Commonwealth OMBUDSMAN

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 2006 to December 2006

AUSTRALIAN FEDERAL POLICE
January 2007 to June 2007

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

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Contents

INTRODUCTION

The *Surveillance Devices Act 2004* (the Act) restricts the use, communication and publication of information obtained through the use of surveillance devices, and establishes procedures to obtain permission to use such devices in relation to criminal investigation and the recovery of children. The Act also imposes requirements for the secure storage and destruction of records in connection with surveillance device operations. Section 55(1) of the Act requires the Commonwealth 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), the Australian Commission for Law Enforcement Integrity (ACLEI), and specified State and Territory law enforcement agencies (s 6(1)). If any of these agencies utilise 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 between this office and the Attorney-General's Department (AGD) 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 finalised in the six-month period to which the Minister's report relates. In this context, results are finalised once the Ombudsman's report to the agency is completed.

This report relates to the period 1 July 2007 to 31 December 2007 (the reporting period). In that period, reports on the results of inspections were finalised for the ACC and AFP (including the results of a regional inspection of the AFP's Brisbane office). Details on those inspections are provided below.

Agency	Period covered by inspection	Date of inspection	Report to the agency completed
ACC	1 July 2006 to 31 December 2006	26 to 29 March 2007	6 July 2007
AFP Brisbane office	1 July 2006 to 30 June 2007	3 to 6 July 2007	30 November 2007
AFP	1 January 2007 to 30 June 2007	30 July to 3 August 2007	30 November 2007

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

Two additional inspections of ACC surveillance device records were carried out in 2007: an inspection of records held at the ACC Brisbane office was held from 3 to 4 July 2007, and a principal inspection was held at the Sydney office from 3 to 5 September 2007 to examine records from the period 1 January 2007 to 30 June 2007 (the second inspection period). However, the report on the results of these two inspections was not finalised before 31 December 2007 and is therefore not included in this report. The ACC was provided with a draft report for their comment in November 2007. The report is expected to be finalised in early 2008, and the results will be included in my next report under s 61.

An inspection of NSW Police surveillance device records was conducted from 31 October to 2 November 2007, which examined 100% of eligible records for the period from 1 January 2007 to 30 June 2007. A draft report was provided to NSW Police in January 2008 for comment. The report is expected to be finalised in early 2008 and the results will be included in my next report under s 61 of the Act.

The category of results termed ‘compliance-related’ for results of inspections was abolished in between the inspection report for the ACC and the inspection report for the AFP. Issues formerly categorised as ‘compliance-related’ are now reported simply as ‘best practice and administrative issues’.

CONDUCT OF INSPECTIONS

All records held by an agency that relate to warrants and authorisations issued under the Act during the 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’.

Both the AFP and ACC provided every assistance in the conduct of inspections. The importance they place on compliance with the Act and their efforts to implement the recommendations made by this office should be noted.

INSPECTION RESULTS

Australian Crime Commission

Inspection results determined in the reporting period

The results of one inspection of the ACC's surveillance device records were finalised in the reporting period. The inspection was conducted at the ACC's Electronic Product Management Centre (EPMC) in Sydney from 26 to 29 March 2007 and examined records from the period 1 July 2006 to 31 December 2006. This office examined 100% of the ACC's eligible records. A final report was provided to the ACC on 9 July 2007.

Background

Based on an assessment of 51 eligible records for surveillance device warrants and authorisations, the ACC was assessed as generally compliant with the Act. However, a number of compliance, compliance-related and best practice issues were identified as a result of the inspection.

Overall, the records for warrants and authorisations were of a high standard, although some issues were identified that may affect compliance in the future if not resolved.

No recommendations were made, as the issues raised were either of a minor nature or were already in the process of being addressed by the ACC. In addition, some key initiatives of the ACC to improve compliance with the Act were recognised.

The ACC advised that it had not used the surveillance devices laws of any State or Territory during the inspection period. Therefore, the Ombudsman was not required to undertake an inspection of ACC records under s 55(2) of the Act during this inspection period.

ACC initiatives

Since the Act came into force, the ACC has introduced several procedures and further training to assist ACC investigators and administrative staff in complying with the Act. The ACC has also advised that significant progress has been made by the working group responsible for the interim draft 'Surveillance Devices Policy and Procedures Manual'.

