

Oversight of covert police intelligence gathering

Actions by the authorities and their documents are generally public for all, or at least for involved parties. However, there are various degrees of exceptions to this publicity. Covert intelligence gathering by the police is one example of an official action in this category.

There is as such no established or clearly defined term for the covert intelligence-gathering activities in which the police engage. In this article, what is meant by these activities is first of all the coercive measures provided for in Section 5a of the Coercive Measures Act and used in the investigation of crimes, i.e. telecommunications interception and monitoring, obtaining data on the location of mobile phones and technical surveillance (listening, watching, tracking). A second form of covert intelligence gathering is the use of these means in order to prevent and detect crimes (according to the Police Act). Likewise included in this category are undercover operations, pseudo purchases and prevention of disclosure of intelligence gathering.

The concept "covert intelligence gathering" was used in the recent report of a committee that studied the Covert Criminal Investigations Act and the Coercive Measures Act (OMKM 2009:2). This committee recommended the enactment of legislation providing for new covert coercive measures and intelligence-gathering methods, some of which would be based on existing means, but others would involve completely new regulation. These new means would be for example using technical equipment to track a person, controlled delivery and directed use of an information source.

Each year, the Ministry of the Interior gives the Ombudsman a report on the use of telecommunications interception and monitoring as well as on the use of technical listening in addition to technical surveillance in penal institutions. Equivalent reports are received also from the Customs, the Defence Forces and the Border Guard. In addition, the Ministry of the Interior gives the Ombudsman a report on the use of undercover activities, pseudo purchases and measures taken to prevent disclosure of intelligence gathering. In practice, the Ministry of the

Interior provides one report on covert intelligence gathering; for reasons of maintaining secrecy, not all parts of the report are public. It should be mentioned already at this stage that the obligation to report does not by any means cover all of the police's covert intelligence gathering.

Oversight of covert intelligence gathering is seen as a special task of the Ombudsman. However, there are no statutory provisions on this other than the reports. Indeed, this oversight has in practice been as much assumed as a special task as it would have been especially entrusted to the Ombudsman. Absence of regulation has given the Ombudsman extensive discretion as to how oversight is conducted. The flipside of this "freedom" is the difficulty of defining the content of the task.

Next I shall examine some – but by no means all – of the special features and problems of covert intelligence gathering and especially oversight of it. Specifically covert intelligence gathering by the police is the perspective. It is not a matter of other authorities meriting no attention, but rather that an examination of the police (as the authority that uses these means most) is sufficient to give an adequate picture of the special features of oversight. Anyone wanting a more detailed picture of the situation can study the Ombudsman's annual reports, which since 1995 have contained a separate section dealing with the means that are under discussion here (the reports since 2001 are available in electronic form on the Ombudsman's web site www.ombudsman.fi/english).

Owing also to the special nature of covert coercive measures, questions of legal remedies are of accentuated importance from the perspective of both those against whom the measures are employed and in general the legitimacy of the entire legal system. The secrecy that is inevitably associated with the covert use of coercive measures exposes these activities to doubts about their legality, whether or not there are grounds for this. Indeed, an effort has been made to ensure legal remedies through special arrangements both before and after the use of coercive measures. The key components of the system of legal safeguards are the court order procedure, authorities' internal oversight as well as the Ombudsman's oversight of legality.

Good law is a fundamental prerequisite

The Constitution requires that the law be scrupulously complied with in all actions by the public authorities. With respect to this demand, it would be important for the law that is to be followed exactly to be itself clear. However, it is generally acknowledged that the field of regu-

lations concerning covert intelligence gathering has, as a result of partial reforms and broadening of powers over the years, become a fragmented totality that is difficult to manage. For this reason, among others, preparatory work for an extensive revision of legislation has been commenced. The committee, already mentioned, that studied the Criminal Investigations Act, the Coercive Measures Act and the Police Act submitted its report in spring 2009 and one of the areas of emphasis in it was precisely covert intelligence gathering.

