

REPORT
TO
AN TAOISEACH,
ENDA KENNY TD

ON A

REVIEW OF OPERATION OF THE
CRIMINAL JUSTICE (SURVEILLANCE)
ACT 2009

FOR THE PERIOD
1st AUGUST 2014 – 31st JULY 2015

MR JUSTICE ROBERT EAGAR
(DESIGNATED JUDGE)

Introduction

1. This review is prepared for An Taoiseach in respect of the provisions of section 12 of the Criminal Justice (Surveillance) Act 2009 (herein after referred to as “the Act”). This review is a review of the operation of the Act, the year 1st August, 2014 to 31st July, 2015.
2. For the purpose of preparing this report, I had two meetings at Garda Headquarters with Assistant Commissioner, John O’Mahony, Crime and Security, Garda Headquarters, Phoenix Park, Dublin 8, together with members of his management team. The first of these meetings was on 2nd October, 2015, and the second meeting was on 7th December, 2015.
3. I had two meetings with the Director of Intelligence of the Defence Forces, Colonel Michael Murray, together with members of his staff on 9th October, 2015 and on 15th October, 2015, both at McKee Barracks.
4. I had a meeting with the Assistant Secretary, Investigations and Prosecutions Division and a senior official of that division, one of the two appointed officers of the Revenue Commissioners for the purpose of s. 4 to s. 8 of the Act. This meeting took place on Thursday, 1st October, 2015.
5. On 7th December, I met with Judge Mary Ellen Ring, the chairperson of An Garda Síochána Ombudsman Commission and the Head of Investigations and the Deputy Head of Investigations of the Garda Síochána Ombudsman Commission in

respect of the extension of the Act under s. 13 of An Garda Síochána (Amendment) Act 2015.

General Comments

6. There has been much controversy about surveillance by State Agencies in the past six months, in the context of surveillance equipment being available to companies, commercial competitors and employers. It was notable that the only organisations or bodies who must make an application to a Court for authorisation to use surveillance devices are An Garda Síochána, the Revenue Commissioners, the Defence Forces and An Garda Síochána Ombudsman Commission.

7. There has also been a great deal of controversy about the extraordinary powers given to the Gardaí, the Defence Forces, the Revenue Commissioners and the Garda Síochána Ombudsman Commission. However the Act makes clear in s. 2 (3) that an authorisation or approval under this Act may not be issued or granted in respect of an activity that would constitute an interception within the meaning of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. This distinction appears not to be recognised by the general media coverage of surveillance.

8. The function of the designated judge under s. 12 of the Criminal Justice (Surveillance) Act 2009, are (a) to keep under review the operations of ss. 4 to 8 of the Act; and (b) to report to An Taoiseach from time to time, and at least once every twelve months concerning any matters relating to the operation of those sections that the designated judge considers should be reported. Further, the designated judge may

investigate any case in which an authorisation is issued under s. 5 or renewed or varied under s. 6 or an approval granted under s. 7 or section 8.

9. Where the designated judge investigates a case under subs.(4) and is of the opinion that it is in the interest of justice to do so, he or she may refer that case to the Referee for an investigation under section 11 of the Act.

10. I can confirm that I found no reason to investigate any case in which an authorisation was issued under s. 5 or renewed or varied under s. 6 or an approval granted under sections 7 or 8 in accordance with s. 12 (8) of the Act.

11. I further confirm that the Referee appointed pursuant to s. 11 of the Criminal Justice (Surveillance) Act 2009, Judge John Hannan, has confirmed that for the relevant period he had no case which he needed to refer to me as designated judge pursuant to section 11(5)(d).

An Garda Síochána

12. On 7th December, 2015, I attended at Garda Headquarters and met Assistant Commissioner, John O'Mahony, who is the Assistant Commissioner for Crime and Security. I also met three members of his management team. The paperwork in relation to all the relevant applications were in folders which were kept in a secure place. I examined the paperwork in respect of all the s. 5 approvals (37), two s. 7 approvals and twelve s. 8 approvals. I was also given the year on year statistics which showed that in two cases, two s. 4 proposals were refused, and five s. 8 applications were refused. I had the benefit of perusing each case file under s. 5 and satisfied

myself that in each case which an authorisation was given, the Act was complied with in every respect.

13. In relation to the two s. 7 authorisations where approval for surveillance and cases of urgency may be approved, the superior officer who gave his approval in these cases set out the reason for the urgency and I satisfied myself that in each case in which approval was given under s. 7 of the Act, the Act was complied with in every respect.

14. In relation to approvals for tracking devices under s. 8 of the Act, the superior officer who gave his approval in all of these cases while I was viewing the files explained the basis of his approval of the use of tracking devices. From time to time, issues can arise in relation to the retrieval of tracking devices. I am satisfied that the approvals granted were justified in accordance with the provisions of the Act and that appropriate written records were maintained and available to me.

15. It is evident from the files inspected that the use of surveillance devices has been of great assistance to An Garda Síochána in the detection and prosecution of offences such as the importation of illicit drugs, tobacco products and laundered fuel and the possession of explosives and also in the monitoring of persons suspected to have been involved in activities which could threaten the security of the State or persons in the State. Part of the work of the NSU is targeted towards Republican dissident activity and serious and organised criminality and a number of the operations in the review period led to arrests for cases that appeared before the Special Criminal Court.

16. It appears to me that the centralised nature of recording of decision making and the monitoring of the use of surveillance devices is a matter which is at the moment more than satisfactorily undertaken by the National Surveillance Unit and, whilst the National Surveillance Unit are considering the recommendations of the Garda Síochána Inspectorate report in relation to the use of surveillance by regional Garda divisions, I am satisfied that key to the operation of the Act and the admissibility of evidence gathered by the surveillance unit requires a centralised co-ordination by the National Surveillance Unit.

