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**BILLE AN GHARDA SÍOCHÁNA (CUMHACHTAÍ
FAIREACHAIS) 2007**
GARDA SÍOCHÁNA (POWERS OF SURVEILLANCE) BILL
2007

Mar a tionscnaíodh
As initiated

ARRANGEMENT OF SECTIONS

Section

1. Interpretation.
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ACTS REFERRED TO

Bail Act 1997	1997, No. 15
Civil Liability Act 1961	1961, No. 41
Criminal Justice (Terrorist Offences) Act 2005	2005, No. 2
Data Protection Acts 1988 and 2003	
European Convention on Human Rights Act 2003	2003, No. 20
Freedom of Information Act 1993	1993, No. 13
Freedom of Information Acts 1997 and 2003	
Garda Síochána Act 2005	2005, No. 20
Interception of Postal Packets and Telecommunications Messages (Regulation) Act 2003	2003, No. 10
Roads Act 1993	1993, No. 14



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2007

BILL

entitled

AN ACT TO PROVIDE ADDITIONAL POWERS FOR THE
GARDA SÍOCHÁNA WITH RESPECT TO SURVEIL-
LANCE; AND TO PROVIDE FOR RELATED MATTERS.

10 BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.—(1) In this Act—

Interpretation.

“the Act of 1993” means the Interception of Postal Packets and Tele-
communications Messages (Regulation) Act 1993;

15 “the Act of 2005” means Part 7 of the Criminal Justice (Terrorist
Offences) Act 2005;

“authorisation” means an authorisation given under *section 2*;

“data” and “data equipment” have the meanings assigned to them
by the Data Protection Acts 1988 and 2003;

“judge” means a judge of the District Court;

20 “place” means any place and includes—

(a) any land, including any road, within the meaning of the
Roads Act 1993,

25 (b) any building or any part of a building, including any dwell-
ing or other place in private occupation, as well as the
curtilage of such a place, and

(c) any vehicle, vessel or moveable structure,

irrespective of whether or not the place is open to the public,
whether on payment of a fee, by invitation or otherwise;

30 “serious offence” has the same meaning as in the Bail Act 1997 and
also includes a suspected or apprehended serious offence;

“surveillance”—

- (a) means surveillance carried out under this Act of a person, place or data equipment in circumstances that would, but for this Act, be—
 - (i) an actionable wrong within the meaning of the Civil Liability Act 1961, 5
 - (ii) a breach of a person’s constitutional rights, or
 - (iii) incompatible with the obligations of the State in respect of any person under the “Convention provisions”, within the meaning of the European Convention on Human Rights Act 2003; 10
 - (b) includes—
 - (i) aural and visual surveillance, irrespective of the means employed, and the interception of communications, whether such communications are effected by electronic or any other means, and, without prejudice to the generality of the foregoing, includes the recording of a conversation without the knowledge of all persons who are parties to that conversation, 15
 - (ii) surveillance of data equipment, meaning the performing at any place of an operation in relation to that data equipment or the data concerned, for the purposes of obtaining, retrieving, recording, keeping and consulting or otherwise using the data; 20
 - (c) does not include interceptions by members of the Garda Síochána of postal packets and telecommunications messages under the Act of 1993, or disclosures to members of the Garda Síochána of communications data under the Act of 2005. 25
- (2) (a) The provisions of this Act are in addition to and not in substitution for provisions made in other enactments and rules of law relating to the powers of members of the Garda Síochána in relation to the prevention, detection and investigation of offences and the apprehension and prosecution of offenders. 30
- (b) Nothing in this Act requires a member of the Garda Síochána to apply for an authorisation for surveillance in circumstances where such an operation may be carried out in accordance with other enactments or rules of law. 35

Grounds for giving authorisation for surveillance.

