



Briefing Paper No 23

The Regulation of Investigatory Powers (Scotland) Act 2000

Introduction

The Human Rights Act 1998¹ came into force in October 2002 introducing new legislation which made it unlawful for public authorities to act in any way that was incompatible with the European Convention on Human Rights (ECHR). This legislation had a profound impact on public space CCTV and covert surveillance operations of individuals, premises and vehicles, which often collected private information, which contravened Article 8 of the Human Rights Act.

In 2000 The Regulation of Investigatory Powers (Scotland) Act² (RIP(S)A) was passed providing a statutory basis for the authorisation and use by public authorities of covert surveillance and covert human intelligence sources. These are important intelligence gathering tools which enable public authorities and partners:

- to prevent or detect crime or to prevent disorder
- act in the interests of public safety
- to protect public health

Authorisation can only be made by those public authorities detailed in the act and only after strict necessity and proportionality criteria have been met.

Under the provisions of the act there is a list of agencies and individuals who can provide authorisation to conduct surveillance and only those persons holding the office, rank or position within the specific public authority are authorised to do this. The public authorities include are:

- Police Scotland
- Scottish Administration
- Local government council
- Common service agency for health
- Health Board
- Special Health Board
- National Health Service
- The Scottish Environmental Protection Agency

There are special provisions for the Scottish Crime and Drug Enforcement Agency which state that applications must be made by a member of that agency that's a police officer.

¹ Human Rights Act 1998; www.legislation.gov.uk/ukpga/1998/42; dated 9 November 1998

² Regulation of Investigatory Powers (Scotland) Act 2000;
<http://www.legislation.gov.uk/asp/2000/11/introduction>; dated 28 September 2000

Scope of the Policy

RIP(S)A provides a framework that specifies the circumstances in which covert surveillance may be used. Surveillance is only covert if it is conducted and the subject of the surveillance is unaware that surveillance is taking place. There are two types of surveillance which are:

- **Overt** - Overt systems are on display with the surveillance method or system known to the public and clearly visible. The surveillance system will also have signs on display which provide the public with details of who is operating the system and how they can be contacted if there are any enquiries. Systems like Public Space CCTV, body worn cameras and enforcement cameras are examples of overt surveillance systems.
- **Covert** - Covert systems are not visible and are hidden from view to maintain anonymity. Covert systems are used when hidden surveillance is needed on an individual, group, property or area without those being observed aware that they are being observed. It is the use of covert surveillance that is governed by strict controls detailed under (RIP(S)A).

There are two types of covert surveillance covered under this act which are intrusive and directed. The definitions of these are:

- **Intrusive** - This is surveillance that is taking place on any residential premises or in a private vehicle involving the presence of an individual or a surveillance device and which will result in the collection of private data and personal information. An example of this would be an individual entering a premises or vehicle with the aim of collecting information and intelligence or the planting of a device which can record audio or video data again with the aim of collecting information.
- **Directed** - This is surveillance that is not intrusive i.e. it is not taking place within a premises or vehicle but it still used to directly target an individual or premises with the aim of collecting private and personal data. An example of this is photographic surveillance of a building in support of a criminal investigation.

There are some considerations around intrusive and directed which are:

- vehicle tracking devices are not intrusive as they do not collect personal information only location data
- devices can be intrusive, even if they are outside the premises or vehicle if the quality of information provided would be comparable or better than the quality of the data collected from inside the property

In addition to intrusive and directed surveillance the act also makes provision on the use of Covert Human Intelligence Source (CHIS). A CHIS cultivates, establishes or maintains personal relationships with others to obtain information, provide access to information on behalf of someone else or discloses information obtained through their relationship. The third party in this case would be unaware that they are the subject of covert surveillance.

Surveillance Commissioners

The governance and scrutiny process of covert surveillance is the responsibility of the Office of Surveillance Commissioners (OSC)³. The OSC is a judicially based independent organisation external to the UK Government and all other public authorities. Although the commissioners are funded by the Home Office the organisation remains independent. The organisation is made up of a Chief Surveillance Commissioner (CSC) and a number of Assistant Surveillance Commissioners.

The most senior Surveillance Commissioner is the Chief Surveillance Commissioner who, in Scotland, is appointed by Scottish Ministers for a term of three years after which they are required to stand down. In Scotland the Assistant Surveillance Commissioners can only be appointed if they are a sheriff. The Assistant Surveillance Commissioners act on behalf of the Chief and conduct reviews and produce reports on findings about surveillance matters.

