

POLICE SURVEILLANCE TECHNIQUES AND YOUR HUMAN RIGHTS

An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

It is a fact of life that the British way of policing is now heavily dependent on technology and intelligence. The proliferation of CCTV cameras makes UK citizens the most watched in Europe and readers of this article will be pleased to know that they may have contributed to the largest DNA database in the world – which will grow even bigger under the amended sample taking scheme under the Criminal Justice Act 2003. There is also the much publicised launch of the new Serious and Organised Crime Agency in April 2006. Not so well known is that the Agency takes over from MI5's involvement in fighting crime – the security agency had been involved in fighting crime since 1996. SOCA is an amalgamation of the National Crime Squad and the National Criminal Intelligence Service but has been given a budget far bigger than its predecessors; £400 million. The Agency has 4,300 staff and 120 officers in 40 countries. We can take it for granted that this intelligence led force will continue the trend to watch and listen to us.

There will always be the question of how far it is proper for the State to keep its own citizens under surveillance. We as defenders though are only concerned with the danger that a culture of the use (or sometimes non-disclosure) of material gathered by covert surveillance operations become accepted without challenge by Court users. The latest noises by the press and the Government only increase our concern; i.e. the reaction to the release of foreign prisoners scandal may be a watering-down to water down of the Human Rights Act – the very tool that we can use to test the police and the prosecution's use of covert surveillance. This article looks at some of the surveillance weapons available to law enforcers and what rights you have (at the moment) to challenge material gathered from these techniques.

TECHNIQUES

There is a dazzling array of weapons available to the law enforcement authorities from simple well known techniques such as use of informants/undercover officers to the even simpler viewing of CCTV camera footage. There are also more covert devices such as the probe or the 'bug'. As long ago as 1995 there were said to be 1300 police bugging operations (Police Bill 1996 Hansard (HL).26 Nov 1996. col.226. Some bugs these days are 'commandable'; i.e. they can be turned on or off – this makes it easier to persuade the authorities, and the Courts, that the risk of invasion to a suspect's privacy

is reduced as a bug can be turned off during an obvious personal, as opposed to criminal, conversation.

In addition to listening devices there is also the traditional simple following of suspects – or nowadays the fixing of a global positioning tracking device on the underside of a suspect's car. The issues however always remain the same – the citizen's right to privacy over the legitimate fight against crime. The old National Criminal Intelligence Service had warned that the internet could be used as a means of communicating between criminals and the increase in the use of encryption (locking/coding of e-mails) led in turn to anti-encryption measures by the State. There is also the simple use of telephone and postal mail intercepts.

The State is everywhere, they can find you, they can listen to you – they may even have a bug in your cell right now – they can hear you and track you down by your use of your mobile phone (phone base station triangulation), they can see where you have been from your credit card records and your welfare benefit claims, your phone bills and so on. Where does it all end – can your privacy be violated with at a whim – can your private words to your friend or your wife be used against you in a public courtroom?

REGULATION OF INVESTIGATORY POWERS ACT 2000

Since the Human Rights Act 1998 came in to force each one of us has certain rights guaranteed, for example the right to a fair trial – this is guaranteed under Article 6 of the European Convention. But you also have a right to privacy, this is guaranteed under Article 8. The State can only infringe this right – e.g. by listening to your conversations, following you etc, if it is for a reason proscribed in Article 8(2), e.g. "for the prevention of disorder or crime" and then only if the interference is 'proportionate' and "in accordance with the law". This last part (lawfulness) has landed the UK in trouble in Strasbourg especially in the 1980s and 1990s. The Government was forced to introduce legislation in an attempt to comply with the Convention. The latest legislation is the Regulation of Investigatory Powers Act 2000 (RIPA). Under RIPA the different types of surveillance are labelled and given a set Code of Practice which regulates the practice of applying for authorisation, the duration of the operation, the nature of the interference etc. The powers RIPA

regulates are the interception of communications (bugging etc); acquisition of telecommunications data (getting your phone billing records); surveillance and access to encrypted data.

Surveillance is in turn sub-divided into 3 types; first of all there is Directed Surveillance. This is typically the authorisation for a subject to be watched and followed – it requires no trespass onto property. Then there is Intrusive Surveillance; this will involve the placing of bugs in cars etc and any interference with property. Then there is the use of Covert Human Intelligence Sources – i.e. informants and undercover officers.

THE NECESSITY TEST

For each type of surveillance it must be shown to be ‘necessary’, and that the invasion of privacy necessary will be the minimum possible. If properly authorised the fruits of this type of surveillance may become admissible in a criminal trial.

TELEPHONE INTERCEPTION

However, telephone interception material is not used in evidence. The material is used for intelligence purposes making it difficult for a Defendant to challenge why it was he was a subject, as under s17 of RIPA there is a prohibition on asking questions at trial about the use of telephone intercepts. There are exceptions under s18 and the House of Lords has made some in-roads into this culture of secrecy about intercepts – AG’s Reference No. 5 of 2002 [2004] UKHL 43.

BREACHES OF HUMAN RIGHTS

The State can and does breach its subjects’ right to privacy. Not all surveillance is lawfully authorised, or proportionate. The point is what can you do about it if you are brought to trial on the back of that breach? It must be remembered that even if you do successfully argue a breach of Article 8 that does not mean that the trial will be stopped as a breach of Article 6 – that point is often mis-understood. If there has been a breach then it may be more likely that the particular evidence in question may be excluded – what is required for that to be a possibility is a thorough understanding of the Codes of Practice to RIPA and the issues of proportionality etc which flow from human rights law so that a challenge can be mounted, if possible, to the ‘lawfulness’ of the interference, as required under Article 8(2).

One thing is for sure, surveillance techniques can only increase. Proactive defenders will always have to be willing to test the lawfulness of such operations – so long that is as the Human Rights Act still provides any rights.

AUTHORS

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