



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

AUSTRALIAN CRIME COMMISSION
July 2005 to June 2006

AUSTRALIAN FEDERAL POLICE
December 2004 to June 2006

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

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INTRODUCTION

The *Surveillance Devices Act 2004* (the Act) restricts the use, communication and publication of information obtained through the use of surveillance devices, establishes procedures to obtain permission to use such devices in relation to criminal investigation and the recovery of children, and imposes requirements for the secure storage and destruction of records in connection with surveillance device operations. Section 55(1) of the Act requires the Ombudsman to inspect the records of each law enforcement agency, as defined in s 6(1), to determine the extent of compliance with the Act by the agency and its law enforcement officers.

The term ‘law enforcement agency’ includes the Australian Crime Commission (ACC), the Australian Federal Police (AFP), and specified State and Territory law enforcement agencies. Where any of these agencies utilises the provisions of the Act, the Ombudsman is required to inspect the records relating to that use.

The Ombudsman is also required under s 61 of the Act to report to the Minister at six monthly intervals on the results of each inspection. In February 2006, it was agreed that the six monthly intervals should be January to June and July to December each year. Reports to the Minister will include inspections where the results of the inspection have been determined in the six-month period to which the Minister’s report relates. In this context, results are determined once the Ombudsman’s report to the agency is completed.

This report relates to the period 1 July 2006 to 31 December 2006 (the reporting period). In that period, agency reports were completed in regard to surveillance devices records kept by the ACC and the AFP. Those inspections are summarised below.

Agency	Period covered by inspection	Date of inspection	Report to the agency completed
ACC	July 2005–December 2005	20–24 February 2006	27 November 2006
ACC	January 2006–June 2006	18–21 September 2006	27 November 2006
AFP	December 2004 ¹ –June 2005	10–15 October 2005	16 August 2006
AFP	July 2005–March 2006	5–12 April 2005 and 22 June 2006	19 September 2006
AFP	April 2006–June 2006	15–18 August 2006	5 October 2006

¹ Commencement of the Act.

Detailed reports on the results of each inspection were provided to the relevant agency. This report summarises the significant issues that arose in the inspections and includes the recommendations made to each agency.

CONDUCT OF INSPECTIONS

All records held by each agency that relate to warrants and authorisations issued under the Act during each inspection period 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 been revoked during the inspection periods. In this report, those records are referred to as 'eligible records'.

The attendance at inspection meetings of the managers of the key areas in the ACC and the AFP involved in the administration and application of the Act facilitated the conduct of the inspections.

INSPECTION RESULTS

The Australian Crime Commission

Inspection results determined in the reporting period

The results of two inspections of the ACC's surveillance devices records were determined in the reporting period. Each inspection was conducted at the ACC's Electronic Product Management Centre (EPMC) in Sydney.

The first inspection took place between 20 and 24 February 2006 and examined records from the period 1 July 2005 to 31 December 2005. A draft report on the results of the inspection was sent to the ACC for comment on 26 July 2006. After considering the ACC's comments, the report was amended and the final report was delivered to the ACC on 27 November 2006.

The second inspection took place between 18 and 21 September 2006 and examined records from the period 1 January 2006 to 30 June 2006. A draft report on the results of the inspection was sent to the ACC for comment on 19 October 2006. Changes were made in light of the ACC's comments and the final report was delivered to the ACC on 27 November 2006.

Owing to the relatively low number of warrants and authorisations in the inspection periods, all the ACC's eligible records were inspected rather than a representative sample.

As the ACC advised that it had not used the surveillance device laws of any State or Territory during the inspection periods, no additional inspection of ACC records under s 55(2) was required.

Background

In determining the extent of the ACC's compliance with the Act during these inspections, it was noted that many of the records inspected had been created prior to the ACC receiving the Ombudsman's reports on earlier inspections. However, measures taken by the ACC to ensure compliance with the Act were reflected in an improvement in the quality of records. These measures included the creation of a surveillance device working group and a policy and procedures manual, and the inclusion of weekly reports on warrant and authorisation files. In addition, the procedure adopted by the ACC of requiring investigators to keep contemporaneous records, in the form of logs attached to the weekly reports, improved the ACC's compliance with ss 52(1)(e) to (h) of the Act.