Authorisation of Surveillance

The term lawful surveillance, under the act, confers an entitlement to engage in covert surveillance but only in accordance to the parameters of the authorisation. If authorised, any person conducting covert surveillance will not be subject to civil liability.

Authorisation of covert surveillance can only be granted if:

- they are satisfied that the authorisation is to support the prevention or detection of a crime, preventing disorder
- is in the interests of public safety
- for the purpose of protecting public health
- for any other purpose prescribed in an order made by the Scottish Ministers

Duration of Authorisation

There are variations in duration for authorised surveillance which are:

- **Directed Surveillance** - A written authorisation granted by an Authorising Officer will cease to have effect (unless renewed) at the end of a period of three months which is from the day on which the authorisation took effect.

Urgent oral authorisation or written authorisations granted by a nominated individual who is only eligible to authorise in the event of an urgent request, only authorises the case for 72 hours. If a renewal is not submitted within this period the original authorisation will be quashed.

- **Covert Human Intelligence Sources** - In the case of a CHIS, a written authorisation will, unless renewed, cease to have effect at the end of a period of 12 months beginning on the day on which it took effect. Urgent oral authorisations are again the same as Directed Surveillance; 72 hours.

³ Office of Surveillance Commissioners; <https://osc.independent.gov.uk/>

Authorisation of Covert Human Intelligence Sources

When dealing with a request for authority in a CHIS case the act also requires that:

- at all times there is a nominated person who will have day-to-day responsibility for dealing with the source, their security and welfare
- at all times there is a nominated person who will have general oversight of the use made of the source
- at all times there is a nominated person who is responsible for the maintenance of records relating to the use of the source
- any special provision made by the Scottish Ministers, for the use of the source, are recorded in detail by the individual responsible for the maintenance of records
- any records that disclose the identity of the source will be restricted and only made available to those that have a need to know

Authorising Directed Surveillance

Within public authorities directed surveillance authorisation is provided by nominated posts. Within Police Scotland, Chief Constables and the Director General of the Scottish Drug and Crime Enforcement Agency (SDCEA) can grant authorisation for directed surveillance.

In urgent cases, where it may not be possible to get the authorisation of the primary nominated post/person, a nominated deputy can provide orally or written authority. Oral authorisation is only valid for 72 hours and must be renewed. For SCDEA cases the authorisation must be provided by a police officer, which means that the responsibility is devolved to the Chief Constable or his designated deputy.

Authorisation of Intrusive Surveillance

When authorisation is given for intrusive surveillance the details of the authorisation must be passed, in writing, to the Surveillance Commissioner. This also applies to any cancellations. The Surveillance Commissioners are responsible for scrutinising and authorising requests. Following the notification of an authorisation, to conduct intrusive surveillance, the surveillance cannot take effect until the written request is authorised by the surveillance commissioner who will decide if the reasons behind the authorisation is valid; within the boundaries of RIP(S)A.

Quashing Authorisation

If there is no longer grounds to satisfy the authority the request will be quashed with immediate effect. In such cases the Surveillance Commissioner can order the destruction of any wholly or partially relating information collected after the authorisation was cancelled, however, information that is required in support of pending criminal or civil prosecutions cannot be destroyed. The authorising person can also, when necessary, cancel an authorisation.

Appeals against decisions by Surveillance Commissioners

Appeals from the authorising individuals, from public authorities, can be submitted to the Chief Surveillance Commissioner for review. The Chief Surveillance Commissioner can elect to uphold the decision, amend aspects of the decision or reverse the decision all of which must be done in accordance with provision 16 of RIP(S)A.

Conclusion

The act specifically refers to covert surveillance which is intrusive, directed or conducted using a CHIS. The Surveillance Commissioners Office is the scrutiny organisation for the authorisation process with a nominated local authority person or post responsible for authorising activities. Each authorisation must adhere to the criteria's of necessary and proportional; in addition to these requirements the authorisations have limited durations which depend on the type of surveillance being conducted and the method of authorisation provided. The act provides clear direction on who and why to renew authorisations and on how to appeal and make complaints in the event of disputed outcome. For further information on the Act visit the following links:

Legislation.gov.uk; Regulation of Investigatory Powers (Scotland) Act 2000;
http://www.legislation.gov.uk/asp/2000/11/pdfs/asp_20000011_en.pdf

Information Commissioners Office; Revised Codes of Practice for Covert Surveillance and Covert Human Intelligence Sources, Response from the Information Commissioners Office (2014); <https://ico.org.uk/media/about-the-ico/consultation-responses/2014/2104/ico-response-ripsa-revised-codes-20140314.pdf>

Office of Surveillance Commissioners; <https://osc.independent.gov.uk/>

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