2.—(1) Notwithstanding any other enactment or rule of law, an authorisation for surveillance may, on application by a member of the Garda Síochána, be given, varied or renewed to that member, for the purposes of an investigation into a serious offence. 40

(2) Where a member of the Garda Síochána applies for an authorisation—

- (a) to a judge, *section 3* applies, 45
- (b) to an officer of the Garda Síochána not below the rank of Chief Superintendent, *section 4* applies.

(3) An authorisation—

(a) shall be in writing and shall specify—

(i) the person, place or data equipment to be placed under surveillance,

5 (ii) the member of the Garda Síochána to whom it is issued, and

(iii) the mode of surveillance authorised by the authorisation,

10 (b) where appropriate, may authorise the member of the Garda Síochána to whom it is given, accompanied by such other persons as the member considers necessary to enter any place—

(i) surveillance of which is authorised by the authorisation, or

15 (ii) in or on which there is data equipment surveillance of which is authorised by the authorisation, and

in or on that place, to do such things as are necessary or expedient for the purposes of initiating, maintaining, or withdrawing such surveillance, and

20 (c) may impose conditions in respect of the surveillance.

(4) An authorisation shall not be given, varied or renewed unless the following conditions are fulfilled:

25 (a) (i) that an investigation is being carried out by the Garda Síochána concerning a serious offence and there is a reasonable prospect that the surveillance would be of material assistance in providing information to show whether the offence has been committed or as to the facts relating to it, or evidence for the purpose of criminal proceedings in relation to the offence, or

30 (ii) that, in the case of a serious offence that is apprehended but has not been committed, an investigation is being carried out for the purpose of preventing the commission of the offence or of enabling it to be detected, if it is committed, by the Garda Síochána and there is a reasonable prospect that surveillance would be of material assistance in preventing or detecting the offence;

35 and

40 (b) that the surveillance is, in all the circumstances and having regard to other lawful means for the investigation of offences, justified, having regard to the likely impact of the surveillance on the rights of any person and to any other relevant circumstances.

45 (5) An authorisation shall not be given if it appears to the person to whom the application is made that it is directed or substantially directed to the surveillance of communications which are protected by privilege.

Authorisation by
judge of the District
Court.

3.—(1) A member of the Garda Síochána may apply to a judge for an authorisation and the judge may, on hearing evidence on oath given by that member, if he or she is satisfied that the conditions specified in *section 2(4)* are fulfilled, grant the authorisation.

(2) An authorisation given by a judge shall expire on such day as the judge shall decide but not more than three months from the date on which it is given. 5

(3) An authorisation given by a judge may from time to time be renewed by order of a judge for any period not exceeding three months. 10

(4) An authorisation given by a judge—

(a) shall be revoked if the judge is no longer satisfied that the conditions specified in *section 2(4)* are fulfilled,

(b) may, if the judge is satisfied that the conditions specified in *section 2(4)* in respect of a particular investigation are fulfilled in respect of a person, place or data equipment other than the person, place or data equipment named in the authorisation, be varied, by the substitution of other persons, places or data equipment. 15

(5) (a) An application for an authorisation may be made to a judge whether or not an authorisation under *section 4* in respect of the same person or place is in effect. 20

(b) Where an authorisation given under *section 4* is in effect, the judge to whom an application under *paragraph (a)* is made shall, if he or she decides to give the authorisation, give an authorisation under this section in its place. 25

Authorisation by
member of the
Garda Síochána not
below rank of Chief
Superintendent.

4.—(1) A member of the Garda Síochána may apply to an officer of the Garda Síochána not below the rank of Chief Superintendent for an authorisation, in respect of a particular person, place or data equipment to be named or identified in the application, and that officer may give an authorisation, for a period of not more than seven days from the date of the issue of the authorisation, or may refuse to give the authorisation. 30

(2) (a) An application for an authorisation under this section shall, if the circumstances of the case reasonably allow, be made in writing to the Chief Superintendent concerned and the authorisation, if given, shall be in writing and signed by the Chief Superintendent to whom the application was made. 35

(b) A Chief Superintendent may, if the circumstances of the case do not reasonably allow, receive an application for an authorisation otherwise than in writing and may give an authorisation otherwise than in writing (whether orally, by any form of telecommunication or otherwise) and, if it is so given— 40
45

(i) both the application and the authorisation shall be recorded, as soon as may be, in writing, and

- (ii) the record of the authorisation shall be signed by the Chief Superintendent who gave it.

