

Covert Investigation

(3rd edition): Blackstone's Practical Policing
Clive Harfield and Karen Harfield
Oxford University Press (2012)
ISBN 978-0-19-964698-2

**Book Review by Sally Ramage, Editor, *The Criminal Lawyer*,
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It is marvellous that Clive and Karen Harfield were still able to work on the third edition of their book *Covert Investigation*, even though they now reside in Australia: it sings praises for global technological developments and especially the wonders of the World Wide Web. This third edition rings the continuity of the previous editions with several changes to the content.

The appendices, bar two, have changed. Appendices A and B of the 2008 edition, namely, Extracts from Part III Police Act 1997, as amended and Extracts from the Regulation of Investigatory Powers Act 2000, as amended, respectively, have been replaced by *Covert Surveillance and Property Interference: Revised Code of Practice* and *Investigation of Protected Electronic Information: Code of Practice*, respectively. Appendix F, *Interception and Communications Code of Practice*, has been moved to become Appendix D in this 2012 edition and Appendix E, *Covert Human Intelligence Sources Code of Practice*, remains as such. That is, the appendices now consist of the present five RIPA codes of practices¹ which, today, give guidance on the procedures that must be followed before interception of communications can take place, namely:

Interception of communications;
Acquisition and disclosure of communications data;
Covert surveillance and property interference;
Covert human intelligence sources;
Investigation of protected electronic information.

Note that since the second edition of *Covert Investigation*, there has been one addition to the RIPA 2000 (in 2010) which relates to matters in Scotland.² UK police and several other law enforcement agencies use the method of covert investigation as a means of detection in order to prevent and investigate serious

¹ See <http://www.homeoffice.gov.uk/counter-terrorism/regulation-investigatory-powers/ripa-codes-of-practice/>.

² <http://www.official-documents.gov.uk/document/hc1012/hc11/1111/1111.pdf>.

crime³ and protect the public.⁴ Such surveillance, without the consent or knowledge of the individual, is intrusive. This is why the Information Commissioner was so concerned that the *'ever greater potential of technologies for surveillance might in itself lead to ever greater use of these technologies without proper debate and without proper protection for the individual.'*⁵ It is the citizen's right to this information under section 52(2) of the 1998 Data Protection Act.⁶

Covert surveillance includes the undisclosed tracking of individuals, interception of the contents of communications, the analysis of traffic data, that is, the record of, for example, who telephoned whom and when—and the use of human agents in undercover activities. Investigators must be capable of being held to account for their actions even though the secrecy of covert investigation limits the ways in which investigators can be managed and held to account. Therefore the management and regulation of covert investigation ensures that the rights of the suspect are not breached except where there is statutory provision to do so; and also that the rights of other citizens not suspected of criminal involvement are protected.

Covert investigation produces evidence that is often considered to be incontrovertible but on the other hand, tools of mass surveillance have become ubiquitous and individual privacy is now a thing of the past, notwithstanding due process regimes in the criminal justice system. Due process aims to ensure that investigators do not act unlawfully, or provide protections if they do.

Covert investigation necessarily intrudes into the private lives of individuals and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which, when on 1 November 1998 when the UK Human Rights Act gained Royal Assent and became enforceable in 2000, meant that and section 6 of the Human Rights Act 1998 (HRA) made it unlawful for UK public authorities 'to act in a way which is incompatible with article 8 (1) ECHR, namely *that 'Everyone has the right to respect for his private and family life, his home and his correspondence.'* However, article 8 (2) ECHR qualifies Article 8 (1) and allows public authorities to breach the citizen's privacy, in certain circumstances.⁷

As to the unilateral use of CCTV today, the Association of Chief Police Officers (ACPO) has said that 'the availability of CCTV images greatly assists in the investigation of crime and disorder' and gave examples to the inquiry of CCTV's effective use in terrorist trials, tracking suspicious vehicles along with number-plate

³ Serious crime is defined in s 81 (3) of the Regulation of Investigatory Powers Act 2000.

⁴ Protecting the public is a duty of government. According to the *Surveillance Studies Network*, during the 1990s approximately 78 per cent of the Home Office crime prevention budget was spent on installing CCTV, whilst some £500 million of public money was invested in CCTV in the decade up to 2006. (See chapter 3 in the publication *Surveillance: Citizens and the State - Constitution Committee Contents*- 'Advantages and disadvantages of surveillance and the use of personal data'.