Compliance issues

Two compliance issues were identified during the first inspection and a recommendation was made in regard to each issue.

The definition of 'used' in section 49 reports to the Minister

Section 49 of the Act requires the chief officer of a law enforcement agency to provide to the Minister a report on each warrant or authorisation. In particular, s 49(2)(b)(iii) requires the chief officer to 'state the kind of surveillance device used' and s 49(2)(b)(iv) requires the chief officer to 'state the period during which the device was used'.

When stating the type of surveillance device 'used', the ACC listed the types of surveillance devices installed under the warrant, even if the surveillance devices had not been activated. However, when reporting on the period during which the device was 'used', the report stated 'not applicable' if the device had been installed but not activated. 'Used' was thus given both a broad and a narrow meaning in the report, without explanation of the difference.

This office considers it preferable to employ the term 'used' consistently and broadly. A meaningful report should include information about when a device was installed, when it was removed, when it was activated and when it was deactivated. In this context it was considered that in reporting the period during which a device was used, 'used' should be given the same broad meaning as when reporting the kind of surveillance device 'used'. This would both avoid the possibility of providing misleading information in the report and support the object and purpose of the Act.

Recommendation

The ACC should employ a comprehensive definition of the term 'use' in s 49 reports to the Minister and employ it consistently.

The ACC accepted this recommendation and advised that it had taken steps to implement it.

Identification requirements

Under s 49(2)(b)(ii) of the Act, the chief officer of a law enforcement agency is to include in the report to the Minister on each warrant or authorisation the name of each person involved in the installation, maintenance or retrieval of a surveillance device. There is no provision, as there is in Part 1AB of the *Crimes Act 1914* (the Crimes Act), for the report to the Minister to use a code to refer to a person where disclosing the identity of the person may endanger the safety of the person or prejudice an investigation or prosecution.

Technical staff from the Crime and Corruption Commission of Western Australia (CCCWA) had assisted the ACC with the installation of surveillance devices, but it was noted during the inspection that the CCCWA had only provided code numbers for those persons and had declined to provide names. The ACC advised that this occurred in two executed warrants, relating to the same person of interest, and was only manifested when the s 49 reports were prepared by the ACC.

Although the ACC does not have control over the practices of the CCCWA, the ACC is accountable under the Act for compliance with s 49. While the CCCWA adheres to its policy of non-disclosure of names, the ACC risks non-compliance with s 49 whenever it uses the services of CCCWA staff in the installation, maintenance or retrieval of a surveillance device. It should be noted that the CCCWA practice is self-adopted policy and is not in pursuance of a statutory obligation of confidentiality.

The ACC's approach had been to identify ACC staff by name in its s 49 reports, and to provide the code numbers for the assisting CCCWA staff as the only means of identification it has for such staff.

The view of the ACC is that the risks associated with disclosure of the identity of staff are not insignificant, encompassing provision of the names of a potential range of sensitive staff and other persons. It considers the issue to be important and has raised it with the Attorney-General's Department as a law reform issue.

Recommendation

The ACC should continue to press for urgent review of the requirement under s 49(2)(b)(ii) with the objective of ensuring that the protection against disclosure provided by s 15S(5) of the Crimes Act is not nullified by an obligation to disclose a person's name when reporting under the *Surveillance Devices Act 2004*. Pending amending legislation or a change of policy on the part of the CCCWA, the ACC should minimise its reliance on CCCWA personnel for the installation, maintenance and retrieval of surveillance devices.

The ACC accepted this recommendation and advised that arrangements had been put in place to progress each of its elements.

Compliance related matters

Provision of section 49 reports to the Minister ‘as soon as practicable’

Under s 49 of the Act, as soon as practicable after a warrant or authorisation ceases to be in force, the chief officer of the law enforcement agency must make a report to the Minister.

The meaning that should be given to ‘as soon as practicable’ in s 49 was discussed in the Ombudsman’s report to the Minister in July 2006. Although the Act does not define ‘as soon as practicable’, it was agreed that, for the purpose of s 49 reports, two months from the cessation of the warrant or authorisation is acceptable.

