

**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 JULY – 31 DECEMBER 2012**

AUSTRALIAN CRIME COMMISSION
Records from 1 July to 31 December 2011

AUSTRALIAN FEDERAL POLICE
Records from 1 July to 31 December 2011

VICTORIA POLICE
Records from 1 July 2011 to 30 June 2012

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

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CONTENTS

INTRODUCTION	1
INSPECTION OBJECTIVE AND SCOPE	2
SUMMARY OF INSPECTION RESULTS	3
AUSTRALIAN CRIME COMMISSION.....	4
Inspection results.....	4
Progress made since previous report	4
Issues arising from the inspection.....	5
AUSTRALIAN FEDERAL POLICE.....	7
Inspection results.....	7
Progress made since previous report	7
Issues arising from the inspection.....	7
VICTORIA POLICE	9
Inspection results.....	9
Progress made since previous report	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 Victoria 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 July and 31 December 2012

Agency	Records covered by the inspection period	Dates of inspection	Report to the agency completed
AFP	1 July to 31 December 2011	5 to 8 March 2012	13 July 2012
ACC	1 July to 31 December 2011	19 to 21 March 2012	2 August 2012
Victoria Police ²	1 July 2011 to 30 June 2012	20 August 2012 21 August 2012	6 November 2012 7 December 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.

² Two inspections were conducted for the Victoria Police as both the Special Projects Unit and the Ethical Standards Department used the provisions of the Act.

SUMMARY OF INSPECTION RESULTS

The inspection found the AFP compliant with the requirements of the Act, except for two cases where it did not notify the Attorney-General of extraterritorial surveillance activities and for not meeting the destruction requirements of the Act.

The inspection found the ACC compliant with the requirements of the Act, except for four cases where it did not specify the 'nature of the authorisation sought' in applications for tracking device authorisations and further, for not meeting the destruction requirements of the Act.

Both the AFP and the ACC made progress towards addressing the requirements of the Act regarding the destruction and retention of protected information. 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.

Due to the retrospective nature of our inspections, we have noted a number of cases where protected information had been retained by both the ACC and the AFP for longer than five years without each chief officer's approval. However, both agencies have taken measures to address the issue. We may continue to note this in future inspections until all records containing protected information held by both agencies have been reviewed for either destruction or retention.

The inspections found the Victoria Police compliant with the requirements of the Act.

All three agencies continue to display a positive attitude towards compliance and are responsive to addressing the issues identified as a result of our inspections.

AUSTRALIAN CRIME COMMISSION

Inspection results

The inspection of the ACC's records was conducted from 19 to 21 March 2012. The inspection examined surveillance device warrants and tracking device authorisations (and associated records) that expired or were revoked during the period 1 July to 31 December 2011 and also records relating to the destruction and retention of protected information. A report of the results of this inspection was provided to the ACC on 2 August 2012.

We inspected records relating to: 38 warrants and four authorisations (a 100% sample); the destruction of protected information obtained under 43 warrants and authorisations (a 100% sample); and the retention of protected information obtained under 25 warrants and authorisations (a 100% sample).

The ACC was assessed as compliant with the Act except for four instances where a requirement relating applications for tracking device authorisations was not met and not meeting the destruction requirements under s 46(1)(b). No recommendations were made as a result of the inspection.

Progress made since previous report

As noted in our last report to the Attorney-General, the ACC self-disclosed that protected information obtained under 22 warrants was retained for more than five years without the chief officer's certification as required under s 46(1)(b)(ii). In response to this issue, the ACC advised that it has updated its guidelines and improved its procedures relating to future destruction and retention of protected information.

In relation to the records and reports comprising protected information currently held by the ACC, the ACC has initiated a review to ensure that each record or report is retained or destroyed in accordance with s 46. As a result of this review, the ACC has identified an additional number of records comprising protected information that have been retained for more than five years without the chief officer's certification. This is further discussed below.

Issues arising from the inspection

Verbal applications for tracking device authorisations did not specify the nature of the authorisation sought

When applying for a tracking device authorisation, the applicant must address those matters that would need to be addressed were the applicant making an application for a surveillance device warrant (s 39(9)(b) of the Act).

Section 14(5)(a)(ii) of the Act requires an application for a surveillance device warrant to specify the nature of the warrant sought. Although the Act does not specify what 'nature of the warrant sought' means, we take it to mean information regarding why the warrant/authorisation was sought and how information obtained under the warrant/authorisation may be used.

For four verbal applications for tracking device authorisations, we were unable to determine compliance with s 14(5)(a)(ii) based on the records available at the inspection. Subsequent to the inspection, the ACC provided supplementary information relating to the nature of the tracking device authorisations sought.

We suggested that the ACC take measures to ensure that sufficient information is recorded when making verbal applications for tracking device authorisations to meet the requirements of s 14(5)(a)(ii). In response, the ACC advised that it has updated its templates to include a prompt for applicants to detail the nature of the authorisation sought, and updated its training and other relevant guidelines to address this issue.

