



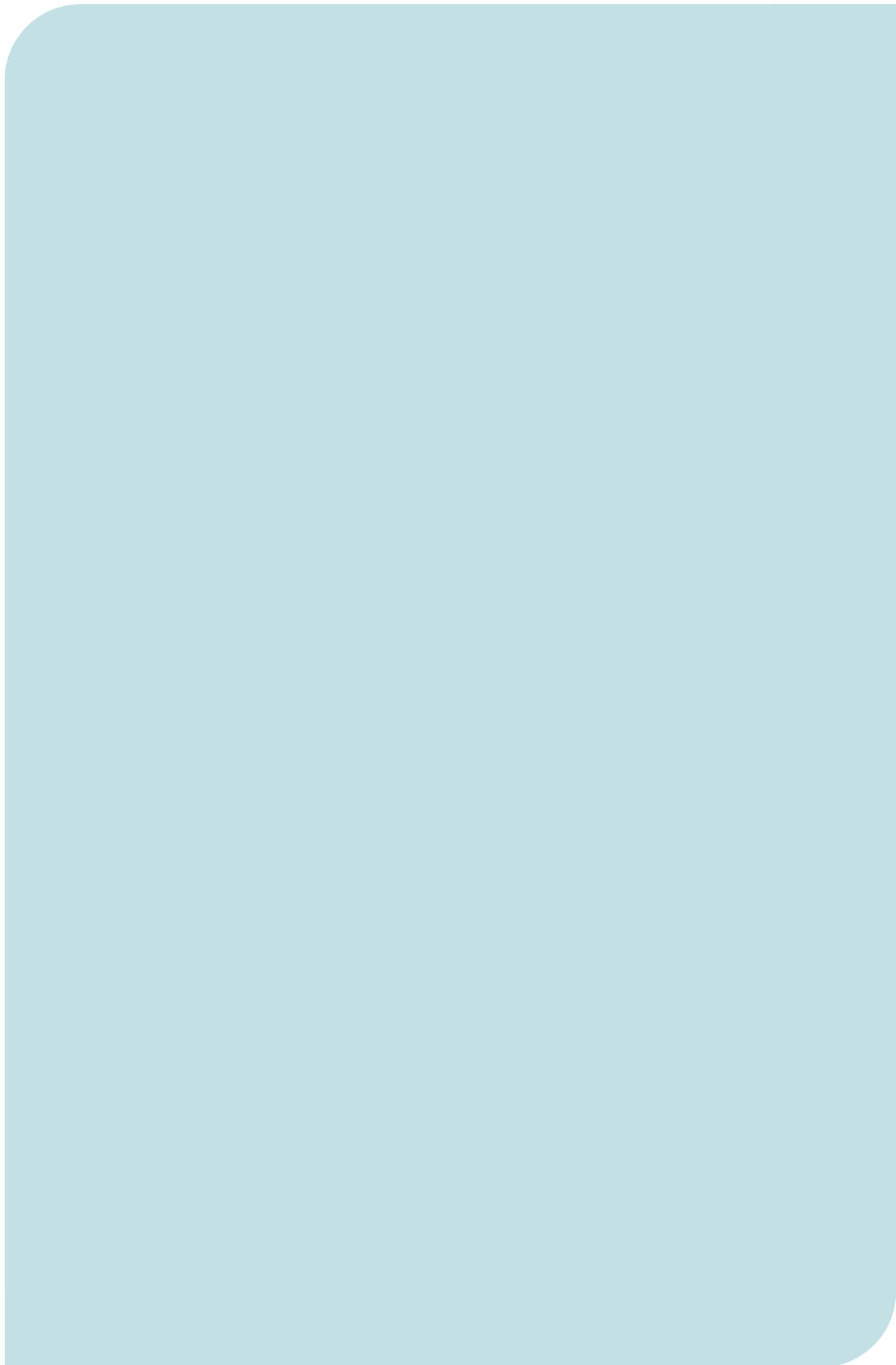
Office of Surveillance
Commissioners

ANNUAL REPORT

of the Chief Surveillance Commissioner
to the Prime Minister and
to Scottish Ministers
for **2008-2009**

HC 704

SG/2009/94



ANNUAL REPORT

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for **2008-2009**

Chief Commissioner:

The Rt. Hon. Sir Christopher Rose

Presented to Parliament by the Prime Minister
pursuant to section 107(3)
of the Police Act 1997

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Contents

	<i>Page</i>
1. Introduction	3
2. Overview of the year	4
3. Particular matters relating to the OSC	5
The statutory provisions	5
Appeals by Authorising Officers	5
Reporting irregularities	5
Reporting to the Prime Minister and Scottish Ministers	6
The scope of my responsibilities	6
Inspection Programme	6
Commissioners' Meetings	7
Procedures and Guidance	7
Presentations and Conferences	8
Liaison	8
OSC Website	8
Changes in personnel	8
Recognition	9
Expenditure	9
4. Statistics relating to the use of property interference and covert surveillance (including the use of Covert Human Intelligence Sources (CHIS) and s.49 Encryption)	10
General	10
Property Interference	11
Intrusive Surveillance	11
Urgency Provisions	11
Directed Surveillance	11
CHIS	11
Section 49 – Encryption	12
5. Key issues arising from my inspections	12
Overview	12
The impact of Statutory Instrument 2003/3171	13
Common causes of error	13
The design of RIPA forms	14
Collaborative arrangements	15
CCTV	16
National databases	16
The value of surveillance	17
The impact of the 'targets culture'	17
Training	18
Property Interference	18
Home Office Public Consultation	18
Freedom of Information	19
6. The year ahead	20

Appendices

Appendix A	Authorisations given under Part III of the Police Act 1997 during the last three years	21
Appendix B	Analysis by offence of authorisations given under Part III of the Police Act 1997 during the last three years	22
Appendix C	Intrusive Surveillance authorisations given under Part II of the Regulation of Investigatory Powers Act 2000 and under the Regulation of Investigatory Powers (Scotland) Act 2000 during the last three years	23
Appendix D	Analysis by offence of authorisations given under Part II of the Regulation of Investigatory Powers Act 2000 and under the Regulation of Investigatory Powers (Scotland) Act during the last three years	24
Appendix E	Inspection priorities	25
Appendix F	OSC Expenditure	27
Appendix G	Members of the Office of Surveillance Commissioners	28



1. Introduction

- 1.1. This is my third report since taking up my appointment as the Chief Surveillance Commissioner in July 2006 and relates to the period 1st April 2008 to 31st March 2009.
- 1.2. It is my duty to keep under review:
 - (a) The performance of functions under Part III of the Police Act 1997 ('the 1997 Act');
 - (b) (except in relation to the Interception of Communications and the Intelligence Services) The exercise and performance of the powers and duties conferred or imposed by or under Part II of the Regulation of Investigatory Powers Act 2000 ('RIPA'); and
 - (c) The exercise and performance of the powers and duties conferred or imposed by or under the Regulation of Investigatory Powers (Scotland) Act 2000 ('RIP(S)A').
- 1.3. This covers the covert activities (except telephone and mail interception) carried out by all public authorities, except the intelligence services. This also includes Part III of RIPA relating to protected electronic information.
- 1.4. The powers and duties of the Surveillance Commissioners ('the Commissioners') in scrutinising, and deciding whether to approve authorisations under the 1997 Act (property interference) and under RIPA or RIP(S)A (intrusive surveillance), have been explained in earlier reports and are publicly available on our website. There is a right of appeal against their decisions to me.
- 1.5. In performance of my duty under all three Acts ('the Acts') to report annually, I continue to prepare a combined report.