Having personally participated in that work, I am somewhat recusable when it comes to evaluating the result. In any case, at least the difficulty of regulation became clear. The objective, which was to clarify legislation, was not in all respects achieved in the best possible way, at least not yet by the committee. The limited nature of the time available for the work led to the proposal being based largely on the present legislative structures and there were no possibilities of developing legislation founded on completely new premises. For example, there have been calls for technically neutral regulation, but no concrete models of this have emerged. Indeed, one could well ask how in practice technically neutral regulation could be combined with the precisely set limits that are demanded of legislation on coercive measures. In addition, several questions that have thus far remained unregulated (due in my view to their difficulty) have been grasped in the proposal. Also for this reason, I do not believe that it can be expected that these will be resolved through particularly simple solutions – such as the use of extra information as well as disclosure of undercover operations and pseudo purchases. On the other hand, a thought that has occurred to me is whether we have come to the end of the road leading to ever more detailed and more micro regulation. In a race with developing technology, legislation always comes second. The view taken in many European countries has been that considerably lighter regulation, in undercover operations for example, suffices. It is, however, true that these solutions have hardly been put to the test in the European Court of Human Rights.

In any event, that there is a need to revise legislation is clear. It is necessary especially from the perspective of the legal remedies available to those who are the focus of the measures, but also to the authorities who apply the law in practice. The more open to interpretation legislation is, the more demanding also oversight of legality becomes and the more the authorities, in the light of experience, expect also the overseers of legality to help them with interpretation. In fact, it has been suggested that in reaching decisions the Ombudsman has investigated even rather difficult questions of legal interpretation, which it would be more natural to leave to courts to decide on (Niemi – de Godzinsky: *Telepakkokeinojen oikeussuojajärjestelmä*, *Optulan tutkimuksia* 243). One can concur with this to some extent. On the other hand, the problems in question are at least to some degree of a kind that can not be referred to courts for resolution, or else it is highly improbable that this would be done.

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Oversight on the Ombudsman's own initiative has been emphasised

The Ombudsman's work mainly comprises investigations arising from complaints or launched on her own initiative as well as inspection visits. Dealing with complaints accounts for the lion's share of the work input.

The situation is different where covert intelligence gathering is concerned. Very few complaints are received, in practice only a few each year, and even these concern the use of coercive measures affecting telecommunications. This is probably attributable, at least in part, to the nature of these measures. To be effective, intelligence gathering must remain something of which its object is unaware, at least in the early stage of an investigation. For this reason, the parties against whom these measures are directed generally have fewer opportunities to react than is the case with "ordinary" coercive measures, which in practice immediately or very soon become evident. It is also possible (provided a court gives its permission for this) to omit to notify a target of coercive measures affecting telecommunications of their use, even after the fact.

It is obvious that undercover operations and pseudo purchases have not come to the notice of their targets. It is, however, true that at time of writing two police officers stand accused of a breach of official duty in conjunction with a pseudo purchase and, at least according to media reports, the targets of the pseudo purchase had become aware of the matter. In any event, there are no statutory provisions on making notifications of undercover operations and pseudo purchases. To redress this obvious shortcoming, the committee studying the legislation on criminal investigations and coercive measures has proposed that there be an obligation (albeit not without exceptions) to make notification of also these measures.

It is, however, true that omitting to notify that telecommunications interception or monitoring has been carried out is nowadays fairly rare. With respect to this, it is noteworthy that very few complaints are made about these coercive measures affecting telecommunications.

The reports received from the Police, Customs, Border Guard and Defence Forces on their covert intelligence gathering are an important part of oversight of these activities. They are not, however, sufficient on their own. Since the objects of covert intelligence gathering have weaker opportunities than normal to react themselves to the use of coercive measures and since these activities are also otherwise not especially transparent from the outside, a need has been recognised to concentrate more than usual on inspections and other own-initiative activities, for example constant year-round contacts with the National Bureau of Investigation

and the senior command echelon in the police. Thus the Ombudsman has not been content passively to receive reports from the Ministry of the Interior and other actors; instead, within the constraints of the available resources, possible problem areas have been sifted through and examined on her own initiative.

The Ombudsman and courts

Judicial power is exercised by independent courts. However, the scope of the Ombudsman's power of oversight extends also to these bodies. Since a key part of the system of legal remedies relating to coercive measures affecting telecommunications and technical listening is the fact that a court order is required for the use of these measures, it has been obvious that the Ombudsman is interested in the actions of courts. After all, courts do not make any reports to the Ombudsman; in their cases, she must herself obtain the information she requires. Of course, the report supplied by the Ministry of the Interior does contain statistical data concerning courts. In addition, the activities of courts are evaluated in the report, albeit fairly randomly. Courts have no role in deciding on undercover operations or pseudo purchases.