Compliance assessments and training sessions were conducted by the ACC in its Perth, Brisbane and Sydney offices between July 2006 and December 2006. Another review of the surveillance device compliance-training program took place in February 2007. The training focuses on statutory requirements and recommendations and best practice issues identified by this office.

Compliance issues

Two compliance issues were identified as a result of the inspection, but no recommendations were made.

Section 53 register

Section 53 of the Act requires a register of all warrants and authorisations to be kept. The register is to specify the name of the person who issued or refused the application and the date of issue or refusal. If the application is approved the register must also record specific information.

The ACC maintains a s 53 register as required by the Act. While the register was generally accurate, there were several errors. The errors were principally due to data entry inaccuracies and were not seen as evidence of any systemic problems. The ACC advised that they have taken steps to ensure that staff are more aware of their obligations in ensuring the accuracy and completeness of all information.

Recording 'use' and 'communication'

Under ss 52(1)(e), (f) and (g) 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 from the surveillance device, and *each* time information obtained from the surveillance device is communicated outside the agency or given in evidence.

During an earlier inspection in September 2006, Ombudsman staff noted that the ACC had begun to include contemporaneous regular reports on each file for each week the warrant or authorisation was in force. These reports were particularly useful for files that had not been executed as they contained explanations as to why the warrant or authorisation had not been executed, and advice from the investigators if the warrant or authorisation was still required.

The introduction of the regular reports was seen as a positive initiative that assisted with the quality of record keeping. However, it was noted in this inspection that investigators had ceased using the 'use and communication' logs that had previously been used to fulfil the requirements of s 52, in lieu of the contemporaneous reports by investigators.

Although the introduction of the regular reports improved the quality of information recorded on the file, the format of the regular reports did not fulfil the requirements of s 52. The ACC subsequently advised that a new log had been developed to record this information and would be in use from May 2007.

Compliance-related issues

Three compliance-related issues were identified as a result of the inspection, but no recommendations were made. While not issues of non-compliance with the Act,

they were raised as having the potential to impact on compliance in the future if not addressed.

Section 49 reports to the Minister

Under s 49 of the Act, the chief officer of the law enforcement agency must make a report to the Minister as soon as practicable after a warrant or authority ceases to be in force. The Minister is to be provided with copies of the warrant or authorisation and of any instrument revoking, extending or varying such a warrant or authorisation.

Late reports

Although the Act does not define 'as soon as practicable', it was previously agreed between the Ombudsman and the ACC that two months from the cessation of the warrant or authorisation would be an acceptable period within which to make the report. Several reports were outside this time frame and many reports had been delayed due to the complex and ongoing nature of the investigation. The ACC advised that those final reports, once prepared, would properly and clearly demonstrate the value of the protected information and the use to which it had been put. The ACC also advised that they would be more closely monitoring compliance with this reporting requirement.

The ACC noted that the telecommunications interception regime under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) sets out a three-month period for equivalent reports to be provided to the Minister under s 94 of the TIA Act. The ACC indicated that it was considering a change in the internal timeliness requirements for s 49 reports to bring the surveillance devices regime into line with the telecommunications interception regime.

The Ombudsman agreed that, for the purposes of consistency, a three-month period would satisfy the requirement for reports under s 49 to be provided 'as soon as practicable'.

Inconsistent period of 'use'

The report on each warrant or authorisation must, if the warrant was executed, state the period during which the surveillance device was used. This office noted that there was an inconsistency in the definition of the term 'used' for this purpose. 'Used' has been given three different meanings in s 49 reports by ACC operational staff.

The Ombudsman's interpretation is that the recording of *each* time a device is switched on and off is not required by s 49. It is the view of this office, and also the view taken by AGD, that the period during which the device is activated and 'available to be used' by the agency is 'the period the device was used' for the purposes of s 49. Best practice requires the reports to include information about the dates of installation and retrieval of the devices, including an explanatory

comment where the device has been installed under a previous warrant or the device is to be used or retrieved under a further warrant. Some devices do not need to be installed to be 'used' by the agency. In those cases, best practice requires a statement outlining this with the period of activation of the device.

The ACC advised that they understand that the period of the activation of the device is considered to be the period of the 'use' of the device for the purposes of the s 49 reports, and that this interpretation has been reinforced with relevant staff.