Prior to the second inspection, the ACC conducted an internal audit of the files to be inspected. The audit discovered that some s 49 reports had not been prepared and steps were taken immediately to complete and send the reports to the Minister.

While 15 of the inspected files contained s 49 reports that were sent more than two months after the warrant or authorisation ceased to be in force, this office considered that this was an organisational oversight and not a systemic issue.

Affidavits not addressing the effect on privacy

Section 16(2)(c) of the Act requires the person issuing a warrant to have regard to ‘the extent to which the privacy of any person is likely to be affected’ in determining whether to grant an application for a surveillance device warrant.

Warrants examined by inspecting officers included a reference that each issuing officer was satisfied that the requirements of s 16(2) had been met. However, in most applications, the majority of which were combined with the supporting affidavits, either there was no mention of privacy or no mention of the extent to which the privacy of any person would be likely to be affected by the use of a surveillance device. Few affidavits mentioned privacy.

The ACC agreed that addressing privacy was a concern and undertook to reinforce to law enforcement officers that this matter must be addressed in sufficient detail to demonstrate that the person issuing the warrant had regard to the extent that privacy of persons impacted by use of a surveillance device would be affected.

Destruction of protected information under section 46

When certain conditions have been met, s 46(1)(b) of the Act places an obligation on the chief officer of a law enforcement agency to destroy any record or report comprising protected information held by the agency.

The Ombudsman's report to the Minister in July 2006 noted that the Act had been in operation for a relatively short time and no such records or reports had been destroyed. Although the ACC advised that policies and procedures had been developed for the destruction of reports and records under s 46, no protected information was destroyed in the inspection periods covered by this report.

Best practice and administrative issues

Several best practice and administrative issues were discussed with the ACC. These included:

- An applicant for a warrant, who is also a member of a state or territory police force, should clearly indicate that he/she is applying for the warrant on behalf of the ACC.
- Where a new warrant is taken out in regard to a particular device rather than an extension of the existing warrant being sought, the issuing officer and the Minister should be given additional related information.
- Procedures should be developed to ensure standardisation of documentation across the organisation and to guard against template drift.
- Issuing and authorising officers should be encouraged to initial or sign each page of a warrant or authorisation.
- Where warrants are not promptly revoked when they are no longer needed, reasons why the warrant was not revoked should be indicated on the file.
- Where reference is made in ACC reports to more than one device installed or retrieved under a warrant or authorisation, the ACC should consider including identification or registration codes to aid in the identification of devices.

The Australian Federal Police

Inspection results determined in the reporting period

The results of three inspections of the AFP's surveillance devices records were determined in the reporting period, including the first inspection since the commencement of the Act. Each inspection was conducted at the AFP's Telecommunications Interception Division (TID) in Canberra.

The first inspection took place between 10 and 15 October 2005 and examined records from the period 15 December 2004 to 30 June 2005. Inspecting officers examined a representative sample, inspecting 65 of 259 eligible records (25%).

A draft report on the results of the inspection was sent to the AFP for comment in May 2006. Comments on the draft report were received in August 2006 and were incorporated into the final report, which was delivered to the AFP on 17 August 2006.

The second inspection took place from 5 to 12 April 2006 and on 22 June 2006, and examined records from the period 1 July 2005 to 31 March 2006. A sample of 114 from 201 eligible records was inspected (56.7%).

A draft report on the results of the inspection was sent to the AFP for comment in July 2006. After considering the AFP's comments, the report was amended and the final report was delivered to the AFP on 25 September 2006.

The third inspection took place between 15 and 18 August 2006 and examined records from the period 1 April 2006 to 30 June 2006. At this inspection, all 102 eligible records were inspected (100%).

A draft report on the results of the inspection was sent to the AFP for comment on 7 September 2006. Changes were made to the report in light of the AFP's comments and the final report was delivered to the AFP on 5 October 2006.

Background

In determining the extent of the AFP's compliance, this office was mindful of the challenges faced by the AFP in settling its procedures after the commencement of the Act. It was also noted that many of the records inspected in the second and third inspections were created prior to the AFP receiving reports on the results of earlier inspections. However, many improvements were evident in the later inspections.