The Ombudsman can not, of course, direct courts through binding precedent decisions or legal interpretations that impose an obligation on them. In any event, inspections focusing on the use of coercive measures affecting telecommunications have been conducted in district courts, but their nature has been fairly discursive. The aim with the inspections has been to obtain information about the judges' experiences and also draw their attention to the observations that the Ombudsman has made in the course of her oversight of legality. As in general, also in this part of the Ombudsman's work the effect is based on the fact that an effort is made to set out the reason for positions adopted as well as possible. Compared with traditional oversight of the legality of courts' actions, we have gone fairly far in this, nevertheless bearing in mind that judicial power is exercised by independent courts and that also in this task they have broad discretionary power to interpret the law. This has not by any means been seen to prevent interpretations and practices that the overseer of legality finds problematic from being brought up. At the same time it has been possible to give the district courts information about the solution models that have been developed in response to various problems. Also deserving of mention is the fact that it is not uncommon, either, for judges to contact the Office of the Parliamentary Ombudsman to discuss questions of legal interpretation. Then, of course, no permission or retroactive approval for some or other particular decision can be given, but there is nothing to prevent discussion of what interpretations have featured in certain types of matters.

It is my impression that the Ombudsman's activities have had a clear influence on courts. The first example of this that I can mention includes a change in the way applications for orders giving permission to use coercive measures are dealt with. The practice in some district courts was to deal with applications for permission to use coercive measures affecting telecommunications through a purely written procedure. After criticism by Deputy-Ombudsman Ilkka Rautio, a lawful procedure began to be used, which helped ensure that applications were dealt with thoroughly, thereby helping to ensure legal safeguards. Something that I believe is clearly more important than this is the fact that the number of cases in which a court has given permission to omit to notify the target of a coercive measure that it has been used has declined very markedly. That happened after Deputy-Ombudsman Rautio examined the practice on his own initiative and found it to be problematic. Notification within the (one-year) specified period is, under the Coercive Measures Act, the main rule, and exceptions should be made only in cases where this is unavoidable. That is because in a state governed under the rule of law there can be secret official actions and especially coercive measures of which their targets are completely unaware only to a very limited extent. When the target is informed in retrospect that a coercive measure has been used, he or she may request to have the legality of the official action evaluated. Without knowledge that the measure has been used, this very key component of legal security is absent. In my assessment, before the Deputy-Ombudsman's decision, the real significance of the matter was not always recognised in courts; instead, police applications were approved routinely and partly on flimsy grounds. Failures to make notification will continue to be monitored, at least on the level of statistics, and if necessary they will be investigated on our own initiative.

A very central subject of discussion on court inspections has been the reasons presented in support of decisions. Based on the observations made in the course of inspections, a precedent decision of the Supreme Court (KKO 2007:7) came as no surprise. In that decision, the Court overturned orders that had been granted for technical listening. Observations made while overseeing legality indicate that decisions of this kind, with the reasons for them outlined in a very schematic fashion, had not been especially exceptional. Of course, this does not necessarily mean that permits would have been generally granted without satisfying the preconditions stipulated in the Coercive Measure Act. An example of the issues that come up is that, in addition to a written application, the orally presented reasons may not have been recorded. A procedure of this kind is very problematic, because the reasons for granting a permit must, of course, be recorded for several reasons, including the need to ensure that decisions are checkable.

Findings that accorded very well with the Ombudsman's observations on inspections were made in the Optula study by Niemi and de Godzinsky mentioned in the foregoing. They

concluded that the reasons presented for decisions granting orders predominantly followed quite a set pattern. In five per cent of cases, the only ground presented in support of an application was the police officer's notification that he had reason to suspect that a particular person was engaged in criminal activity without mentioning on which facts the suspicion was based on.

