



Legal feature

Modern surveillance

Richard Atkins, partner with Knights Solicitors, considers whether keepers have a valid concern about surveillance.

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A modern drone being used to carry a surveillance camera.

SURVEILLANCE IS A HOT TOPIC AND ONE I FIND holds more than a passing interest for gamekeepers. As I do a number of talks and seminars up and down the country, the topic invariably features in questions. But like all things, one needs to have a sense of proportion. When dealing with the topic, I always preface my answer by saying that only those who are doing something wrong need fear or will attract the interest. It is also a sad fact that those conducting surveillance exercises, if they wait long enough, frequently do find something to justify the time and resources involved.

Yet the fear of surveillance is certainly the most serious problem voiced by gamekeepers who have nothing to fear, when in fact those who live in the cities constantly remain under surveillance by CCTV. For criminal legal practitioners in the courts, CCTV is the gold standard of evidence to prove or disprove a case. Regrettably, modern policing depends almost entirely now on CCTV and DNA to the detriment of good honest testimony.

SO WHAT IS SURVEILLANCE?

Most surveillance is either overt or covert. Overt is in the open and is what so-called monitors profess to do. Covert surveillance is conducted undercover without the knowledge of the 'target' by physical observation, tracking devices or a camera or video footage. In general the taking of images of a person is not itself unlawful in the UK or for that matter elsewhere. We all take pictures on holidays, including of other people, and so in general there is nothing wrong in another taking a picture of someone at their work.

Shoving a camera right up in to another's face, wherever it may occur, is not acceptable and likewise someone causing an obstruction or harassment is likely to cause intimidation or at worst alarm. Being disorderly is in England potentially a breach of the peace and an offence under the Public Order Act 1986. If conducted as part of a 'course of action' resulting in harassment, alarm or distress it falls under the Protection from Harassment Act 1997. In fact the number

of incidents that are required to prove a course of action is only two.

People often ask about children. Taking images of children is not itself intrinsically unlawful as long as they are not of an indecent nature, but it is viewed as a social no-no and likely to provoke hostility whenever a stranger without permission does so.

It is frequently not just the taking but the use of images that gives rise to legal issues such as unlawful invasion of privacy, breach of copyright and harassment (civil or criminal). We should not forget that the storage of images which can lead to the identification of a person may contravene the Data Protection Act 2000 (DPA). It is the storage of the data and its use that is protected under the DPA. A Code of Practice has been issued by the Office of the Surveillance Camera Commissioner in respect of surveillance conducted by Police and Local Authorities in a public place.

Most surveillance by video cameras involves the use of reusable discs which are overwritten. Those using the equipment do not store data, but need to register with the Information Commissioner's Office (ICO) and must demonstrate compliance with the ICO.

DRONES

In my travels I am frequently asked about aerial surveillance and in particular by drones. Personally I do not think them to be a particularly good means of conducting surveillance. Although the drones can now be quite small, they are still noisy and highly visible. Furthermore, a downwards looking camera rarely produces a useful picture capable of showing any alleged wrong doing. That said, they are potentially a highly effective means of tracking people and vehicles. Many people confuse commercial drones with military drones, which are a completely different piece of kit.

Use of aerial vehicles (eg. drones) is regulated by the Civil Aviation Authority (CAA) and subject to the Air Navigation

Order 2009 (ANO). Restrictions on drones (or for the larger variety, read ‘un-manned aircraft’) depends largely on the weight of the drone, starting with those weighing over 7kg. Drones less than 20kg must be under the direct visual contact of the operator at all times. Drones weighing up to 150kgs may only be flown below 400 metres and are subject to a number of other restrictions, including a prohibition on them being flown within 50 metres of any person and a distance of 150 metres of any vehicle or house not under the control of the operator.

Larger drones than these require registration and are subject to flight plan permission. As the very essence of surveillance requires spontaneity and the ability to change direction, the use of larger drones is effectively precluded.