Improvements implemented by the AFP included the creation of a draft AFP National Guideline on Surveillance Devices (the AFP Guideline), the cross-referencing of files where multiple warrants are issued on one application, the inclusion on warrant and authorisation files of action sheets recording the action taken on a warrant, and the inclusion of schedules containing information as to when reports were delivered to the Minister pursuant to s 49 of the Act.

Compliance issues

Two compliance issues were identified during the second inspection and a recommendation was made in regard to each issue.

The definition of 'used' in section 49 reports to the Minister

Section 49 of the Act requires the chief officer of a law enforcement agency to provide to the Minister a report on each warrant or authorisation. Under s 49(2)(b)(iv) of the Act, the report must state the period during which the surveillance device was used.

Inspecting officers noted that there was a significant variation in the interpretation of the term 'used'. In most reports, 'use' referred to the period from the time the device was installed to the time it was retrieved. In some reports, it referred to the period from the time the warrant was issued to the time the warrant expired or was

revoked. In a smaller number of reports, it referred to the period during which the device was activated.

It is important that a device not be recorded as 'used' in one context and 'not used' in another context without explanation, if, for example, 'not used' means that it has been installed but not activated. It is also important that whatever approach is taken is followed consistently within the AFP.

From the point of view of inspecting for compliance, it is necessary to know when a device is installed, when it is removed, when it is activated and when it is deactivated. From the point of view of reporting to the Minister under s 49, a meaningful report would require the same information and we would interpret 'used' accordingly.

Recommendation

The AFP should, for the purposes of the s 49 reports, develop and employ a consistent interpretation of the term 'used' for reporting on the period during which a surveillance device was used.

The AFP advised that, until advice was received from the Attorney-General's Department, the AFP would continue to interpret the term 'used' when referring to a surveillance device, to mean the time from when the device was installed on a particular day to the time that it was retrieved on the same day or a later day.

Keeping records under section 52

Under s 52(1)(e), (f), (g) and (h) of the Act, the chief officer of a law enforcement agency is required to record the details of:

- each use within the agency of information obtained by the use of a surveillance device
- each time information obtained by the use of a surveillance device is communicated outside the agency
- each occasion information obtained by the use of a surveillance device is given in evidence
- each occasion where information obtained by the use of a surveillance device is used in the location and recovery of a child under a family court order.

Most files inspected contained a document entitled 'use and communication log' which is intended to meet the requirements of s 52(1)(e), (f), (g) and (h) of the Act. However, the information contained in these documents was brief and not adequate for these purposes.

This issue was raised in the agency report on the first inspection, at which time the AFP acknowledged the concern and advised that the matter would be addressed. While inspecting officers noted a marked improvement in the inclusion of 'use and

communication logs' on files at the second inspection, sufficient detail was still not being recorded to satisfy the requirements of s 52.

Recommendation

The AFP should include more details in reports on the use and communication of information obtained from surveillance devices in order to satisfy the requirements of s 52.

The AFP agreed with the recommendation and advised that there was an increased emphasis on training for both new and more experienced investigators.

Compliance related matters

Linking offences to the definition of 'relevant offence'

Section 14 of the Act provides that a law enforcement officer may apply for a warrant in relation to a 'relevant offence'. A relevant offence is, amongst other things, a Commonwealth offence punishable by a minimum term of three years imprisonment, or a State offence with a federal aspect also punishable by a minimum term of three years imprisonment. The question of whether an offence is a relevant offence is a threshold issue, as a warrant cannot be issued unless the law enforcement officer is investigating or is likely to be investigating a relevant offence.

At the first two inspections, inspecting officers found that while applicants clearly stated the offence in question was a relevant offence, they did not demonstrate how the offence fitted the legislative definition. Specifically, applicants did not state the length of the maximum term of imprisonment for the specific offence, or whether it was a Commonwealth offence or a State offence with a federal aspect.

The AFP advised that it had introduced procedures to address this issue.

Provision of section 49 reports to the Minister 'as soon as practicable'

Agency reports to the Minister pursuant to s 49 of the Act must be provided 'as soon as practicable' after the warrant or authorisation 'ceases to be in force'.