Protected information retained for longer than five years without certification

As detailed under 'Summary of inspection results' on page 3, s 46(1)(b) of the Act imposes requirements on how law enforcement agencies destroy or retain protected information (as defined under s 44 of the Act).

To ascertain an agency's compliance with these requirements, we expect to see:

1. evidence that an agency has conducted regular reviews of protected information to assess if it is still required;
2. if protected information is not required, evidence that the agency has sought the chief officer's approval to destroy it, and on receipt of that approval, the protected information was destroyed as soon as practicable; and

Report to the Attorney-General on the results of inspections of records under s 55 of the *Surveillance Devices Act 2004*, March 2013

3. if protected information is still required after a period of five years, certification from the chief officer (or delegate) that the protected information may be retained (and certification for every five year period thereafter).

The ACC self-disclosed that protected information obtained under 15 warrants was retained longer than five years without the chief officer's certification. In these instances the ACC did not meet the requirements of s 46(1)(b)(ii) of the Act.

AUSTRALIAN FEDERAL POLICE

Inspection results

The inspection of AFP surveillance device records was conducted from 5 to 8 March 2012. The inspection examined surveillance device warrants and authorisations (and associated records) that expired or were revoked during the period 1 July to 31 December 2011 and also records relating to the destruction of protected information carried out during the same period. A report of the results of this inspection was provided to the AFP on 13 July 2012.

We inspected records relating to: 63 warrants and authorisations (a 23% sample); and the destruction of protected information obtained under 11 warrants and authorisations (a 22% sample).

The AFP was assessed as compliant with the Act except for two cases where the Attorney-General was not notified where required of relevant surveillance activities and not meeting the destruction requirements under s 46(1)(b). No recommendations were made as a result of the inspection.

Progress made since previous report

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 two cases where tracking devices were either used or retrieved after the tracking device authorisation had expired (or was revoked). The AFP took measures to address this issue and the same issue was not noted at our subsequent inspection. The other issues identified at the inspection are further discussed below.

Issues arising from the inspection

Protected information not regularly reviewed and retained for longer than five years without certification

As noted previously for the ACC, to ascertain compliance with the destruction and retention requirements of the Act, we expect to see evidence of regular reviews of protected information and that protected information has been retained and destroyed with appropriate approvals.

Prior to our inspection, the AFP did not have a formalised procedure to regularly review protected information. Since the inspection, the AFP advised that it has instituted the relevant procedures, which include extending

responsibility for compliance with s 46(1)(b) to regional offices and implementing biannual reviews of protected information for destruction and retention.

In 32 instances, protected information was kept for longer than five years without certification from the Commissioner of the AFP, contrary to s 46(1)(b). However, we noted that in six of these cases, certification was obtained at a later date (after the five year period had elapsed). We also noted that 15 of these records had since been destroyed or were in the process of being destroyed.

On 27 June 2012, the AFP advised that protected information pertaining to the 32 records had been destroyed or retained with the Commissioner's certification. The AFP also advised that retention and destruction procedures have been updated to ensure that it meets the requirements under s 46(1)(b).

In addition, the AFP has reviewed all files containing protected information created five or more years ago to ensure that it handles protected information in accordance with s 46.

Attorney-General not notified of extraterritorial surveillance in a timely manner

Section 42(6) of the Act requires that as soon as practicable after the start of surveillance under the authority of a warrant in a foreign country, the Commissioner of the AFP must give the Attorney-General evidence in writing that the surveillance has been agreed to by an appropriate consenting official of the foreign country.

For two warrants, the AFP obtained a letter of consent from a foreign official, but the Attorney-General was not advised until almost four months after the surveillance had commenced. This issue was self-disclosed by the AFP.

We suggested that the AFP implement measures to ensure that the requirement under s 42(6) is complied with in future. The AFP has advised that it will update its existing procedures to address this issue.

VICTORIA POLICE

Inspection results

The inspections of the Victoria Police's surveillance device records were conducted on 20 and 21 August 2012. The inspections were conducted at the Special Projects Unit and the Ethical Standards Department of the Victoria Police respectively. We examined surveillance device warrants (and associated records) that expired or were revoked during the period 1 July 2011 to 30 June 2012. There were no records relating to the destruction of protected information relevant to the same period. The reports on the results of the inspections were provided to the Victoria Police on 6 November 2012 and 7 December 2012.

We inspected records relating to two warrants (a 100% sample), one each for the Special Projects Unit and the Ethical Standards Department. The Victoria Police was assessed as compliant with the Act and no significant issues were noted. No recommendations were made as a result of the inspections.

Progress made since previous report

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

There were no issues noted at the previous inspection of the Special Projects Unit.

At the previous inspection we suggested that the Ethical Standards Department implement procedures to ensure that investigators record sufficient information to establish a link between the person of interest on the warrant and the premises entered to install surveillance devices. The Ethical Standards Department has implemented procedures to address this, although we did not assess this aspect at the 2012 inspection because the warrant was not executed.

Colin Neave
Commonwealth Ombudsman