2. Overview of the year

- 2.1. The statistics relating to property interference and intrusive surveillance are set out in Section 4 below.
- 2.2. The numbers of authorisations for directed surveillance and the use of Covert Human Intelligence Sources ('CHIS') are set out in Section 4 below.
- 2.3. Throughout the reporting period, there has been significant interest in the legislation for which I have the responsibility of oversight. Select Committees in both Houses of Parliament have made recommendations regarding the use of surveillance; the Appellate Committee of the House of Lords gave their judgments in *McE, M, C, and another* ([2009] UKHL 15); and parts of the media continue to report their perceptions of the use of covert powers. This interest has culminated in the production of new draft Codes of Practice, the Police and Crime Bill and the recent Home Office publication of a public consultation paper (*The Regulation of Investigatory Powers Act 2000: Consolidating Orders and Codes of Practice*). I will comment on these later in the report. I welcome the public debate but have reservations about the quality of some of it.
- 2.4. As to covert activity in relation to the arrest of Damien Green MP, I mention the matter because it is public knowledge that the Metropolitan Police Service informed me that some of its officers had worn covert equipment without seeking the protection that RIPA can afford. As there may be further legal action it would be inappropriate for me to make any public comment save to say that covert surveillance without appropriate authorisation is not unlawful but it may be unwise.



3. Particular matters relating to the OSC

The statutory provisions

- 3.1. The purposes and provisions of Part III of the 1997 Act, Part II of RIPA and RIP(S)A that are relevant to oversight of covert surveillance, together with an account of the statutory functions of the Commissioners, are available on the OSC website at www.surveillancecommissioners.gov.uk and are also set out in the 2000-2001 Annual Report to the Prime Minister and Scottish Ministers.
- 3.2. Following publication of the opinions of the Lords of Appeal, referred to earlier in this report, it became apparent that it would be necessary to change the law to enable me to act on the suggestion that my Commissioners should provide prior approval in relevant cases. I await the enactment of the legislation.
- 3.3. My statutory responsibilities are fulfilled by the Commissioners' oversight of authorisations, inspections by Assistant Commissioners and Inspectors, and follow up inspection visits by the Commissioners to all law enforcement agencies. I understand that almost all Chief Officers find the inspection process to be a valuable means of raising standards and a useful indicator of potential vulnerability should covert activity be subject to judicial scrutiny at trial.

Appeals by Authorising Officers

- 3.4. There have been no appeals lodged by an Authorising Officer during this reporting period.

Reporting irregularities

- 3.5. I continue to require Chief Officers to report to me all covert operations in which statutory requirements have not been observed and also cases in which trial judges exclude the product of covert surveillance because of the way in which it was obtained. Out of the 61 unauthorised surveillance activities reported to me by law enforcement agencies this year, many have resulted from the non-retrieval of technical equipment, either because circumstances prevented early retrieval or because of a failure to confirm retrieval at the time the relevant authorisation was

cancelled. I am, however, satisfied that appropriate remedial action has been taken in each case.

Reporting to the Prime Minister and Scottish Ministers

- 3.6.** During the reporting year I have not made a report to the Prime Minister or Scottish Ministers about any of the matters with which I am concerned, but the possibility of such a report was under active consideration at the end of the year.

The scope of my responsibilities

- 3.7.** I have set out my formal responsibilities in the introduction to this report. However, I consider it necessary to mention that I have no power of enforcement and cannot dictate whether covert surveillance powers should, or should not, be used. I neither promote nor limit the use of covert powers. My responsibility is limited to examining the processes that are used should a public authority decide to seek the protection that legislation affords. Because, once authorised, covert surveillance is 'lawful for all purposes', the quality of authorisation, competence of the Authorising Officer and effectiveness of internal audit are of paramount importance.

Inspection Programme

- 3.8.** My Assistant Commissioners and Inspectors share the responsibility for the inspection of local authorities. They meet together several times a year to discuss the style of inspections, to ensure consistency and to share experiences and findings. When appropriate, and if commitments allow, they conduct together inspections of the larger law enforcement agencies.
- 3.9.** The frequency with which I inspect public authorities remained unchanged in this reporting period. I have decided to inspect the Royal Military Police annually and to inspect the Child Support Agency as part of the inspection of the Department for Work and Pensions. The public authorities that I currently inspect are shown at Appendix E. I will review this once the Consolidation Order is published by Parliament. My review will also include the impact (if enacted) of the Police and Crime Bill: this enables collaborative arrangements that have hitherto hindered my ability to incorporate many joint operating units into my inspection programme.
- 3.10.** I have not inspected the local authorities in Northern Ireland as I have not been given the power to do so. I am aware that the Northern Ireland Executive is considering how the covert surveillance activities of these authorities will be overseen. I note that the proposed Consolidating Order does not include these authorities. I will accept this responsibility if I am required and enabled to do so.
- 3.11.** The inspection programme for 2009-2010 has incorporated the changes to local government structures which took effect on 1st April 2009.

Commissioners' Meetings

3.12. The Commissioners met on three occasions during this reporting period and the meetings were attended by the Assistant Commissioners, Inspectors, Secretary to the OSC and managers from my Secretariat. They continue to be a valuable mechanism for making collective decisions about matters of interpretation emanating from inspections, follow up visits and, occasionally, requests received from authorities.

Procedures and Guidance

3.13. Although it is not my role to be an advisory body, I published in December 2008 a Procedures and Guidance document. This provides the Commissioners' interpretations of matters about which guidance is most frequently sought and on issues commonly reported on inspections. For the first time this document is available to all public authorities, not only law enforcement agencies. Its purpose is to promote consistency in the authorisation process and to help raise standards of compliance. It has been welcomed by very many authorities.

