

**Report to the Attorney-General
on the results of inspections
of records under s 55 of the
*Surveillance Devices Act 2004***

**INSPECTIONS FINALISED BETWEEN
1 JANUARY – 30 JUNE 2012**

AUSTRALIAN CRIME COMMISSION
Records from 1 January to 30 June 2011

AUSTRALIAN FEDERAL POLICE
Records from 1 January to 30 June 2011

NEW SOUTH WALES POLICE
Records from 1 July 2009 to 30 June 2011

Report by the Commonwealth Ombudsman
under s 61 of the *Surveillance Devices Act 2004*

September 2012

**Report to the Attorney-General
on the results of inspections
of records under s 55 of the
*Surveillance Devices Act 2004***

**INSPECTIONS FINALISED BETWEEN
1 JANUARY – 30 JUNE 2012**

AUSTRALIAN CRIME COMMISSION
Records from 1 January to 30 June 2011

AUSTRALIAN FEDERAL POLICE
Records from 1 January to 30 June 2011

NEW SOUTH WALES POLICE
Records from 1 July 2009 to 30 June 2011

Report by the Commonwealth Ombudsman
under s 61 of the *Surveillance Devices Act 2004*

September 2012

ISSN 1833-9263

Date of publication: September 2012

Publisher: Commonwealth Ombudsman, Canberra, Australia

© Commonwealth of Australia 2012

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Australian Government, available from the Attorney-General's Department.

Requests and enquiries concerning reproduction and rights should be addressed to the Commonwealth Copyright Administration, Copyright Law Branch, Attorney-General's Department, National Circuit, Barton ACT 2601, or posted at <http://www.ag.gov.au/cca>.

OR

Requests and enquiries can be directed to the Director Public Affairs, Commonwealth Ombudsman, GPO Box 442, Canberra ACT 2601; email ombudsman@ombudsman.gov.au.

Copies of this report are available online from the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

CONTENTS

INTRODUCTION	1
INSPECTION OBJECTIVE AND SCOPE	2
SUMMARY OF AGENCY COMPLIANCE AND IMPROVEMENTS	3
AUSTRALIAN CRIME COMMISSION.....	5
Inspection results.....	5
Improvements.....	5
Issue arising from the inspection – destruction and retention of protected information	5
AUSTRALIAN FEDERAL POLICE.....	7
Inspection results.....	7
Improvements.....	7
Issue arising from the inspection – use and retrieval of tracking devices ..	7
NEW SOUTH WALES POLICE	9
Inspection results.....	9
Improvements.....	9
Issue arising from the inspection – destruction and retention of protected information	9

INTRODUCTION

The *Surveillance Devices Act 2004* (the Act) restricts the use, communication and publication of information obtained through the use of surveillance devices.¹ The Act also establishes procedures for law enforcement agencies to obtain permission to use such devices in relation to criminal investigations and the recovery of children, and imposes requirements for the secure storage and destruction of records in connection with the use of surveillance devices.

Section 55(1) of the Act requires the Commonwealth Ombudsman to inspect the records of each law enforcement agency to determine the extent of their compliance with the Act. Under s 6(1) of the Act, the term 'law enforcement agency' includes the Australian Crime Commission (ACC), the Australian Federal Police (AFP), the Australian Commission for Law Enforcement Integrity, police forces of each state and territory, such as the New South Wales Police (NSW Police) and other specified state and territory law enforcement agencies.

The Ombudsman is also required under s 61 of the Act to report to the relevant Minister (the Commonwealth Attorney-General) at six-monthly intervals on the results of each inspection. Reports to the Attorney-General alternately include the results of inspections that have been finalised in the periods January to June and July to December. Inspection results are considered finalised once the Ombudsman's internal report to the agency is completed (having provided the agency with an opportunity to comment on the findings), so typically there will be some delay between the date of inspection and the report to the Attorney-General.

¹ Under the Act, a 'surveillance device' means a data surveillance device, a listening device, an optical surveillance device or a tracking device (or a device that is a combination of any two or more of these devices).

The following table is a summary of the inspections covered by this report.

Table 1. Inspections finalised between 1 January and 30 June 2012

Agency	Records covered by the inspection period	Dates of inspection	Report to the agency completed
ACC	1 January to 30 June 2011	27 to 29 September 2011	25 January 2012
AFP	1 January to 30 June 2011	19 to 22 September 2011	10 January 2012
NSW Police	1 July 2009 to 30 June 2011	7 and 8 November 2011	16 March 2012

Detailed internal reports on the results of each inspection were provided to the relevant agency. This report summarises the results of these inspections, outlining any significant compliance and administrative issues.

INSPECTION OBJECTIVE AND SCOPE

The objective of the inspection is to determine the extent of compliance with the Act by agencies and their law enforcement officers. The following criteria were applied to assess compliance.