5 5.—(1) A member of the Garda Síochána may, if he or she considers that the case is one of exceptional urgency, without an authorisation carry out surveillance in respect of a particular person, place or data equipment where he or she, with reasonable cause, suspects that—

Surveillance without authorisation.

10 (a) before an authorisation could be obtained, a person may abscond for the purpose of avoiding justice, obstruct the course of justice, or commit a serious offence, or

(b) information or evidence in relation to the commission of a serious offence may otherwise become unavailable.

15 (2) A report of any surveillance carried out under *subsection (1)* shall be made, as soon as may be, in writing to an officer of the Garda Síochána not below the rank of Chief Superintendent and shall include a statement of the grounds of exceptional urgency relied upon by the member of the Garda Síochána who carried out the surveillance concerned.

20 6.—(1) The Garda Síochána Ombudsman Commission established under section 64 of the Garda Síochána Act 2005 (“the Commission”), in addition to the functions conferred on it by that Act, has the duty of—

Oversight of Acts by Garda Ombudsman Commission.

(a) keeping under review—

(i) surveillance under this Act,

25 (ii) interceptions by members of the Garda Síochána of postal packets and telecommunications messages under the Act of 1993, and

(iii) disclosures to members of the Garda Síochána of communications data under the Act of 2005,

30 (which enactments are in this section referred to as “the Acts”),

(b) ascertaining whether the provisions of the Acts are being complied with, and

35 (c) reporting to both Houses of the Oireachtas at such intervals, being intervals of not more than 12 months, as the Commission thinks necessary or expedient in relation to—

40 (i) the general operation of the Acts (including a report on the number of authorisations and disclosures given or made to members of the Garda Síochána under the Acts and under each provision of the Acts respectively), and

45 (ii) any particular matters relating to the Acts which the Commission considers should be reported or are otherwise appropriate in relation to the operation of the Acts.

(2) For the purpose of its functions under this section, the Commission may, if it appears to it desirable in the public interest to do so, investigate any matter that appears to it to indicate that a member of the Garda Síochána may have—

(a) committed an offence, or 5

(b) behaved in a manner that would justify disciplinary proceedings.

(3) The provisions of Part 4 of the Garda Síochána Act 2005 relating to investigations and reports apply with the necessary modifications in relation to a matter referred to in *subsection (2)* as though that matter were the subject of a complaint other than one referred to in section 91 of that Act. 10

(4) The Commission may at any time include in a report to be laid before both Houses of the Oireachtas its opinion that an authorisation should not have been given or (because of circumstances arising after it had been given) should be varied or that the period for which it was in force should not have been extended or further extended. 15

(5) (a) Section 8 of the Act of 1993, as amended by section 66 of the Act of 2005, is repealed. 20

(b) A reference in any other section of the Act of 1993 or the Act of 2005 to a “designated judge” shall be construed as a reference to the Commission.

Admissibility of real evidence.

7.—(1) For the avoidance of doubt—

(a) nothing in the rules of evidence applies to deny the admissibility in evidence of any statement or thing on the sole ground that it was obtained by means of surveillance, 25

(b) any recording made and retrieved from an automated system for the recording of information without human intervention is, provided that the court is satisfied as to the reliability of the system used to make or compile the recording, admissible in evidence as real evidence and not as hearsay. 30

(2) Where, in any proceedings, the High Court is satisfied as to the reliability of an automated system for the recording of information without human intervention, it shall, in any subsequent proceedings in any court, be for a person against whom information derived from the same or a similar system is proposed to be used in criminal proceedings to show that the system should not be relied upon in the circumstances of his or her case. 35 40

(3) *Subsections (1) and (2)* apply to—

(a) an interception, within the meaning of the Act of 1993,

(b) communications data disclosed to a member of the Garda Síochána under the Act of 2005,

(c) information or evidence obtained under this Act. 45

8.—On the date that is six months after the coming into operation of this Act—

Application of
Freedom of
Information Acts
1997 and 2003.