3.14. The use of covert surveillance powers can only properly be considered when the full facts of each specific case are available. For that reason, I made a point of emphasising that:

(a) It is unacceptable to consider whether an authorisation is required based on a general description of the surveillance. For instance, 'test purchases' conducted by law enforcement agencies (e.g. for drugs operations) are significantly different from those normally conducted by local authorities (e.g. by trading standards officers). 'Drive-by' surveillance may or may not require an authorisation depending on the circumstances.

(b) The application of the legal principles of covert surveillance to particular facts is, ultimately, a matter of judgment: the extent to which that judgment can be prescribed is limited. There cannot be a one-size-fits-all catalogue of principles, and it would be misleading if Authorising Officers, in particular, were to believe that such a chimera exists.

3.15. It is for this reason that I have expressed concern at the use of examples in the draft Codes of Practice in the public consultation paper. Examples are invaluable in training but experience gleaned from very many inspections shows that examples given in handbooks tend to be inflexibly applied, leading to a wrong conclusion which consideration of the specific facts of the case would have avoided.

3.16. Other organisations (for example, the Association of Chief Police Officers and the Department for Work and Pensions) also provide guidance to their members as to the meaning of the legislation. If such guidance is in conflict with that of the Commissioners, bearing in mind that all seven Commissioners have held high judicial office, it may be thought that the Commissioners' view is likely to be more reliable as to how legislation will be interpreted by a trial judge.

Presentations and Conferences

- 3.17.** The Chief Inspector continues to participate in meetings with other public bodies, conferences and national training events in order to help them improve their understanding of the requirements for compliance with the legislation and of the business of the OSC. He has presented to twenty Authorising Officers courses and to six conferences ranging from those run by individual authorities to the National Covert Authorities Bureaux Conference and a Conference for Trading Standards Officers.
- 3.18.** I participated in a Westminster Briefing principally to members of local authorities and published the full text of my address on the OSC website. I also gave evidence before the House of Lords Select Committee on the Constitution.

Liaison

- 3.19.** The RIPA Coordination Group that I referred to last year has continued to meet. The name of this group was changed to the RIPA Strategic Liaison Group to recognise its purpose and to emphasise that it is not designed to make policy.
- 3.20.** My Chief Inspector also represents me at quarterly Tripartite meetings with the Security Service and the National Coordinator of Special Branches. Although I have no statutory responsibility for overseeing the manner in which the Security Service conducts its business, it is necessary to review procedures and processes to ensure common standards of compliance. I referred in my last report (paragraph 8.13) to expressions of dissatisfaction with the quality of some Security Service authorisations. With the agreement of the Intelligence Services Commissioner, I am pleased to report that the Service has started work with one of my Inspectors to review the design of its authorisation forms.

OSC Website

- 3.21.** The OSC website is designed to help promote public awareness and to assist public bodies to carry out their statutory responsibilities under RIPA and associated legislation. During the reporting year there have been 22,882 visits to the website, an increase of almost 9% on the previous year and 19,473 visitors, slightly down on the previous year. As before, the most popular pages are those covering advice and guidance with almost half the visitors consulting them. I rely on the resources of others to maintain this website. I do not have the capacity to improve the website in the way that I had hoped but improvement remains an aspiration.

Changes in personnel

- 3.22.** Since my last report, the following members of the Secretariat have departed: Darren Fearnley (casework and administration manager), Jane Sheehan (personal secretary), Rafael Sabater (finance officer), Michelle Wild (casework officer) and Joanne Breen (Protective Service Division, Northern Ireland Office). I would like to express my gratitude for the service that each of them provided to the OSC. New

staff have joined us and I would like to welcome Lee Stephen our new casework and administration manager, Arif Choudhary and Deborah Clarke, who have joined his team, and Andrew Burke who has joined the Protective Security Division in Northern Ireland.

- 3.23.** I have made a modest increase to my inspection staff with the recruitment of Kevin Davis who will join the OSC on secondment from the Metropolitan Police Service in June 2009 pending full-time employment when he retires from the Police Service in September. I will again review my capability once the effects of legislative change are known.
- 3.24.** Our organisation chart is at Appendix G.

Recognition

- 3.25.** I wish to record my thanks to the Commissioners, Assistant Commissioners, Inspectors, the Secretary to the OSC, Linda Ward, and all the members of the OSC for the indispensable support which they give me in performing my statutory role. My thanks go, likewise, to Joanne Breen, Protective Security Division, Northern Ireland and to the staff within the Police Division of the Scottish Government Justice Department for the invaluable administrative support they provide to the Commissioners based in Northern Ireland and Scotland respectively.

Expenditure

- 3.26.** I summarise the expenditure of the OSC at Appendix F. It shows that once again our expenditure has come in just under budget despite significant increases in IT and accommodation costs. We were able to make savings in travel, stationery and conference costs to offset these increases.



4. Statistics relating to the use of property interference and covert surveillance (including the use of Covert Human Intelligence Sources (CHIS) and s.49 Encryption)

General

- 4.1.** Statistics for property interference and each type of covert surveillance authorisations for the past year are set out in the tables at Appendices A-D. I continue my practice of not reporting the number of authorisations per agency because to do so could be misleading. For the reasons explained in paragraphs 3.14 and 3.15 of this report, I see no benefit in attempting to break down the use of covert tactics to fine detail. The fact that an authorisation is granted for a given type of activity by one public authority but not by another is of no use without the full facts considered by the Authorising Officer. Offences relating to drug trafficking, murder and firearms continue to be the major targets of authorisations. Offences relating to kidnap and burglary/robbery are also noteworthy with an increase in Part III (Police Act 1997) authorisations this year. However, there is an apparently substantial fall in authorisations relating to terrorism offences: this may be due to the inaccurately high recording of figures in previous years which we are investigating.
- 4.2.** These statistics have been supplied by all law enforcement agencies and most of the other public authorities. I cannot glean them by inspection because I do not inspect all public authorities annually; I therefore rely on public authorities responding to my request for information. For several years some authorities from whom I have requested statistics have not provided them by the deadlines I set. Although we eventually have a good return rate this is through the efforts of my Secretariat in writing, e-mailing, telephoning and cajoling some authorities to provide the figures. The failure to provide the information I seek within deadlines is not acceptable and I am considering including a list of those who have failed to provide this information in my next report. If public authorities maintain an

accurate Central Record of Authorisations (as the legislation requires) the provision of this statistical information should not be an onerous task.

Property Interference

- 4.3. Excluding renewals, there were 2,681 property interference authorisations during 2008-2009, which is again slightly up on the 2,493 authorisations during the previous year. There were 666 renewals of authorisations made during 2008-2009, compared with 525 in the previous year.
- 4.4. Five authorisations were quashed, where insufficient information was provided, one more than in the previous year.