1. Were applications for warrants and authorisations properly made?
2. Were warrants and authorisations properly issued?
3. Were surveillance devices used lawfully?
4. Were revocations of warrants properly made?
5. Were records properly kept and used by the agency?
6. Were reports properly made by the agency?

All records held by an agency under the Act were potentially subject to inspection. However, the Ombudsman's discretion under s 55(5) of the Act was exercised to limit the inspections to those warrants and authorisations that had expired or were revoked during the inspection period.

SUMMARY OF AGENCY COMPLIANCE AND IMPROVEMENTS

The inspection found the AFP compliant with the requirements of the Act, except for one case where it used a tracking device after the tracking device authorisation allowing for its use had expired.² The AFP advised that any information obtained after the expiry of the authorisation was not forwarded to its investigators. We also noted another case where a tracking device was retrieved without authority as the AFP had already revoked the authorisation. In this case, the AFP should have applied for an authorisation to retrieve the device under s 39 of the Act.

The inspections found the ACC and the NSW Police both compliant with the requirements of the Act, except for the requirements to consider the destruction and retention of protected information.³ Under s 46(1)(b), as soon as practicable after a record or report comprising protected information is created, the chief officer must ensure that the record or report is destroyed if the chief officer is satisfied that it is no longer required by the law enforcement agency. The chief officer may decide to retain protected information, however, this decision must be recorded. The decision to retain or destroy protected information must be made within five years after its creation. If the chief officer decides to retain protected information, the decision must be made every five years until the protected information is destroyed.

The ACC retained protected information for longer than five years without obtaining a record of the chief officer's decision to retain. The NSW Police had not considered the destruction and retention for protected information that it had held since 2005-06.

The agencies displayed a strong culture of compliance and a high standard of record keeping. The issues identified were generally able to be remedied through improved record keeping processes and guidance to agency staff.

² Under the Act, a 'tracking device' means any electronic device capable of being used to determine or monitor the location of a person or an object or the status of an object. A 'tracking device authorisation' is issued internally by an authorising officer of the agency. It allows for the use of a tracking device without a warrant, but does not allow entry onto premises without permission or interference with the interior of a vehicle without permission.

³ 'Protected information' includes information obtained from the use of a surveillance device under a warrant or a tracking device authorisation. It also includes any information that is likely to enable the identification of a person, object or premises specified in a warrant or a tracking device authorisation.

Report to the Attorney-General on the results of inspections of records under s 55 of the *Surveillance Devices Act 2004*, September 2012

All three agencies made progress towards addressing the issues identified at previous inspections. Although some issues noted during previous inspections were noted again, the agencies had already taken measures to prevent them from occurring in the future.

AUSTRALIAN CRIME COMMISSION

Inspection results

The inspection of ACC surveillance device records was conducted from 27 to 29 September 2011. The inspection examined surveillance device warrants and authorisations (and associated records) that expired or were revoked during the period 1 January to 30 June 2011, and also records relating to the destruction of information carried out during the same period. A report of the results of this inspection was provided to the ACC on 25 January 2012.

We inspected records relating to 29 warrants and authorisations (a 28% sample), and records relating to the destruction of information obtained under 16 warrants and authorisations (a 25% sample). The ACC was assessed as compliant with the Act except for the destruction requirements under s 46(1)(b). Further details are provided under 'Issue arising from the inspection – destruction and retention of protected information' below.

No recommendations were made as a result of the inspection as the ACC had already taken steps to address the issue identified.

Improvements

The ACC continues to demonstrate its commitment towards improving compliance with the Act. It is responsive to our inspection findings and willing to adopt the suggested best practices.

As noted in last year's report to the Attorney-General, the ACC was assessed as compliant with the requirements of the Act. We raised one minor issue in relation to s 40(1) of the Act, which requires an appropriate authorising officer to make a written record of a tracking device authorisation as soon as practicable after giving the authorisation. The ACC has updated its template for tracking device authorisations to address this issue.

Issue arising from the inspection – destruction and retention of protected information

As discussed under 'Summary of agency compliance and improvements' on page 3 of this report, an agency is required to regularly consider the destruction and retention of protected information, and in any event, must either destroy or record the decision to retain protected information within five years after it has been created. The ACC self-disclosed that protected information obtained under 22 warrants was destroyed more than five years after the information was created. However, there was no record of the

Report to the Attorney-General on the results of inspections of records under s 55 of the *Surveillance Devices Act 2004*, September 2012

decision from the chief officer that the protected information could be retained beyond five years.

In response to this issue, the ACC advised that it has updated its guidelines and improved its procedures relating to the destruction and retention of protected information. We will assess the ACC's progress towards addressing this issue at the next inspection.

