. In recent

times, there has also been comment in the media about the use of covert surveillance in relation to dog-fouling. The headline “Anti-terror laws used against dog fouling” encapsulates in a few words all that is worst in popular journalism. It is inaccurate, emotive and grossly misleading. The legislation is, expressly, for many purposes other than fighting terrorism. I understand that dog excrement carries a parasite which can cause blindness in children. On this basis I suspect that a reasonable, well-informed, member of the public would approve of covert surveillance necessary to reduce dog-fouling in children’s playgrounds.

I make it clear, in closing, that it is no part of my responsibility to encourage or discourage the use of covert surveillance. How much or how little takes place is not my concern. My job is to seek to ensure, so far as the resources at my disposal permit, that when covert surveillance is carried out it is necessary, proportionate and in accordance with the legislation and relevant Codes of Practice.

4th February 2009