Intrusive Surveillance

- 4.5. There were 384 intrusive surveillance authorisations granted in 2008-2009, a slight increase on the 355 authorised in the previous year. Renewals of authorisations remain relatively stable, with 71 granted this year and 77 during 2007-2008.

Urgency Provisions

- 4.6. There were just over 300 cases where the urgency provisions allowed for in the legislation were used. The increase in the number of these cases from 267 last year is mainly due to the large number of investigations into kidnapping and drugs offences. A small number of law enforcement agencies account for the majority of the use of these provisions but I am content that the provisions are not being misused.

Directed Surveillance

- 4.7. Law enforcement agencies granted 16,118 directed surveillance authorisations during the period 1 April 2008 to 31 March 2009, and 2,708 were still in place at the end of that period. This compares with 18,767 and 3,020 respectively in the previous year showing a small decrease in activity.
- 4.8. In relation to other public authorities 9,894 directed surveillance authorisations were granted during the year, of which 1,287 were still in place at the end of the reporting year. With a slightly higher number of public authorities providing statistics than the previous year, this indicates a fairly stable situation. The figures for 2007-2008 being 9,535 and 1,217 respectively. It is worth noting that of the 9,894 directed surveillance authorisations granted over 50% were granted by government departments.

CHIS

- 4.9. There were 4,278 CHIS recruited by law enforcement agencies during the year; 4,202 were cancelled during the year (including some who were recruited in the

previous year); and 3,722 were in place at the end of March 2009. The figures for the previous year which were 4,498, 4,653 and 3,776 respectively indicate a stable usage of CHIS.

- 4.10.** During the current reporting year other public authorities recruited 234 CHIS, of whom 153 were cancelled during the year with 106 in place on 31 March 2009. This shows a relatively stable situation. During the previous year 204 were recruited, 105 cancelled and 72 were in place at the end of the year. Again it is worth noting that just under half the number of CHIS were recruited by government departments.

Section 49 – Encryption

- 4.11.** My Commissioners and Inspectors attended a briefing by the National Technical Assistance Centre (NTAC) regarding the processes and procedures for the investigation of protected electronic information. During the period of this report, NTAC approved 26 applications for the service of a notice under s.49 of RIPA Part III.¹ Of these 17 went on to obtain permission from a Judge. No permissions were refused and 15 Notices were served.² Eleven individuals failed to comply resulting in seven charges and two convictions. The types of crime under investigation were: counter terrorism, child indecency and domestic extremism.

- 4.12.** One Notice was served without the proper involvement of NTAC. The force concerned had relied on incorrect information from the Police National Legal Database. The individual on whom the Notice was served refused to comply but it was decided not to proceed.

5. Key issues arising from my inspections

Overview

- 5.1.** It is worth bearing in mind that 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 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.
- 5.2.** 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

¹ NTAC declined one application.

² Nine applications were withdrawn because other legal proceedings took precedence..

- 5.3.** I do not have the resources to respond to every instance of concern expressed by the media. Nor would it be appropriate for me to intervene suddenly in a way which might improperly affect the exercise of discretion by those bearing the statutory responsibility for the authorisation process.
- 5.4.** I am satisfied that in general the use made of the legislation for which I have the responsibility of oversight is proper and of a good standard. This applies to all types of public authority. Error is usually due to inexperience resulting from lack of use. The lack of use is because most public authorities use the power as the last resort. This is what the law requires.

The impact of Statutory Instrument 2003/3171

- 5.5.** It is of significant concern to me that my inspections continue to discover some instances where local authority³ Authorising Officers have granted authorisations for purposes other than those which are now available to them. Statutory Instrument 2003/3171 revoked the capability to grant authorisations on the grounds set out in sections 28(3) (a), (c), (d), (e) and (f) and 29(3) (a), (c), (d), (e) and (f).
- 5.6.** This confusion is, in my opinion, at the heart of the debate regarding the way that local authorities are perceived to be using RIPA. Many of the justifications for using covert investigatory techniques are not directly related to criminal acts that would be considered in a court of law. But local authorities have enforcement obligations to tackle relatively minor offences, giving rise to issues that are of significant concern to the local population; these require the collection of evidence to support action. Sometimes the tactics adopted will meet the necessity and proportionality tests for covert activity set by Parliament. If surveillance is covert and likely to be invasive, there is a strong argument that the public is best protected by ensuring that there is a verifiable audit of decisions and actions.
- 5.7.** It should be noted that local authorities in Scotland retain the original powers granted by Parliament.

Common causes of error

- 5.8.** The areas that have received the most criticism on inspection – and this applies equally to all types of public authority – in this reporting period are:
- (a)** a continuing failure on the part of Authorising Officers properly to demonstrate that less intrusive methods have been considered and why they have been discounted in favour of the tactic selected;

³ In this context (and for the period covered by this report) 'local authority' means any county council or district council in England, a London Borough Council, the Common Council of the City of London in its capacity as a local authority, the Council of the Isles of Scilly, and any county borough council in Wales.

- (b) the continuing preference to interpret private information as limited to biographical data rather than recognise the wider meaning decided by the European Court of Human Rights. A specific act of surveillance may not be intrusive but a combination of acts may enable the construction of a profile; this requires careful consideration when judging whether an individual's private life is subject to interference;
- (c) the failure of Authorising Officers, when cancelling authorisations, to give directions for the management and storage of the product of the surveillance;
- (d) the continuing confusion with regard to the need for authorisation when surveillance equipment (such as CCTV) is focused on an individual in a public place. It is not where the CCTV is placed (which may be overt or covert) but the manner in which the camera is used that is determinative of whether the surveillance is covert;
- (e) Authorising Officers not knowing the capability of the surveillance equipment which they are authorising. For instance, there are differences between video cameras that record continuously and those activated by motion; and between thermal image and infra-red capability. These differences may have an important bearing on how a surveillance operation is conducted and the breadth of the authorisation being granted. Therefore, a simple authorisation for 'cameras' is usually insufficient;
- (f) poor internal audit by senior management. The Central Record of Authorisations is often in a form not conducive to quick review or status check. Sometimes it is apparent that there has been no meaningful internal audit between OSC inspections; and
- (g) those conducting covert surveillance basing their activity on what was requested rather than on what was specifically authorised. *R v Sutherland* underpins the importance of briefing those conducting the surveillance beforehand on the specific authorisation.⁴

The design of RIPA forms

- 5.9. My Inspectors encourage authorities to use a design of form similar to that currently available on the Home Office website. These forms contain prompts to guide applicants and Authorising Officers. Errors usually result from a failure to use up to date forms or to follow the prompts.
- 5.10. The constant challenge for applicants and Authorising Officers is to demonstrate in writing how the relevant issues have been addressed. This is difficult to perfect when there are many demands on the individual's time and expertise. The requirement for a concise written audit is at the heart of accusations of unnecessary bureaucracy but I shall continue to criticise the use of template or

⁴ *R v Sutherland and Others*, Case No T20027203.