It should be borne in mind, however, that the material for that study dated from November 2005. My own observations indicate that the reasoning presented for decisions (and applications) has developed since then. In addition, as I see it, the Supreme Court decision mentioned in the foregoing awakened judges to the importance of the matter. One of the things that the Supreme Court underscored in its judgement is that when it examines an application for the use of a coercive measure, a court must ensure that the suspect's legal security is not jeopardised. The court must examine the factual information on which the suspicion of a crime is alleged to be founded. Merely a reference by the policeman presenting the demand to information gleaned in the course of an investigation or his conclusion drawn from it can not be regarded as a sufficient. Concrete facts, on the basis of which a court itself is able to assess in an individual case whether there is reason to suspect a particular crime must be presented in support of demands.

In my perception, there is no justification for talking of courts as "rubber stamps", i.e. suggesting that district courts, without examining the matter more closely, would agree to all of the demands that the police make. However, feedback to the effect that the expertise of courts leaves something to be desired is still being received from the police. In ordinary cases, such as telecommunications interception on a mobile phone, there are no problems, but when one proceeds into the world of information networks, resolving a matter may pose special demands for a judge's expertise. The same applies, of course, to oversight of legality. Sometimes my own technical knowledge seems very inadequate.

I am certain that there will be an interesting discussion arising from the proposal of the committee examining the legislation on criminal investigations and coercive measures, namely that the permission of a court would, with certain exceptions, be required for engaging in undercover activities and pseudo purchases. At present, it is the police that decide completely independently whether to use these measures. Also, one of the alternatives outlined in the above-mentioned Optula study dealing with coercive measures affecting telecommunications is a broadening of the area of application of a public ombudsman-type authority (to include telecommunications interception as in the Swedish model) and/or giving the public prosecutor tasks in the permits process. The committee did not propose any such changes.

The police's internal oversight has improved

One of the main objectives in the Ombudsman's work has been to improve the police's internal oversight. At least where coercive measures affecting telecommunications are concerned, the situation has improved considerably. One important step of progress in oversight was the inauguration in late 2004 of the SALPA (an acronym derived from the Finnish for "covert coercive measures") information system. All coercive measures affecting telecommunications are logged in the SALPA system, which means that reliable data on the use of these measures are nowadays available. The system also makes it possible to monitor the use of these measures, even in real time. In my perception, the fact that functions are centrally channelled through the National Bureau of Investigation has brought quality and a systematic character to activities and oversight of them.

The change was indeed necessary. A rapporteur appointed by the Ministry of the Interior, Chancellor of Justice Jaakko Jonkka, stated in November 2004: "Retrospective oversight did not work as intended in the early years. Police units neglected to send information to the Ministry of the Interior and this body, in turn, reported to the Ombudsman only in general terms. In my view, the police on all organisational levels neglected its duty of oversight in an astonishing way at that stage, something that has eroded the credibility of the entire oversight system. The matter has repeatedly had to be intervened in by the Office of the Parliamentary Ombudsman, and likewise by Eduskunta committees." In my own view, what was in part involved was that when activities strongly expanded, oversight did not develop in the way that this growth would have warranted.

Thus the oversight structures for coercive measures affecting telecommunications are nowadays in relatively good shape. Indeed, the question relating to them is more that of how much there is a need and willingness to devote resources to separate oversight. Here, too, the monitoring and support of subordinates that a superior's normal work involves has a key role. At the moment, the standard of oversight varies, even a lot, from one police service to another, as does most obviously the overseers' expertise.

In undercover operations, pseudo purchases and prevention of disclosure of intelligence gathering, internal oversight has not developed so well. A more active role could have been expected from especially the senior command echelon of the police. In the early years of activity at least, oversight remained largely within the National Bureau of Investigation. As such, the special concentration within this organisation was on the decision-making and documentation processes relating to undercover operations. However, it can be asked how

credibly the National Bureau of Investigation can oversee functions which are decided on by the head of that body, who also in the final analysis bears responsibility for them.

Even if the situation has to some extent improved in quite recent years, greater inputs should be made into oversight of undercover operations and pseudo purchases. What is involved is the most secret part of the police's activities and (at least up to now) the opportunity available to involved parties to react has been non-existent, because they have not been aware of the measures of which they have been the focus. It cannot be left to actors themselves to determine the lines they follow in their actions; the highest command echelon must, when necessary, adopt a position on interpretations.