Providing relevant information

The Act sets out the information required to be reported on to the Minister under s 49 of the Act. However, in some circumstances the information required by the Act does not give a meaningful or full picture to the Minister of the circumstances of the warrant or authorisation.

Ombudsman staff noted that on some files the s 49 report sent to the Minister gave further explanatory information. This information did not include any operational detail, but explained the circumstances and, for example, gave a reason why the warrant or authorisation had not been executed, or indicated to the Minister that the device had been installed under a previous warrant and had not been retrieved. This extra information, although not required by the Act, gives an accurate description of the life of the warrant or authorisation and the operation. The fact that the Act requires certain information to be reported to the Minister does not preclude further information from also being provided to ensure a meaningful report.

The ACC agreed that further explanatory information would be included, where appropriate, in future reports.

Providing sufficient detail to issuing officers

Ombudsman staff noted that further detail needed to be provided to issuing officers to ensure that they have a clear understanding of the scope of the investigation and the operation for which the warrant or authorisation is being applied. Information that may be of relevance includes, for example, where the device authorised by the warrant or authorisation has been installed under a previous warrant or authorisation and is still in place. Operational detail is not required, but for the purposes of obtaining a warrant or authorisation the applicant should give the issuing officer all of the information that is relevant to the application.

Privacy

Section 16(2)(c) of the Act requires that the issuing officer must have regard to the extent to which the privacy of any person is likely to be affected by the use of the surveillance device when determining whether to issue a warrant. While a number of applications made reference to privacy, the information supplied did not appear

to generally assist the issuing officer to meet his or her obligations under s 16(2)(c). Although fewer applications are omitting a reference to privacy, a mere reference is not sufficient. This issue has been noted before and included in previous inspection reports to the agency.

The ACC advised that the issue of privacy and how to address this subject in applications for warrants was a central focus of compliance training in February 2007.

Best practice and administrative issues

Three best practice and administrative issues were identified as a result of the inspection, but no recommendations were made.

ACC members identifying themselves as State/Territory police

Under s 14 of the Act, a law enforcement officer may apply for a surveillance device warrant if he or she suspects on reasonable grounds that one or more relevant offences have been, are being, or are about to be committed and an investigation into those offences is being, or is likely to be, conducted and the use of a surveillance device is necessary. However, if the application is being made by, or on behalf of a State or Territory law enforcement officer, the list of relevant offences is narrowed under s 14(2).

When an applicant for a warrant or authorisation is a member of both a State or Territory police force and the ACC, the applicant should make it clear that the application is being made by the applicant in his or her capacity as a member of the ACC. This was not clear in several warrants inspected.

The ACC advised that this issue was the subject of compliance training in February 2007.

Initialling all pages of warrants

As previously noted in inspections, in most cases issuing officers did not sign or initial the front page of the warrant where the document was more than one page. As a matter of best practice, warrants and authorisations should be initialled on pages other than the signature page. This ensures that all parties can be satisfied that the pages of the warrant or authorisation were original pages and were properly authorised.

While this is not a compliance issue, as previously suggested, appropriate authorising officers, eligible judges and nominated AAT members could be prompted to sign or initial the extra pages by inserting a space for initials or a signature block at the foot of each page other than the signature page.

The ACC advised that while it is the agency's view that the decision to initial each page of the warrant is a matter for the issuing officer, and does not impact on the validity of the documents, issuing officers will be invited to initial all pages.

Australian Federal Police

Inspection results determined in the reporting period

The results of two inspections of the AFP's surveillance devices records were determined in the reporting period. The principal inspection was held at the AFP's Telecommunications Interception Division (TID) in Canberra from 30 July to 3 August 2007, and examined 100% of eligible records from the period 1 January to 30 June 2007 (the inspection period). A regional inspection was also held at the AFP's Brisbane office from 3 to 6 July 2007, and examined a sample of 25 eligible records from the period 1 July 2006 to 30 June 2007. A final report was provided to the AFP on 30 November 2007.

Background

Based on an assessment of 113 eligible records for surveillance device warrants and authorisations, the AFP was assessed as compliant with the provisions of the Act. Overall, the records examined were of a high standard. There were no issues of non-compliance with the Act to report, but there were three best practice and administrative issues. The AFP advised in November 2007 that they are committed to continuous improvement in relation to these three best practice and administrative issues, and have already implemented training and changes to ensure improvement in these areas.