‘tick-box’ solutions which inevitably give the appearance of minimal or no consideration of important issues. What is required is a clear, concise demonstration that the relevant matters have been considered.

- 5.11.** In the case of law enforcement agencies, the design of form is often constrained by the design of the software solutions purchased. Some of these prevent flexibility in completion or, in some cases, force inaccuracies. For instance, one of my Inspectors noticed that his examination of an authorisation automatically adjusted the dates on some entries to indicate when the field was last accessed and did not retain the date on which it was originally completed.
- 5.12.** The 2000 Act enables an Authorising Officer to render activity ‘lawful for all purposes’.⁵ It is therefore vital that authorisations are completed to the highest standard if they are to withstand scrutiny in a court of law. It is important that everyone, particularly trial judges because they are the arbiters of admissibility, should appreciate that not every authorisation presented in court has been subject to scrutiny by the OSC. A Surveillance Commissioner sees all authorisations for property interference and intrusive surveillance contemporaneously. No authorisations for directed surveillance or the use of a CHIS are seen contemporaneously; a proportion, selected by dip sample, are seen during OSC inspections.
- 5.13.** It is not for me to dictate the design of forms but the OSC has assisted designers and, through examination and reporting, advises where improvement can be made. It is often better if the prompt asks specific questions in order to get specific answers than rely on the writer expressing with clarity concepts that are difficult to grasp and that may be subject to scrutiny some time later.

Collaborative arrangements

- 5.14.** I have previously reported on the difficulty of maintaining a reasonable level of compliance for those public authorities that have engaged in collaborative arrangements. The draft Police and Crime Bill resolves many of the issues that have caused difficulty for law enforcement agencies. The Commissioners will review their Procedures and Guidance as and when the Bill is enacted.
- 5.15.** I perceive an improvement in communication and transparency between public authorities to avoid conflicting operations and investigations. The importance of openness is counter-intuitive to those operating in the covert domain but is necessary if risks to the public and to those conducting the operation are to be managed.
- 5.16.** There are an increasing number of public entities with regional or national coverage (e.g. trading standards ‘scambusters’ and counter terrorism units). It is becoming increasingly difficult for my tiny organisation to keep track of these innovative arrangements and to produce an effective programme of inspections.

⁵ RIPA section 27 (and its Scottish equivalent).

- 5.17.** I have also made it clear that those public authorities which use the services of private sector investigators render those investigators liable to inspection by me. When authorised to conduct covert surveillance using public funds they must comply with the legislation. This should be made clear during negotiations and by contract.
- 5.18.** I am also wary of the continued reliance of local authorities on the willingness of their local police force to manage investigations involving the use of CHIS. I am not aware that a CHIS has been managed by the police on behalf of a local authority, but many local authority policies indicate that this would be the course they would follow. Local authorities very rarely engage in covert surveillance using a CHIS but my inspections suggest that the ease with which an individual could become a CHIS is often misjudged. If a local authority wishes to retain this capability, it should either produce written confirmation that the police agree to act on its behalf, or invest to ensure that the CHIS is managed correctly.

CCTV

- 5.19.** There has been an improvement in the number and quality of CCTV protocols implemented during this reporting period. However, I detect continuing confusion regarding the power of the police who are party to arrangements and the local authorities who often own the equipment. Local authorities must be comfortable with the arrangements in place. A natural inclination is not to inhibit the work of the police but this should not result in an automatic acceptance of everything the police want. For instance, I continue to receive complaints that some police officers fail to produce adequate proof of authorisation or sufficient details to assure the local authority that their equipment is being used in a compliant manner.
- 5.20.** There is also disparity in the qualifications to operate CCTV equipment. CCTV operators employed by local authorities are required to pass rigorous examination for the use of this controversial equipment, yet it appears that some police officers operate CCTV without obvious qualification.
- 5.21.** Those responsible for managing the National CCTV Strategy Programme instigated by Government have consulted my Chief Inspector. I welcomed this development and pledged my support. It proved helpful to confirm (as indicated at paragraph 5.8(d) above) that just because a CCTV camera is visible or there are warning signs, the way in which the camera is used may be covert. The need for authorisation often depends on whether it is foreseen that an individual or group of individuals will be the subject of focused attention.

National databases

- 5.22.** Notwithstanding the arguments for and against large databases, the lack of proper systems to transfer relevant (even vital) information quickly and securely affects the effectiveness of covert operations. My inspections frequently reveal

the frustrations of practitioners who have little confidence in national databases such as the National Compromise Database or National Source Database. Incomplete databases have limited value, yet access to this type of information is vital to proper risk assessment and compliance with legislation which emphasises the duty of care.

- 5.23.** The issue is inability to receive acceptable security accreditation. The impact is to inhibit important cross-checking of information and data and to force time-consuming and convoluted processes of authorisation. On the other hand, ensuring that there are humans engaged in the process may ensure some control on the passage of information only to those who can prove that they need to know it.

The value of surveillance

- 5.24.** When I am informed of unauthorised activity, a product is sometimes described as being of no evidential value. Such a statement does not mitigate the fact that the activity was unauthorised. Whilst I accept that it is not always possible to foresee what product will be obtained, it is important that Authorising Officers ensure that they conduct reviews frequently enough to identify, particularly for future purposes, when activity is not achieving the results hoped for. I do not have the resources to check the accuracy of the assertions and rely on the integrity of those reporting to me.

- 5.25.** Though not a requirement of the legislation, it would be a useful practice for authorities to retain a record of the value of covert activity. This might assist Authorising Officers in judging whether future applications would be likely to achieve objectives or to identify other tactics that would be more proportionate. Such an 'outcomes audit' would assist the public authority to counter inaccurate criticism and provide evidence for public assurance.

The impact of the 'targets culture'

- 5.26.** The requirement to meet targets – whether imposed by Government or management – sometimes results in a dilemma when a target can only be achieved by means of covert activity but the lack of adequate intelligence prevents authorisation. An example of this is the requirement to capture quality evidence (usually a visual recording) of car drivers using mobile phones whilst driving. The need to deal with this dangerous activity is obvious. However, if the observation is conducted in a manner that is covert and where there is no intent to stop the vehicle immediately, it may be necessary to consider an authorisation for directed surveillance.⁶ The intention to retain recordings of individuals for potential later use is deemed by the Commissioners to be an invasion of their privacy. Although a human right is not absolute, it is equally important that public authorities do not consider that the ends always justify the means.

⁶ This is a similar problem to that of Automated Number Plate Recognition which I have highlighted in my last two reports.