⁵ Home Office, *A surveillance society? 5th report of session 2007-2008*, Home Office.

⁶ 'The Commission may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit.'

⁷ 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.'

recognition, and suspicious behaviour in a town centre'. Transport for London (TfL) alone uses a staggering 10,000 CCTV cameras in its rail network, stations, roads and buses. The report's recommendation was that the Home Office should commission an independent appraisal of the existing research evidence on the effectiveness of CCTV in preventing, detecting and investigating crime.

Thus were formulated codes of conduct for police surveillance. The subject matter is so complex that there is software sold to police that will ensure that they check that they have complied with all of the codes of conduct. The following is a simplified automated procedure: Does the investigative act fall within the scope of Article 8? If yes, has the Article 8 right been interfered with by a Public Authority? If it has, was this interference in accordance with the law? If lawful, was the interference pursuant to a legitimate aim as identified in Article 8(2)? Even if it was both lawful and pursuant to a legitimate aim, was it proportionate?

It must be remembered that often, covert investigation techniques, by themselves, do not fulfil the criteria for prohibiting crime. The Serious Organised Crime Agency (SOCA) has as one of its main responsibilities, to try to seize the assets to affect the profitability of those involved in crime. SOCA even has targets for the amounts of cash they budget to seize in a financial year and an example is that SOCA planned to seize £8 million of cash in 2007/08 and they did in fact seize over £7 million. On restrained assets, their target was £40 million for 2007/08 and they achieved £20 million. On confiscation orders, their target was £28 million and they achieved over £7 million. On confiscation orders enforced, their target was £3 million and they successfully enforced orders totalling over £6 million in 2007/08.⁸ This example illustrates the many factors in play during surveillance, notwithstanding the fact that proceeds of confiscation go to the treasury of the agencies, making somewhat an overwhelming conflict of interest in pursuing those suspected of crime. Not only covert surveillance but legislation is a factor that enables the proceeds of crime to be tracked after conviction.⁹

It has been alleged that some local authorities have misused their powers of covert surveillance and some have termed this, '*the moral hazard involved in covert surveillance by local councils*',¹⁰ so enabled by the UK Investigatory Powers Act 2000. The verification for the term 'moral hazard' was noted by the organisation *BigBrotherWatch* which have revealed that between 2008 to 2010, local councils had carried out over 8,500 separate covert surveillance operations using the Investigatory Powers Act 2000. The government's *Final Surveillance Report* was published on 6 February 2009 after an inquiry into misuse of surveillance, mishaps causing citizens'

⁸ Select Committee on Home Affairs Minutes of Evidence, 29 January 2008.

⁹ There are powers within the Serious Organised Crime and Police Act around Financial Reporting Orders that help us, particularly after conviction to continue to go after the assets of the convicted people.

¹⁰ Early Day Motion 697 on 8 September 2010. (Early Day Motions (EDMs) are formal motions submitted for debate in the House of Commons. However, very few are actually debated. EDMs allow MPs to draw attention to an event or cause. MPs register their support by signing individual motions.

collected data to become lost¹¹; illegal holding of nonconvicted citizens fingerprints in police databases.¹²

In all, this book is very thorough and an increasingly important topic, covert investigation abroad, is to be found in chapter 10. chapter 10 covers which public authorities may conduct covert investigation abroad; the law relating to this; the regime necessary for such an investigation abroad; caselaw and much advice.

Professor Emeritus John Gieves spoke succinctly of the complexity of this subject and the expertise of the authors. He said:

‘As ever it is the investigative hunter-gatherers who are closest to my heart; there are many criminals who cannot prey on the vulnerable nor pursue their greed because of the advice obtained by the hunter-gatherers from this book. Good hunting to you all.’

ENDS+

¹¹ Gus O’Donnell, *Data Handling Procedures in Government: Final Report*, TSO, June 2008. The inquiry was undertaken in the wake of the HMRC data loss.

¹² *S and Marper v United Kingdom* [28] ECHR 1581. The European Court of Human Right (ECtHR) ruled that keeping the DNA profiles of individuals not convicted of a criminal offence breached Article 8 of the European Convention on Human Rights (ECHR). See <http://www.bailii.org/eu/cases/ECHR/2008/1581.html>.