Effective direction of activities naturally presupposes knowledge of what these activities and the problems relating to them actually are in practice. The highest command echelon of the police should conduct regular inspections, in which the activities themselves are gone through sufficiently concretely and comprehensively. Without all-round scrutiny of documents, it is not possible to gain an adequate picture of activities. For example, merely going through decisions concerning undercover activities does not necessarily mean that possible problems will be revealed. On the other hand, comprehensively reviewing the reporting of just one single undercover operation case is very laborious.

The tasks of the steering group appointed by the Ministry of the Interior in 2001 to oversee undercover operations and pseudo purchases included monitoring activities and training, reporting to the top police command echelon on matters that are deemed important from the perspective of oversight of legality and making development proposals. As I understand it, satisfaction with the group's activities has been less than total. In particular, concrete guidelines for activities would have been welcomed, but were not provided. Rapporteur Jonkka proposed in 2004 that consideration be given to enlarging the steering group by adding members from outside the police administration or that a completely new oversight body be set up. That led to the present monitoring group containing representatives of, in addition to the police, the Office of the Prosecutor-General, the Customs, the Border Guard and the courts system. It remains to be seen whether increasing the size of a group that was already large will lead to a better result – doubts that it will have been voiced. In 2008 the group was given the additional task of monitoring activities to do with information sources and preventing exposure of intelligence gathering. In addition, a working group tasked with developing covert intelligence gathering has been set up within the National Bureau of Investigation and its tasks include preparation of matters to be referred to the monitoring group; it is hoped that better results than up to now will be achieved this way.

Is special oversight needed?

It can be asked whether special monitoring of covert intelligence gathering is needed or would ordinary oversight of legality be sufficient also in this respect. This question has been prompted from time to time when, for example, the police have been given new powers and, as one guarantee of legal remedies, a requirement to report to the Ombudsman has been proposed (and often provided for in legislation).

The everyday work of supervisory police personnel – which includes supporting subordinates – and the other internal oversight within the police force are in a key position. The closer monitoring is to the actual activities, the better it can observe and immediately intervene in even the slightest problems. Within the police, however, special care must be taken to ensure that covert intelligence gathering does not become so secret that it disappears entirely from superiors' field of vision. The leadership must know by what means results are achieved. Intelligence gathering can involve navigating areas that are so difficult already in the technical sense, not to mention the juridical, that the skill of overseers is really put to the test.

In any event, there is a need for the Ombudsman's work. Something that is encountered from time to time is that there are unrealistic perceptions of the coverage of the Ombudsman's oversight of covert intelligence gathering. The area of special oversight of these activities has been constantly growing. What was originally involved was oversight of telecommunications interception and monitoring and of (a certain type of) technical listening. The number of cases was also rather small in the early years. Nowadays, thousands of permits for coercive measures affecting telecommunications alone are granted, and new measures that have to be overseen are continually being added. Indeed, the nature of oversight has changed substantially. It should be mentioned that the committee examining legislation on criminal investigations and coercive measures recommended a further expansion of the scope of the Ombudsman's oversight.

If we discuss concrete individual cases, the Ombudsman's special oversight can be, if only for resources-related reasons, at best of a random check nature. Oversight of covert intelligence gathering is after-the-fact and, even at its best, of a quite general overview nature, "oversight of oversight". The Ombudsman is fairly remote from the actual operations and can not begin directing the authorities' actions or otherwise be a key setter of limits, who would redress the weaknesses in legislation. Annual or other reports that must be supplied to the Ombudsman can not be a patent solution to problems of legal safeguards.

It must also be taken into consideration that the Ombudsman does not have, with the exception of coercive measures affecting telecommunications that must be dealt with in a court and require the collaboration of a telecoms operator, any means of control outside the police to ensure that she even learns about all of the police's covert intelligence gathering. In this, oversight is founded on trust. After all, it is as such conceivable that, owing to its nature, covert intelligence gathering is not recorded and thus remains concealed from the Ombudsman and perhaps also from police superiors. For the sake of clarity, I want to emphasise that no intentional concealment of this kind has been observed.

