



Commonwealth Ombudsman's report on inspection of the Australian Crime Commission's surveillance device records

REPORT TO THE ATTORNEY-GENERAL FOR THE
PERIOD 1 JANUARY TO 30 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 Ombudsman is also required under s 61 of the Act to report to the Minister at six monthly intervals on the result of each inspection. In February 2006 the Minister agreed that the six monthly intervals should be January to June and July to December each year.

During the period 1 January 2006 to 30 June 2006, a report was finalised on the first inspection of surveillance devices records kept by the Australian Crime Commission (ACC). The inspection covered the period from 15 December 2004 (when the Act commenced) to 30 June 2005 and was conducted at the ACC's Electronic Product Management Centre between 8 and 11 November 2005. A draft report on the results of that inspection was sent to the ACC for comment on 20 April 2006. Comments on the draft report were received from the ACC on 14 June 2006 and some adjustments to the results and conclusions were made in light of the ACC's comments.

This report summarises the significant issues that arose in the inspection and lists the recommendations made in respect of those issues. A detailed report on the results of the inspection has been provided to the ACC.

INSPECTION OF ACC SURVEILLANCE DEVICE RECORDS FOR THE PERIOD 15 DECEMBER 2004 TO 30 JUNE 2005

Inspection methodology

This was the first inspection of ACC surveillance device records since the Act commenced on 15 December 2004. The inspection methodology was developed over a number of months during the early part of 2005 and drew on the experience of my office in performing functions under other inspection regimes.

All records held by the ACC that related to warrants and authorisations issued under the Act in the period of inspection were potentially subject to inspection by my office. However, I exercised my discretion under s 55(5) of the Act to

limit my inspection to warrants and authorisations that had expired or been revoked during the inspection period.

Because the number of such warrants and authorisations was relatively low, my office inspected all records eligible for inspection rather than a representative sample.

Since the ACC had not used the surveillance device laws of any State or Territory during the inspection period there was no inspection under s 55(2) of ACC records relating to such use.

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

Inspection results

The ACC had done a considerable amount of preparatory work in anticipation of the requirements of the Act and its compliance with the Act was generally high.

A new centralised record-keeping system helped to achieve a high quality of record keeping and consistency of file documentation; the format for file numbering provided significant information at first glance and allowed easy cross-referencing; early assignment of file numbers made it easy to trace withdrawn or refused applications; and the register of warrants and authorisations required by s 53 of the Act was functioning effectively. The prompt issue of a detailed and comprehensive policy and procedures manual was a critical factor in the level of compliance demonstrated by the ACC.

Potential compliance issues

My office noted some practices that may lead to non-compliance in the future, although none was of sufficient gravity to affect the ACC's compliance with the Act on this occasion. Most of these issues were resolved through discussions with the ACC.

Provision of section 49 reports to Minister

One issue was the meaning that should be given to 'as soon as practicable' in s 49 which requires the chief officer of a law enforcement agency to provide reports to the Minister on each warrant and authorisation issued or given under the Act 'as soon as practicable' after the warrant or authorisation ceases to be in force. The chief officer must also provide the Minister with a copy of each warrant and authority, and any instrument revoking, extending or varying the warrant.

My office noted that some reports had not been provided in a timeframe that could be described as 'as soon as practicable'. However, my office also noted that the ACC Guidelines stated that reports under s 49 should be provided within two weeks of the date the warrant or authority ceased to be in force, a deadline which appeared unrealistic. It was agreed that the ACC amend its Guidelines to require that s 49 reports be provided to the Minister within two months after the warrant or authorisation ceased to be in force. In cases where this was not possible, the relevant law enforcement officer (usually the 'executing officer') would detail the reasons for the delay in the form of a file note.

Keeping records under section 52

Under s 52(1)(e) to (g) of the Act, the Chief Executive Officer of the ACC is required to record the details of each use within the ACC of information obtained from the use of a surveillance device, and each time information obtained from the use of a surveillance device is communicated outside the ACC or given in evidence.

A number of files inspected included a form on which the relevant law enforcement officer had recorded details of 'use' and 'communication' of information obtained by the use of surveillance devices under the relevant warrant. These records complied with the requirements under s 52(1)(e), (1)(f) and (1)(g).