Training

- 5.27.** I continue to hold the view that those public authorities which invest in training usually achieve a higher standard of compliance. The quality of training is variable. My reports should be a useful indicator as to the value and success of the investment.
- 5.28.** It is also clear to me that those authorities whose senior executives take an interest in the training tend to encourage attendance. I was disturbed by the report from a training provider that a police force had requested training because this had been an OSC recommendation, but only two days of the usual five day Authorising Officers' course was sought. To compound matters, of the students who started training, about half did not reappear the next day because of supposed pressing engagements. This is not typical, but is an indicator that attendance at training will be affected if senior officers do not appear to take seriously the need for training.
- 5.29.** There remain too many ACPO officers and senior executives who have yet to receive formal training in this legislation. This is often commented on in reports. It is vital that they receive formal training not least because their views on the legislation can be clouded by inexperience and misconceptions. Most of them will also be Authorising Officers in their own right and may have difficulty defending their credentials if challenged.

Property Interference

- 5.30.** Easily available technology has encouraged some public authorities to favour the use of equipment such as tracking devices. Their motives are understandable. However, the use of such devices involves property interference and may only be authorised by an authority empowered by the Police Act 1997 and may only be used for the prevention and detection of 'serious crime'.⁷ It is not, as some believe, enabled by RIPA or RIP(S)A.

Home Office Public Consultation

- 5.31.** I am conscious that this consultation is taking place after the period covered by this report and the consultation will be nearing its end by the time that this report is published. It may be useful for others to be aware of my views. I have already provided comments to the Home Office.
- 5.32.** The Government has posed seven questions and I will briefly provide my views in relation to three of them:
- (a)** Q3. What more should we do to reduce bureaucracy for the police so they can use RIPA more easily to protect the public against criminals?

⁷ Police Act 1997, Section 93(2)(a).

I do not wish to inhibit effective police performance and covert activity has a very important role in combating crime. But the way in which this question is framed reveals an objective which concerns me. It should not be acceptable that the use of covert powers is made “easy” for any public authority. The fundamental purpose of the legislation is to ensure that covert surveillance is necessary, proportionate and carried out in a way which is compliant with human rights; it is to that end that I provide oversight from an independent judicial perspective. Every time the use of intrusive tactics is contemplated the matter should be considered with the greatest care. I have repeatedly commented that the bureaucracy some complain about is often self-inflicted and due to police officers’ failure to construct their documents concisely and with clarity.

The documentary trail which is provided by the authorisation of covert activity needs to show, transparently, what application was made and what authorisation granted; why, when, where and how 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, when necessary, hear evidence about it when deciding whether to admit the product in evidence. That documentary trail provides the principal focus for examination at inspections on my behalf. Producing this trail is essential to proper observance of the legislation and is not meaningless bureaucracy.

- (b) Q4. Should the rank at which local authorities authorise the use of covert investigatory techniques be raised to a senior executive?

It is not the rank or grade of an officer that matters but his or her competence. It is a management responsibility to ensure that those granting authorisations are selected carefully and appropriately qualified.

- (c) Q5. Should elected councillors be given a role in overseeing the way local authorities use covert investigatory techniques?

Elected members already have an oversight role which many do not exercise. Those authorities which perform well tend to be those where executive officers take an interest and who report regularly to their elected members. I am doubtful whether the legislation contemplates elected members taking part in the authorisation process. If they were to do so, they would have to be trained appropriately and would be vulnerable to accusations of political bias.

Freedom of Information

- 5.33. Last year I commented on the impact of the Freedom of Information Act and the pressure on public authorities to disclose my reports. My intent was to address the difficulty of balancing transparency with the need to protect covert

techniques and activity. They are not comfortable bedfellows. In order to provide evidence to support my recommendations, I frequently have to provide detail of specific investigations or tactics. I protect my reports in accordance with the Government Protective Marking System. Without this evidence and protection, they would be of little value to the authority reported on. Redaction, however, can attract adverse comment. The OSC never discloses the content of its reports to third parties.

- 5.34.** I misled myself regarding section 36 of the Freedom of Information Act. I am not capable of being a 'qualified person' within the meaning of that Act. I therefore confirm that the decision whether to disclose my reports, and if so in what form, rests with each public authority. I have promised to review the design of my reports to assist public authorities to meet their obligations.



6. The year ahead

- 6.1.** The year ahead, as far as the legislation is concerned, will be dominated by the introduction of the Police and Crime Act and the result of the public consultation into RIPA. The former should result in improvements to the processes that enable law enforcement agencies to conduct covert surveillance across operational boundaries. The latter should result in improvements to the Codes of Practice and greater clarity regarding the use of covert investigation techniques. I will monitor closely the impact of legislative changes.
- 6.2.** For my own organisation, there are improving prospects for the provision of better office accommodation and communication facilities the standard of both of which has inhibited my operations. Whilst the former may move me geographically closer to the Home Office and those who provide financial support, I will continue to be robust in the protection of my independence.

AUTHORISATIONS GIVEN UNDER PART III OF THE POLICE ACT 1997 (AS AMENDED) DURING LAST THREE YEARS

	2006-2007			2007-2008			2008-2009		
	England, Wales & N.I.	Scotland	Total	England, Wales & N.I.	Scotland	Total	England, Wales & N.I.	Scotland	Total
Total number of authorisations (not including renewals)	2,195	116	2,311	2,372	121	2,493	2,563	118	2,681

PRIOR APPROVALS

	2006-2007			2007-2008			2008-2009		
	England, Wales & N.I.	Scotland	Total	England, Wales & N.I.	Scotland	Total	England, Wales & N.I.	Scotland	Total
Number of cases requiring approval	173	15	188	194	11	205	164	10	174
Cases requiring prior approval by category:									
• Dwelling	130	10	140	133	7	140	117	6	123
• Office premises	25	2	27	37	1	38	28	4	32
• Hotel bedroom	16	1	17	24	3	27	11	0	11
• Matters subject to legal privilege	1	0	1	0	0	0	5	0	5
• Confidential journalistic material	0	0	0	0	0	0	0	0	0
• Confidential personal information	1	2	3	0	0	3	3	0	3

**ANALYSIS OF AUTHORISATIONS GIVEN UNDER PART III OF THE POLICE ACT 1997
(AS AMENDED) FOR THE LAST THREE YEARS BY OFFENCE***

	2006-2007			2007-2008			2008-2009		
	England, Wales & N.I.	Scotland	Total	England, Wales & N.I.	Scotland	Total	England, Wales & N.I.	Scotland	Total
Assault	6	0	6	5	0	5	13	1	14
Burglary/Robbery	96	0	96	59	0	59	160	2	162
Conspiracy	41	0	41	39	0	39	71	4	75
Drug trafficking	1,333	84	1,417	1,418	91	1,509	1,603	92	1,695
Firearms offences (including armed robbery)	157	3	160	131	2	133	118	3	121
Kidnap/extortion	66	7	73	74	3	77	91	3	94
Money laundering	53	0	53	60	0	60	55	0	55
Murder/loss of life	140	11	151	147	15	162	155	5	160
Organised illegal immigration	34	1	35	40	3	43	45	0	45
Tax evasion	37	0	37	59	0	59	35	1	36
Terrorism	114	2	116	118	2	120	16	2	18
Other	118	8	126	222	5	227	201	5	206

* Only the most common type of offences featuring authorisation are listed. As a result, these totals may not reflect the number of authorisations granted.