In addition, this office noted improvements and developments in practices and procedures, which are discussed briefly below.

Section 53 register

In the previous inspection report to the agency in May 2007, the Acting Ombudsman recommended that:

> The Australian Federal Police should, as a matter of priority, implement a register that contains all of the information required to be kept under s 53 of the *Surveillance Devices Act 2004*. Measures to ensure compliance with s 53 pending the upgrade of the current database should be adopted as soon as possible.

That recommendation has been implemented. A new electronic database has been developed and is now in use, providing a register of warrants, emergency authorisations and tracking device authorisations.

Content of s 49 reports to the Minister

The content of reports to the Minister under s 49 of the Act has improved and the AFP is now assessed as being compliant with this section of the Act, including the requirement that reports be provided to the Minister as soon as practicable after the warrant or authorisation ceases to be in force.

Destructions

This was the first inspection period in which the AFP had destroyed any records relating to the use of a surveillance device, and therefore, the first inspection of this process and legislative requirement. Section 46 makes provisions for dealing with records obtained by use of surveillance devices, and s 46(1)(b) details the requirements for the destruction of these records.

The AFP had destroyed records and reports held in regional offices comprising protected information associated with 41 warrants and authorisations. For each warrant or authorisation for which protected information was destroyed, there was a certification by the chief officer of the AFP that the protected information was no longer needed, and the destruction occurred within five years after the making of the record or report.

Compliance issues

There are no issues of non-compliance to report as a result of the inspection.

Best practice and administrative issues

Section 16(2)(c)—Privacy

Section 16(2) of the Act sets out those matters that an eligible judge or a nominated AAT member as issuing officer must have regard to in determining whether to issue a surveillance device warrant. One of those matters is 'the extent to which the privacy of any person is likely to be affected' (s 16(2)(c)).

Although most warrant applications made reference to the effect the surveillance device would have on privacy, there was a general lack of detail, and some applications did not make any reference to privacy. This issue has been noted in all previous inspection reports to the AFP. While we note an improvement in the number of applications addressing privacy and the manner in which they do so, there remains scope for improvement.

Recommendation

The Australian Federal Police should ensure that all warrant applications include information on the extent to which the privacy of any person is likely to be affected by use of a surveillance device, so that issuing officers can more readily address the requirements of s 16(2)(c).

Recording 'use' and 'communication'

Under ss 52(1)(e) and (f) 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 from the surveillance device, and each communication outside the agency of information obtained from the surveillance device. The AFP requires investigators to keep 'use and communication' logs in order to fulfil the requirements of s 52.

Issues associated with the maintenance of s 52 logs have been raised in previous reports, and we note that the keeping of s 52 logs and the recording of use and communication of devices in s 52 logs had improved by the time of the inspection. However, we note that for a small percentage of warrants and tracking device authorisations where information had been obtained, there were no use and communication logs available on file. It is not entirely clear that use and communication logs were applicable in all of these cases. However, the circumstances suggest that in at least some of these cases there was in fact use and communication that was not recorded.

Recommendation

The Australian Federal Police should continue to ensure that for all warrants and authorisations, where applicable, records are kept detailing each use of information obtained from the use of a surveillance device (s 52(1)(e)), and records are kept detailing each communication of information obtained from the use of a surveillance device (including tracking devices) to a person other than a law enforcement officer of the AFP (s 52(1)(f)).

Initialling warrants and authorisations

The initialling of warrants and authorisations is an issue of best practice, to ensure the authenticity of the documents. Many warrants and tracking device authorisations were not initialled on the front page when the warrant was more than one page (and signed on the last page). We did however, note an improvement in this issue, and expect to see further improvements by the next inspection given that the AFP have amended the document templates to include a prompt for the issuing officer to add their initials, and AFP officers having been encouraged to urge issuing officers to initial warrants and authorisations.

Regional inspection—Brisbane

In July 2007, Ombudsman staff examined surveillance devices records from the AFP Brisbane office. They noted some administrative errors and some instances where records in relation to the use of surveillance devices could have been more fully detailed.

Of particular note, the issue raised above in relation to s 16(2)(c) dealing with the extent to which the privacy of any person is likely to be affected was a significant one for the Brisbane office. None of the affidavits examined included a statement in relation to the extent to which the privacy of any person is likely to be affected by the use of the surveillance device.

Prof. John McMillan
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