However, other files did not contain any record that would satisfy the requirements under the relevant provision in s 52(1), despite other information on these files suggesting that the protected information had been either used internally or communicated externally.

The ACC advised my office that, before the inspection, the ACC had implemented a number of measures to improve compliance with s 52(1)(e), (1)(f) and (1)(g) of the Act. These measures included:

- (a) introduction of a document (referred to as a 'Log') to record details of whether information is used, communicated or given in evidence
- (b) provision of general surveillance training to staff
- (c) conduct of an Internal Compliance Audit program for quality assurance purposes.

The ACC also advised my office that the responsibility of law enforcement officers to record the details required under s 52(1)(e), (1)(f) and (1)(g) is included in 'compliance training' which is provided to all new ACC staff on induction.

The ACC undertook to ensure that all staff receive further compliance training during 2006. Further, the ACC undertook to circulate written directions outlining

the information that must be recorded in order to comply with s 52(1)(e), (1)(f) and (1)(g).

The ACC has advised that a new log currently under development should help overcome the lack of consistency in recording identified during the inspection. Specific training on completing the log would be provided once it was introduced and in the meantime investigative staff had been asked to improve their level of recording in accordance with s 52 under current processes.

Insufficient time has passed to enable the measures to have full effect but this is a matter I will be examining in future inspections.

Use of protected information by examiners

ACC procedures require staff to record whether or not the protected information obtained by the use of a surveillance device has been used by an ACC 'examiner'. However, when recording that the information has been used, staff are not required to indicate the purpose for which the examiner used the information. The omission of any reference to the purpose of the examination in the records of these cases made it impossible to say with certainty that the use of protected information had been in accordance with the Act.

While the ACC Board issues Determinations that clearly distinguish between operations conducted purely for intelligence gathering purposes and intelligence gathering operations related to investigations, and while the ACC's Guidelines reinforce the rule that protected information may not be used for a purely intelligence operation, ACC records need to make clear in what capacity an examiner is acting when the use of protected information takes place.

The ACC assured my office that it had not used protected information for intelligence gathering purposes. I accepted this assurance and, given the clear guidance provided by the ACC Board and by ACC Guidelines on the use of protected information, I am satisfied that the risk that protected information may be used for purposes unrelated to an investigation is low. However, since the use of protected information by an examiner is lawful in one context but not in another, I took the view that ACC procedures should require staff to record more than simply the fact that an examiner has used the information.

Best practice issues

I noted a number of areas whether agency practice could be improved. For example, s 16(2)(c) requires the person issuing the warrant to have regard to 'the extent to which the privacy of any person is likely to be affected'. I noted that the application for a warrant should address this issue in sufficient detail to enable the person issuing the warrant to fully consider privacy considerations. The ACC undertook to reinforce this message to law enforcement officers.

I also noted that it was important that applications for a warrant state clearly on what basis the offence under investigation was a 'relevant offence'. This required applicants to show how the offence fitted the legislative definition of 'relevant offence', by stating the length of the maximum term of imprisonment for the offence and identifying the offence as a Commonwealth offence or a State offence with a federal aspect. The ACC acknowledged my concerns and undertook to amend its Guidelines accordingly.

Other matters

Section 46 - Storage and destruction of records

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 ACC advised my office that policies and procedures are in place for destruction under s 46, and that the intention is to undertake destruction in future on a quarterly basis.

The ACC advised that, as the Act has only been in operation for a relatively short time, no records or reports comprising protected information have been destroyed pursuant to s 46(1)(b). The implementation and administration of the destruction procedures under s 46 will be an area of focus for future inspections.

ACC annual report to the Minister

Under s 50 of the Act the Chief Executive Officer of the ACC is required to provide a report to the Minister in respect of each financial year. The report must be provided 'as soon as practicable' or at the latest by 30 September each year and must contain mandatory information set out in s 50(1). The Minister must cause a copy of the report to be laid before each House of Parliament within 15 sitting days after receiving it.

I inspected the annual report prepared by the ACC pursuant to s 50 of the Act relating to the period from 15 December 2004 to 30 June 2005. I note that the annual report to the Minister complied with s 50 of the Act in that it was provided prior to 30 September 2005 and contained all the information required under s 50(1) of the Act.

Prof. John McMillan
Commonwealth Ombudsman