5 (a) the Garda Síochána is a public body within the meaning and for the purposes of the Freedom of Information Acts 1997 and 2003,

(b) paragraph (1)(5)(a) of the First Schedule to the Freedom of Information Act 1993 is repealed.

9.—(1) This Act may be cited as the Garda Síochána (Powers of Surveillance) Act 2007.

Short title and
commencement.

10 (2) This Act comes into operation six months after the date of its passing.



**BILLE AN GHARDA SÍOCHÁNA (CUMHACHTAÍ
FAIREACHAIS) 2007
GARDA SÍOCHÁNA (POWERS OF SURVEILLANCE) BILL
2007**

EXPLANATORY MEMORANDUM

Purpose of the Bill

It will come as a shock to many people to learn that the Garda Síochána have at present no legal powers to undertake electronic surveillance of criminal suspects. They cannot bug a building or any other place in which crime suspects might meet, because they do not have the legal powers to do so.

This is, however, a question which the Law Reform Commission looked at in the context of its consultation paper on privacy, published in 1996. Definitive and specific recommendations — including the Heads of a Bill — were published in its report of 1998.

This Bill is based on the Heads of the Bill published by the Law Reform Commission. The Bill also seeks to address a certain confusion that may exist as to whether the product of surveillance or of postal or telecommunications interception is admissible in evidence against an accused.

The Bill is, by its long title, an Act “to provide additional powers for the Garda Síochána with respect to surveillance”; The Bill does not interfere with existing statutory or other legal powers.

Provisions of Bill

Section 1 defines certain words in standard form and also defines other terms used in the Bill. In particular, “surveillance” is defined as meaning surveillance carried out under this Bill (i.e., not including surveillance under the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 or the disclosure of communications data under Part 7 of the Criminal Justice (Terrorist Offences) Act 2005) of any person, place or data equipment in circumstances that would, but for the legislation, be a civil wrong, a breach of constitutional rights, or a breach of rights under the European Convention on Human Rights.

Surveillance includes aural and visual surveillance, the interception of communications, the recording of conversations without the knowledge of all the parties and the surveillance of data equipment.

The section also makes it clear that the Bill is additional to and not in substitution for provisions made in other enactments and rules of law relating to the powers of members of the Garda Síochána in relation to the prevention, detection and investigation of offences and the apprehension and prosecution of offenders.

Section 2 enables an authorisation for surveillance to be given to a member of the Garda Síochána, for the purposes of an investigation into a serious offence. An application may be made either to a judge of the District Court or to an officer of the Garda Síochána not below the rank of Chief Superintendent.

An authorisation for surveillance must be in writing and must specify—

- the person, place or data equipment to be placed under surveillance,
- the member of the Garda Síochána to whom it is issued, and
- the mode of surveillance authorised by the authorisation.

The authorisation may also, where appropriate, authorise entry onto premises in order to place surveillance equipment in place and other such purposes.

The conditions for giving an authorisation are that an investigation is being carried out by the Garda Síochána concerning a serious offence (or an apprehended serious offence), that there is a reasonable prospect that surveillance would be of material assistance for those purposes and that the surveillance is, in all the circumstances and having regard to other lawful means for the investigation of offences, justified, having regard to the likely impact of the surveillance on the rights of any person and to any other relevant circumstances.

Section 3 sets out the procedure for applying to a District Court judge for an authorisation. The application must be grounded by sworn evidence. The authorisation cannot be given for more than three months but may be renewed. The authorisation must be revoked if the judge is no longer satisfied that the conditions specified in *section 2* are fulfilled. The authorisation may be varied by the substitution of other persons, places or data equipment for those named in the original authorisation.