AUSTRALIAN FEDERAL POLICE

Inspection results

The inspection of AFP surveillance device records was conducted from 19 to 22 September 2011. The inspection examined surveillance device warrants and authorisations (and associated records) that expired or were revoked during the period 1 January to 30 June 2011, and also records relating to the destruction of information carried out during the same period. A report of the results of this inspection was provided to the AFP on 10 January 2012.

We inspected records relating to 48 warrants and authorisations (a 20% sample), and records relating to the destruction of information obtained under 19 warrants and authorisations (a 34% sample). The AFP was assessed as compliant with the Act except for one case where it used a tracking device after the authorisation allowing for its use had expired. We also noted another case where a tracking device was retrieved by the AFP after the authorisation was revoked. Further details are provided under 'Issue arising from the inspection – use and retrieval of tracking devices' below.

No recommendations were made as a result of the inspection as the AFP had already taken steps to address the issue identified.

Improvements

The AFP continues to demonstrate its commitment towards improving compliance with the Act. It is responsive to our inspection findings and willing to adopt the suggested best practices.

As noted in last year's report to the Attorney-General, the AFP was assessed as compliant with the requirements of the Act except in three cases where tracking devices were either used or retrieved after the tracking device authorisations had expired (or were revoked). The AFP had published new national guidelines and aide-memoires to further increase organisational awareness and understanding of this issue. However, due to the retrospective nature of our inspections, this issue was noted again at this inspection. We will assess the AFP's progress towards addressing this issue at future inspections.

Issue arising from the inspection – use and retrieval of tracking devices

Under s 39 of the Act, a law enforcement officer may, with the written permission of an appropriate authorising officer, use a tracking device without a warrant in the investigation of a relevant offence. A law enforcement officer

Report to the Attorney-General on the results of inspections of records under s 55 of the *Surveillance Devices Act 2004*, September 2012

may also, with the written permission of an appropriate authorising officer, retrieve a tracking device. The written permission, or a tracking device authorisation, may remain in force for a maximum period of 90 days.

For one tracking device authorisation, the AFP self-disclosed that the device was used six days after the expiry of the authorisation. For another tracking device authorisation, the AFP self-disclosed that the tracking device was retrieved two days after the authorisation was revoked. The use and retrieval of the above tracking devices were not compliant with s 39, as these actions took place after the authorisations had expired or were revoked.

Both issues were identified by the AFP and measures had been taken to mitigate the effects of the non-compliance. We note the AFP's advice that no unlawfully obtained information was provided to its investigators.

NEW SOUTH WALES POLICE

Inspection results

The inspection of the NSW Police surveillance device records was conducted on 7 and 8 November 2011. The inspection examined surveillance device warrants (and associated records) that expired or were revoked during the period 1 July 2009 to 30 June 2011.⁴ A report of the results of this inspection was provided to the NSW Police on 16 March 2012.

We inspected records relating to 10 warrants (a 100% sample). The NSW Police was assessed as compliant with the Act except for the destruction requirements under s 46(1)(b). Further details are provided under 'Issue arising from the inspection – destruction and retention of protected information' below.

One recommendation was made as a result of the inspection relating to the destruction and retention of protected information.

Improvements

The NSW Police is committed towards improving compliance with the Act. It is responsive to our inspection findings and willing to adopt the suggested best practices.

At the previous inspection we made two recommendations to the NSW Police. The first recommendation related to the need for the NSW Police to record each communication of information obtained from the use of surveillance devices (s 52(1)(f)). The second recommendation related to the need to sufficiently address the effects on a person's privacy when the NSW Police applies for a warrant (s 16(2)(c)).

The NSW Police has addressed both recommendations and no issues were noted at this inspection.

Issue arising from the inspection – destruction and retention of protected information

As discussed under 'Summary of agency compliance and improvements' on page 3 of this report, an agency is required to regularly consider the destruction and retention of protected information, and in any event, must

⁴ The inspection spanned a 24-month period because the Commonwealth Ombudsman was incorrectly informed by the NSW Police that it had not used the provisions of the Act during 2009-10.

either destroy or record the decision to retain protected information within five years after it has been created. At the inspection, there were no records to indicate that the NSW Police had undertaken any destruction or retention processes. As warrants were issued to the NSW Police in the 2005-06 financial year, any protected information obtained under those warrants would have been kept for a period longer than five years without the chief officer's approval to do so. The following recommendation was made.

Recommendation: The NSW Police should implement procedures to fulfil the requirements of s 46(1)(b) of the *Surveillance Devices Act 2004*, relating to the retention and destruction of protected information obtained under surveillance device warrants and tracking device authorisations.

In response to this recommendation, the NSW Police advised that it has amended its guidelines and will regularly review protected information to meet the requirements of s 46(1)(b) of the Act. We will assess the NSW Police's progress towards addressing this issue at the next inspection.

Alison Larkins
Acting Commonwealth Ombudsman