The first inspection in the reporting period found that some reports had not been provided in a timeframe that could be described as 'as soon as practicable'. The AFP agreed that two months from the date a warrant or authorisation ceased would be a reasonable time in which to provide s 49 reports to the Minister. It was also agreed that if this time frame could not be met, a note detailing the reasons would be placed on file.

Although subsequent inspections found a general improvement in the timeliness of s 49 reports, there were several instances where reports had not been provided for up to four months after the cessation of a warrant or authorisation. In most

cases, this was due to the regional offices not providing completed documentation promptly when requested by TID.

Addressing privacy in supporting documentation

Section 16(2)(c) of the Act provides that in determining whether to issue a surveillance device warrant, the issuing officer must have regard to the extent to which the privacy of any person is likely to be affected.

AFP officers use approved templates when applying for warrants. Although the affidavit template prompts officers to address elements that the issuing officer must have regard to, inspecting officers found that the issue of privacy appeared to be addressed in a cursory manner. The third inspection found that less than half of the affidavits inspected mentioned the issue of privacy and, where it was addressed, a standard paragraph was usually included asserting that 'all reasonable steps' would be taken 'to limit the extent to which privacy is affected by the surveillance device'. This wording does not address the impact on privacy in the particular case and does not fulfil the requirement in s 16(2)(c).

The AFP agreed that where devices, other than tracking devices, are installed in premises occupied by people, supporting documentation should refer to this matter to give the issuing officer sufficient information to determine whether to issue the warrant. The AFP advised that an appropriately worded paragraph would be inserted into the AFP Guideline and also undertook to reinforce this procedure to law enforcement officers.

Installation of a surveillance device before a warrant is granted

At each inspection, one or two examples were found where a surveillance device was either installed before a warrant or authorisation was issued or was retrieved after the cessation of the warrant or authorisation. This usually occurred where the device was installed on property or premises under the AFP's control (but not owned by the AFP). At the third inspection, one of the AFP's warrant files indicated that a surveillance device was installed in a package several hours before the warrant was issued, although it was not delivered to the person of interest until after the warrant was issued.

The AFP sought advice from the Attorney-General's Department which advised that a warrant should be in existence before a device is installed, including into a package in the AFP's control. The AFP advised that an appropriately worded paragraph would be inserted into the AFP Guideline to reinforce this requirement.

Child recovery orders

Section 40(1)(d) of the Act requires that the written record of the tracking device authorisation made by the authorising officer must include the date the child recovery order was made and the name of the child to whom the order related. The third inspection examined records of the first two tracking device

authorisations relating to child recovery orders. However, the records did not include the dates the recovery orders were made. The AFP advised that steps would be taken to ensure that this information is included where appropriate.

Section 53 register

The database the AFP uses to keep the register required under s 53 was found not to be adequate for the purposes of the Act. It did not include some information required by the Act, and did not have the capacity to show details when warrants or authorisations are extended or varied. Often AFP warrants are extended several times and this needed to be reflected in the register.

While the AFP advised that the database is scheduled to be replaced, the upgrade has been postponed a number of times due to changing resource priorities.

Destruction of protected information under section 46

When certain conditions have been met, section 46(1)(b) of the Act places an obligation on the chief officer of a law enforcement agency to destroy any record or report comprising protected information held by the agency.

The AFP advised that it did not undertake any destruction of protected information in the inspection periods but that in future it plans to do so on a quarterly basis. To that end, a section covering the destruction of such information was drafted for inclusion in the AFP Guideline.

Best practice and administrative issues

Several best practice and administrative issues were discussed with the AFP. These included:

- Where unusual events have occurred in regard to a warrant or authorisation, action sheets on files should include extra details to explain what has occurred. Care should be taken to cite correct warrant and device numbers in the action sheets.
- Issuing officers should be requested to initial or sign all pages of warrants and authorisations.
- Warrant templates should be used consistently throughout AFP regions and should provide space to allow the issuing officer to specify conditions on the warrant if necessary.
- Where an application is made for a new warrant, rather than an extension of an existing warrant, previous use of the relevant surveillance device should be documented to ensure a clear record of what action has taken place in regard to the device.

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