Section 4 sets out the procedure for applying to an officer of the Garda Síochána not below the rank of Chief Superintendent for an authorisation. Such an authorisation cannot be given for more than seven days.

The application must, if the circumstances of the case reasonably allow, be made in writing to the Chief Superintendent and the authorisation, if given, must be in writing and signed by the Chief Superintendent.

But a Chief Superintendent may, if the circumstances of the case do not reasonably allow, receive an oral application for an authorisation may give an oral authorisation. If so, then both the application and the authorisation must be recorded, as soon as may be, in writing, and the record of the authorisation must be signed by the Chief Superintendent who gave it.

By *section 5*, where a member of the Garda Síochána considers that the case is one of exceptional urgency, he or she, may, without an authorisation carry out surveillance in respect of a particular person, place or data equipment where he or she, with reasonable cause, suspects that—

- before an authorisation could be obtained, a person may abscond for the purpose of avoiding justice, obstruct the course of justice, or commit a serious offence, or
- information or evidence in relation to the commission of a serious offence may otherwise become unavailable.

A report of any such surveillance must be made, as soon as may be, in writing to an officer of the Garda Síochána not below the rank of Chief Superintendent and must include a statement of the grounds of exceptional urgency relied upon by the member who carried out the surveillance concerned.

Section 6 provides that the Garda Síochána Ombudsman Commission established under the Garda Síochána Act 2005, in addition to the functions conferred on it by that Act, has the duty of keeping under review surveillance under this Bill, interceptions under the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 and the disclosure of communications data under Part 7 of the Criminal Justice (Terrorist Offences) Act 2005.

The Commission is to ascertain whether the provisions of the three enactments are being complied with and to report to both Houses of the Oireachtas at least every 12 months—

- the general operation of those Acts (including a report on the number of authorisations and disclosures given or made to members of the Garda Síochána under the Acts and under each provision of the Acts respectively), and
- any particular matters relating to the Acts which the Commission considers should be reported or are otherwise appropriate in relation to the operation of the Acts.

The section provides that, for the purpose of its functions the Commission may, if it appears to it desirable in the public interest to do so, investigate any matter that appears to it to indicate that a member of the Garda Síochána may have committed an offence or behaved in a manner that would justify disciplinary proceedings. The provisions of Part 4 of the Garda Síochána Act 2005 relating to investigations and reports apply with the necessary modifications, to an investigation under this section.

The Commission may at any time include in a report to be laid before both Houses of the Oireachtas its opinion that an authorisation should not have been given or (because of circumstances arising after it had been given) should be varied or that the period for which it was in force should not have been extended or further extended.

Section 7 relates to rules of evidence and clarifies that—

- nothing in the rules of evidence applies to deny the admissibility in evidence of any statement or thing on the sole ground that it was obtained by means of surveillance;

- a recording made and retrieved from an automated system for the recording of information without human intervention is, provided that the court is satisfied as to the reliability of the system used to make or compile the recording, admissible in evidence as real evidence and not as hearsay.

Furthermore, if in any proceedings the High Court is satisfied as to the reliability of an automated system for the recording of information without human intervention, it then becomes, in any subsequent proceedings in any court, for a person against whom information derived from the same or a similar system is proposed to be used in criminal proceedings to show that the system should not be relied upon in the circumstances of his or her case.

Section 8 provides that, six months after the commencement of the Bill, the Garda Síochána becomes a public body within the meaning and for the purposes of the Freedom of Information Acts 1997 and 2003. Paragraph 1(5)(a) of the First Schedule to the Freedom of Information Act 1993, which provides for the future application of those Acts to the Garda Síochána, is consequently repealed.

Section 9 provides in standard form for the short title and commencement (six months after its passing) of the Bill.

*Pádraig Ó Coinín,
Samhain, 2007.*