Appendix C

**AUTHORISATIONS GIVEN UNDER PART II OF THE REGULATION OF INVESTIGATORY POWERS ACT 2000 AND THE
REGULATION OF INVESTIGATORY POWERS (SCOTLAND) ACT 2000 DURING THE LAST THREE YEARS**

	2006-2007			2007-2008			2008-2009		
	England, Wales & N.I.	Scotland	Total	England, Wales & N.I.	Scotland	Total	England, Wales & N.I.	Scotland	Total
Total number of authorisations (not including renewals)	329	21	350	339	16	355	366	18	384
Cases by category:									
• Private vehicle	157	10	167	179	7	186	201	8	209
• Residential premises	172	11	183	160	9	169	165	10	175

Appendix D

ANALYSIS OF AUTHORISATIONS GIVEN UNDER PART II OF THE REGULATION OF INVESTIGATORY POWERS ACT AND THE REGULATION OF INVESTIGATORY POWERS (SCOTLAND) ACT 2000 IN THE LAST THREE YEARS BY OFFENCE*

	2006-2007			2007-2008			2008-2009		
	England, Wales & N.I.	Scotland	Total	England, Wales & N.I.	Scotland	Total	England, Wales & N.I.	Scotland	Total
Assault	2	0	2	6	0	6	4	1	5
Burglary/Robbery	17	0	17	4	0	4	13	1	14
Conspiracy	9	0	9	3	0	3	17	1	18
Drug trafficking	156	11	167	153	11	164	179	8	187
Firearms offences (including armed robbery)	10	1	11	29	1	30	17	0	17
Kidnap/extortion	8	2	10	7	0	7	11	1	12
Money laundering	3	0	3	10	0	10	3	1	4
Murder/loss of life	83	5	88	72	4	76	79	5	84
Organised illegal immigration	6	0	6	5	0	5	6	0	6
Tax evasion	0	0	0	6	0	6	2	0	2
Terrorism	1	0	1	12	0	12	1	0	1
Other	34	2	36	32	0	32	34	0	34

* Only the most common type of offences featuring authorisation are listed. As a result, these totals may not reflect the number of authorisations granted.

Appendix E

Inspection priorities

Subject to annual inspection

British Transport Police
 Civil Nuclear Constabulary
 Department for Work and Pensions
 Environment Agency
 HM Prison Service
 HM Revenue and Customs
 UK Borders Agency
 Northern Ireland Prison Service
 Office of Fair Trading
 Police forces for England and Wales
 Police Service of Northern Ireland
 Police forces for Scotland
 Port of Dover Police
 Port of Liverpool Police
 Serious Organised Crime Agency
 Scottish Crime & Drug Enforcement Agency
 Royal Mail Group plc
 Royal Military Police
 Scottish Prison Service

Subject to inspection every other year

Ministry of Defence Police & Guarding Agency
 Royal Navy Police
 Royal Air Force Police
 British Broadcasting Corporation
 Department for Environment, Food and Rural Affairs (incl. Rural Payments Agency)
 NHS Scotland (National Services Division)
 Department for Business Enterprise & Regulatory Reform
 Department for Transport (incl. Driving Standards Agency)
 Gangmasters Licensing Authority
 Healthcare Commission
 Health and Safety Executive
 Independent Police Complaints Commission
 Local Authorities – Unitary, Metropolitan, London Boroughs, Scottish & Welsh Councils
 Maritime and Coastguard Agency
 NHS Counter Fraud & Security Management Service
 Office of the Police Ombudsman for Northern Ireland
 Scottish Environment Protection Agency
 Scottish Executive Environment and Rural Affairs Department

Appendix E

Serious Fraud Office
Vehicle & Operator Services Agency
Welsh Assembly Government

To be inspected every 3 years

Charity Commission
Financial Services Authority
Food Standards Agency
Gambling Commission
Information Commissioner
Local Authorities – County & District Councils
Medicines & Healthcare Products Regulatory Agency
Office of Communications
Office for Standards in Education
Royal Pharmaceutical Society of Great Britain
Scottish Accountant in Bankruptcy