In addition, UK air space restrictions and local byelaws add further liabilities to those seeking to operate drones. Failure to follow the provisions of the ANO are taken seriously by the CAA and they will prosecute or impound any offending craft. It should also be remembered that anything that does pop up on the radar screen in CAA or military flight areas will be investigated and potentially shot down if it presents a risk.

STATIC CAMERAS

Realistically, those under surveillance are most likely to be filmed using static cameras. However, the vulnerability of this kit is the battery life and image storage. The operator must break cover from any static observation position or return to the scene. This places them at risk of discovery and identification.

Investigators from one of the animal charities and monitors or activists from direct action groups are no respecters of the notion of private. They rarely, if ever, seek permission to enter private land. As such they may be trespassers in respect of land they enter to conduct surveillance and also other neighbouring land used for access. Unfortunately, unless they cause a legal nuisance or damage property, it is difficult to take action effectively in the courts. Perhaps all landowners whose land has been used for surveillance without their permission should make official complaints and seek out-of-court compensation from those involved.

Neither the RSPB nor the RSPCA are defined as public bodies for the purposes of the Regulation of Investigative

Practices Act 2000 that govern the Police or investigators from central and local government. This means the charities are not subject to supervision from the Surveillance Commissioners Office or in any effective way accountable for their actions save for the provisions of the DPA and hence superintendence from the Office of the Information Commissioner.

Unlike in the US, English and Welsh courts have no compunction in receiving evidence which has been obtained unlawfully, unless the unlawful action calls into question the reliability of the evidence itself. Regrettably, if the image shows what it purports to do and has not been tampered with, it will be admitted. There are some exceptions, but these are mainly centred on reprehensible activities of Police or officials of central and local government acting in a repugnant manner. As charity investigators and their fellow travellers are not officials, it will be rare for any reliable evidence to be excluded, even if they have acted in a high-handed or unlawful manner.

I am often asked what to do if surveillance equipment is found on land. My advice is first to make a record of what has happened. Secondly, make sure that there is nothing remiss to attract those in authority if a search takes place. This does not suggest guilt, but is practical advice to gamekeepers who frequently find themselves in trouble, perhaps not for the reason those in authority have come

to search premises but for something completely different, eg. insecure firearms.

There is nothing wrong in the spies watching the spies. So, if there is a means to keep watch on the watchers, do so. However, under no circumstances must there be a confrontation that could lead to other complaints. Nor must the surveillance equipment be damaged – the last image of a broken camera frequently shows a person holding a big stick before the screen image goes blank!

One practical option is to report the matter to the Police and (without damaging it) hand the equipment in to them. Make a claim to the item if it is not recovered. It may provoke an interesting response if someone lays claim to the missing property. The Police will certainly inform you if it is collected and you can ask for the details of the person in question. Lastly, I also suggest, again without damaging it, that any disc be removed, read and copied to a computer and then replaced back in the camera.

I am currently in dialogue with the ICO and the Office of Surveillance Commissioners about issues of accountability of the RSPCA and RSPB investigators and the manner in which their investigations are conducted. If anyone has any information that can be used as part of a submission to the official bodies mentioned above, please contact me at Knights (see box below).

NOTE IT!

KNIGHTS SOLICITORS

Richard Atkins is a Partner of Knights Solicitors, Tunbridge Wells. Knights Solicitors have dealt with numerous investigations and prosecutions under the Animal Welfare Act 2006 and Wildlife & Countryside Act 1981. Knights Solicitors specialise in countryside and country sports litigation and have acted on behalf of gamekeepers throughout England and Wales. Tel: 01892 537311, www.knights-solicitors.co.uk. Ask for Matthew Knight, Richard Atkins or Joshua Quinn.



NGO FREE LEGAL HELPLINE

NGO members in need of emergency legal advice relating to gamekeeping and field sports can call the helplines below. Up to 30 minutes telephone advice is available free of charge as a benefit of your NGO membership.

For those in the South: Matthew Knight, Richard Atkins and Joshua Quinn, Knights Solicitors (Tunbridge Wells), 01892 537311 (24hr line).

For those in the North, Scotland and Wales: Michael Kenyon, Solicitor (Macclesfield), 01625 422275 or 07798 636460.