Keeping these limitations in mind, an important role can be seen for the Ombudsman in external oversight of activities. Where coercive measures affecting telecommunications are concerned, she has the opportunity to highlight court practices that she finds problematic. For example, the practice of omitting to make notification that a coercive measure has been used has, naturally, not been problematic from the perspective of the police when courts have approved the applications made by the officers in charge of investigations. There was a need for the Ombudsman to adopt stances, in which the perspective of the targets of coercive measures were highlighted, and the practice could indeed change. Of course, the police's internal oversight can not itself intervene at all in the actions of courts; in some cases, however, it has been on the basis of information received from the police that the Ombudsman has taken an action of a court under investigation.

On the whole, external oversight can reveal systemic faults or legally untenable practices within an organisation, things that the actors themselves have not perceived as problematic. The danger of becoming blind to the faults of one's own ways of doing things is inherent to all work, and practices can gradually drift further and further from solutions that were originally perhaps completely justified. Another issue involved is that in a democratic society no exercise of public power may be left without oversight. Chancellor of Justice Jonkka has emphasised that only credibly monitored exercise of power can be genuinely confidence-inspiring. What I would add to that is that maintaining the credibility of official actions is not the task of the Ombudsman's oversight; if abuses are detected, they must be intervened in.

Just as obvious as the fact that external oversight is needed is, in my view, that the Ombudsman can not passively sit and wait for someone to make a complaint about covert intelligence gathering. I believe that already the examples that I have mentioned of decisions by the Ombudsman influencing court practices show very clearly that it is precisely work done on our own initiative that has the greatest impact. That is true especially in the case of covert intelligence gathering because, among other reasons, due to the nature of the matter, those

against whom these activities are directed have weaker-than-usual opportunities to react. Complaints alone would have given and will continue to give in the future only an extremely narrow and random picture of the problems of covert intelligence gathering.

However, there are certain boundary conditions to the Ombudsman working on her own initiative. Having followed these matters for ten years or so, I have often had to note that questions which are interesting and would merit study have had to be left aside or postponed until further notice. Constant growth in the number of complaint cases very effectively limits opportunities for own-initiative investigations. For a long time, too, this oversight depended on just one legal adviser, which of course was a vulnerable arrangement and not a desirable state of affairs in other respects, either. Nowadays responsibility has been spread.

There has also been an effort to ensure that working on our own initiative and constant contact with the police does not lead to a blurring of the respective roles of overseer and overseen. Finland is a small country and there are not many experts on covert intelligence gathering. Questions of legal interpretation have had to and still must be discussed in quite small circles and the danger of cliquishness is always present.

It is regrettable that some activities are so secret that an overseer of legality can not reveal his or her observations concerning covert intelligence gathering or legal interpretations that are found to be problematic, because even a description that remained on a general level would reveal information that is required by law to be kept secret. It is true that situations like this are rare, but not insignificant. Interpretations are not subjected to public scrutiny, or to legal scrutiny, either, and then the Ombudsman's decisions are of accentuatedly major importance.

Going forward, I believe that a more nuanced approach should be taken to covert intelligence gathering. These activities are not a single uniform totality, although different means and oversight of them do share common features. Some activities are already fairly well established (for example telecommunications interception and monitoring), whereas policy lines are still being drawn in others. There is also a lot of difference with regard to how and with what degree of forcefulness intelligence gathering is an intervention in fundamental rights. There are also differences with respect to the degree of secrecy involved in these activities. Telecommunications interception and monitoring (nowadays) come to the knowledge of their targets, with certain exceptions, albeit naturally after the fact. Undercover operations and pseudo purchases are much more secret activities than these. Regulation of them (and through this also oversight of legality) is a lot more problematic than in the case of coercive

measures affecting telecommunications. One goes even deeper when working with police informers, because there is still very little legislation concerning this; working with informers is not (so far at least) included in the intelligence gathering that must be reported to the Ombudsman.

As such, it is justifiable that the content of the Ombudsman's oversight task is not regulated more precisely in the law. That way, activities can be adjusted to suit each particular situation. On the other hand, this places a great burden of responsibility on those who make choices. Also one's own activities must constantly be critically examined and we cannot afford to be lulled into excessive contentment. Since there will apparently continue to be very limited time for own-initiative work, it is especially important that the emphases in activity be carefully chosen. Under the pressure of a complaints backlog, there is always a temptation to devote less time to own-initiative work. Then, however, cuts can be made in precisely the area of activity that is most effective. □□□