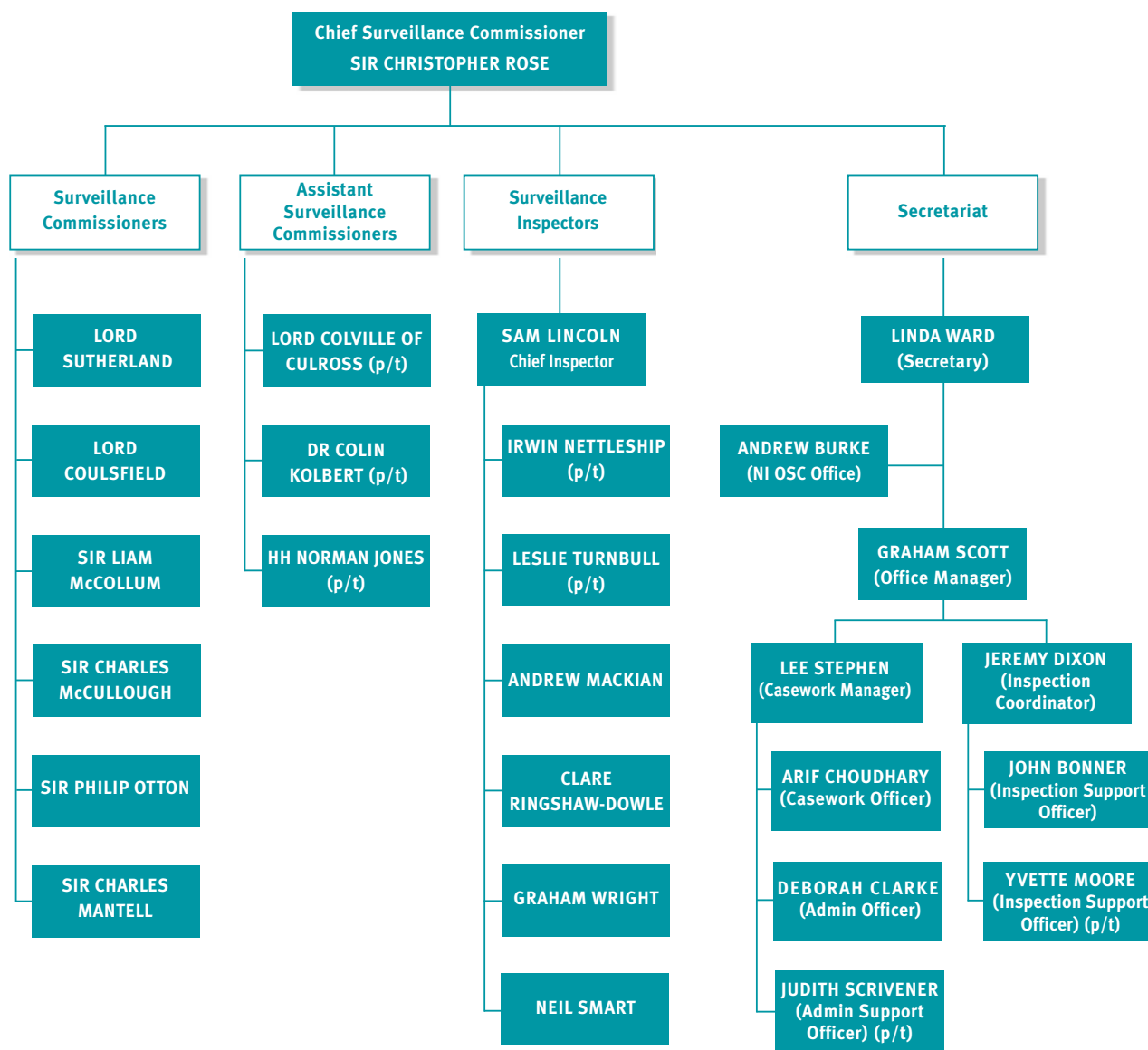
Appendix F

OSC expenditure for April 2008 - March 2009

Description	Total cost £
Staff costs, including recruitment and training	1,353,854
Travel and subsistence	113,115
Conferences and meetings	3,210
IT and telecommunications	52,470
Stationery, printing and postage	18,418
Office equipment, including security equipment	3,774
Accommodation costs	80,223
Total	1,625,064

Appendix G

MEMBERS OF THE OFFICE OF SURVEILLANCE COMMISSIONERS AS AT 31 MARCH 2009



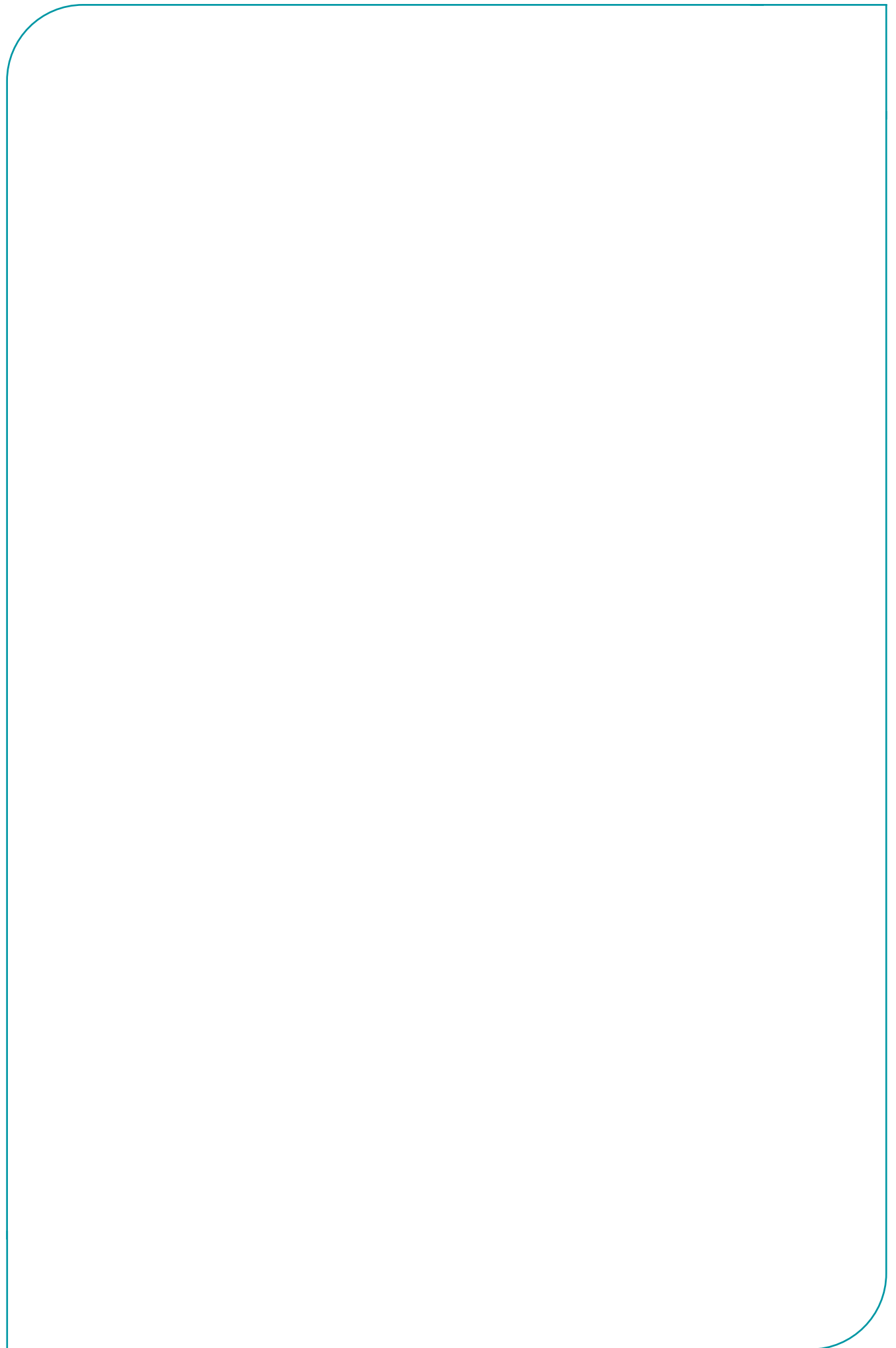
Members of OSC who have left during the reporting period:

Richard Allsopp (Inspector)
 Darren Fearnley (Casework Manager)
 Rafael Sabater (Finance Officer)
 Michelle Wild (Casework Officer)
 Jane Sheehan (Personal Secretary)
 Joanne Breen (NI OSC Office)

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