17. A final issue in respect of the operation by An Garda Síochána of the Act is the issue of the obligation of the prosecutor to disclose documents to the legal representatives of persons charged with an offence, either before the Special Criminal Court or any criminal court. The requirements of disclosure is usefully summarised in the Director of Public Prosecutions's Guidelines for Prosecutors, the revised version being published by the Director in November 2010. The Director of Public Prosecutions state that the constitutional rights to a fair trial in due course of law and fair procedure place a duty on the prosecution to disclose to the defence all relevant evidence which is in their possession. The issue of disclosure of evidence obtained by way of surveillance is of course a particularly difficult one. However the guidelines for prosecutors of the Office of the Director of Public Prosecutions state that the investigation for prosecution of offences are separate and distinct within the criminal justice system. The Director as a general rule has no investigative function and no power to direct the Gardaí or their agencies in their investigation. Whilst the Director is not responsible for the conduct of the investigations she is free to indicate what

evidence would be required to sustain a prosecution. As a general rule, requests for advice from the Director of Public Prosecutions by An Garda Síochána or other investigations should be made in writing. This includes advice in relation to, *inter alia*, the disclosure of evidence. It appears to me that it would be prudent for the Director of Public Prosecutions to assign a Senior Officer of the Director's Office or of the Chief Prosecution's Solicitor's Office to consider the issue of disclosure of evidence in any case involving the use of the Act.

18. I wish to acknowledge the assistance and courtesy of the Assistant Commissioner and his colleagues in relation to this review.

The Defence Forces

19. A superior officer of the Defence Forces may apply to a judge for an authorisation where he/she has reasonable grounds for believing that the surveillance being sought to be authorised is necessary for the purposes of maintaining the security of the State. It is noted that the Defence Forces are limited by s. 4 (2) to surveillance which is necessary for the purpose of maintaining the security of the State.

20. On 9th October I met Colonel Michael Murray and a member of his staff and agreed to review the operation of the Act on 15th October, 2015 at McKee Barracks.

21. In the review period, there was only one operation which had been a continuation of the operation previous to the period between 1st August, 2013 and 31st July, 2014 and no new applications in accordance with ss. 4 – 8 had been made in the

period between 1st August, 2014 and 31st July, 2015. I viewed the paperwork in relation to the relevant application which had been commenced prior to the commencement of the review period. I am satisfied that the Act was complied with in every respect.

22. I wish to acknowledge the assistance and courtesy of the Director of Intelligence and his staff in relation to this review.

The Revenue Commissioners

23. I travelled to the Office of the Revenue Commissioners Investigation and Prosecutions Division in Ashtown. I met the Assistant Secretary and a Senior Official of the Revenue Commissioners who was one of the two authorised persons under the Act. They reported that there had been 17 applications under s. 8 of the Act and one authorisation under s. 5 of the Act.

24. The authorised officer indicated that there were no formal refusals and no one had raised problems by way of a complaint despite the general public knowledge of the use of surveillance equipment. Many of the operations were successful. Almost all the devices were fitted in respect of the importation of illegal cigarettes and there was quite a good success rate of retrieving cigarettes and in one case a substantial sum of money. In each of the approvals for tracking devices under s. 8 of the Act I have satisfied myself that in each case the Act was complied with in every respect. In respect of the application for authorisation under s. 5, I am satisfied that in this case the Act was complied with in every respect.

25. I wish to acknowledge the assistance and courtesy of the Assistant Secretary and the senior official of the Revenue Commissioners in relation to this review.


The Garda Síochána Ombudsman Commission

26. I met with Ms. Justice Mary Ellen Ring (the Chairperson of An Garda Síochána Ombudsman Commission) and the Head of Investigations and Deputy Head of Investigations of the Garda Síochána Ombudsman Commission in respect of my review of the operation of the Criminal Justice (Surveillance) Act 2009 as amended by s. 13 of the Garda Síochána (Amendment) Act 2015. Ms. Justice Ring indicated that since the commencement of the Garda Síochána (Amendment) Act 2015 no applications had been made under ss. 4 – 8 of the Criminal Justice (Surveillance) Act 2009 (as amended) up to the 31st July 2015.

27. I suggested that a policy document should be prepared by the Garda Síochána Ombudsman Commission outlining the law in respect of the 2009 Act and I have been given a reassurance from the Chairperson that a policy in this area will be developed. I believe this to be particularly relevant in view of the recent controversy over the interception of phones within the meaning of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 which was also extended to the powers of the Garda Síochána Ombudsman Commission by s. 12 of the Garda Síochána (Amendment) Act 2015.

28. The Chairperson of the Garda Síochána Ombudsman Commission has indicated that a superior officer as defined in the Garda Síochána (Amendment) Act 2015 at s. 13 means one of the two remaining Commissioners (other than the Chairperson) will be the person under s. 4 of the Criminal Justice (Surveillance) Act 2009 to make an application for a Judge for the relevant authorisation. Designated officers are distinct persons under the 2005 Act and not the Commissioners. Therefore it is at the highest level of the organisation that applications will be made to a Judge in accordance with the new legislation and therefore in practice any necessary authorisations must be applied for by one of the two Commissioners on foot of an application to a Judge. In cases of urgency under s. 7 of the Act, one of the Commissioners must provide the necessary authorisation to a designated officer on the basis that such an authorisation is necessary.

29. I wish to acknowledge the assistance and courtesy of the Chairperson and the Commissioners of the Garda Síochána Ombudsman Commission for their courtesy in relation to this review.


Mr Justice Robert Eagar
19/2/2016