

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

INSPECTIONS FINALISED
1 JANUARY – 30 JUNE 2011

AUSTRALIAN CRIME COMMISSION
Records from 1 January 2010 to 30 June 2010

AUSTRALIAN FEDERAL POLICE
Records from 1 January 2010 to 30 June 2010

VICTORIA POLICE (ETHICAL STANDARDS DEPARTMENT)
Records from 1 July 2009 to 31 July 2010

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. The Act also establishes procedures 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 surveillance device operations.

Section 55(1) of the Act requires the Commonwealth Ombudsman to inspect the records of each law enforcement agency to determine the extent of compliance with the Act by the agency and its law enforcement officers. 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 and 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 report to the agency is completed (having provided the agency with an opportunity to comment), so typically there will be some delay between the date of inspection and the report to the Attorney-General.

The following is a summary of the inspections of agencies that advised this office that they had used surveillance devices under the Act during the relevant period. Namely, the Australian Crime Commission (ACC), the Australian Federal Police (AFP) and the Victoria Police¹.

Table 1. Inspections which were finalised between 1 January and 30 June 2011

Agency	Records covered by inspection	Dates of inspection	Report to the agency completed
ACC	1 January to 30 June 2010	20 to 22 September 2010	20 March 2011
AFP	1 January to 30 June 2010	5 to 7 October 2010	28 April 2011
Victoria Police	1 July 2009 to 31 July 2010	25 November 2010	14 April 2011

¹ We understand that the Victoria Police has two different sections that use surveillance devices warrants. This report discusses the inspection results from the Ethical Standards Department.

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

INSPECTIONS OF SURVEILLANCE DEVICE RECORDS

Conduct

All records held by an agency that relate to warrants and authorisations issued 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.

This office appreciates the continued cooperation of the agencies inspected and their constructive responses to address the issues identified. The importance agencies place on compliance with the Act is recognised.

Inspection Methodology

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 carried out?
5. Are records properly kept and used by the agency?
6. Were reports properly made by the agency?

SUMMARY OF AGENCY COMPLIANCE AND IMPROVEMENTS

The inspections found the ACC, the AFP and the Victoria Police to be compliant with the Act and noted continued improvement in agency processes and record-keeping in order to ensure continued compliance with the requirements of the Act. The agencies showed a strong culture of compliance and a high standard of record keeping. The issues identified were relatively minor and generally able to be remedied through training and improved record-keeping processes.

The common issue arising from the inspections to which this report relates was a tendency by agencies to provide insufficient information to establish a link between persons named in a warrant and the premises where the surveillance device/s were installed.

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Section 18(1)(c) states that a surveillance device warrant may authorise the use of a surveillance device in respect of the conversations, activities or location of a specified person or a person whose identity is unknown. A warrant of this type is colloquially known as a ‘person warrant’.

Section 18(2)(c)(i) states that a ‘person warrant’ authorises the installation, use and maintenance of devices on premises where the person is reasonably believed to be or likely to be. To allow operational flexibility, there is no requirement in the Act for a ‘person warrant’ to detail such premises. However, this does not provide agencies with authority to install surveillance devices under a ‘person warrant’ on any premises – the premises, as s 18(2)(c)(i) requires, must be where the person is reasonably believed to be or likely to be. Therefore, where surveillance devices have been installed on premises under a ‘person warrant’, we would expect to see information relating to the use of these devices that connect the premises to the person named in the warrant.

The ACC, the AFP and the Victoria Police have all advised that they have reviewed and amended procedures to ensure sufficient information is recorded to establish a connection between the person named in the warrant and the premises where the device(s) were installed.

AUSTRALIAN CRIME COMMISSION

Inspection results

The inspection of ACC surveillance device records was conducted at the ACC's Electronic Product Management Centre (EPMC) in Sydney from 20 to 22 September 2010. The inspection examined surveillance device warrants and authorisations (and associated records) that expired during the period 1 January to 30 June 2010. A report of this inspection was provided to the ACC on 20 March 2011.

Based on the examination of 47 warrants and authorisations (42% sample), the ACC was assessed as compliant with the Act. However, some minor issues were identified where improvements may be made. No recommendations were made as a result of the inspection.

Issues arising from inspection

Access to records to confirm lawful access to premises under 'person warrants'

Out of 23 person warrant records, six did not contain sufficient information to establish a link between the person named in the warrant and the premises where the device/s were installed. As a consequence we were unable to verify compliance with s 18(2)(c)(i) for these records.

The ACC advised that since the inspection, new procedures have been implemented to improve compliance with s 18(2)(c)(i). The effectiveness of these measures will be reported in the next report to the Attorney-General.

For more information on the nature of 'person warrants' and the information required, please see 'Summary of Agency Compliance and Improvements' on pages 3–4.

Tracking device recording data after expiry of warrant

Section 18 of the Act permits the use of a surveillance device in accordance with a surveillance device warrant. Accordingly, any device installed under the authority of a surveillance device warrant cannot be used once the warrant expires, unless the warrant is extended using the provisions under s 19.

In one instance, a tracking device installed by the ACC under a surveillance device warrant recorded and transmitted data after the expiry date of the warrant. The ACC advised that the data transmitted by the device after the expiry of the warrant was quarantined.

The ACC disclosed this matter prior to inspection and provided a full account of the circumstances under which it occurred. The ACC has further advised that it has reviewed its processes and improved the way warrant expiry dates are managed.

Maintaining records for use of information obtained by surveillance devices

Section 52(1)(e) of the Act requires the chief officer of a law enforcement agency to keep the details of each use by the agency, or a law enforcement officer of the agency, of information obtained by the use of a surveillance device by a law enforcement officer of the agency.

For two warrants, the ACC did not keep a record of the use of information obtained from surveillance devices operated by the ACC. The records reflected that the information obtained from surveillance devices had not been used within the ACC, when in fact such information had been used.

The ACC has since advised that they have amended the records for the two warrants to correctly reflect the use of the information.

AUSTRALIAN FEDERAL POLICE

Inspection results

The inspection of AFP surveillance device records was conducted at the AFP's Telecommunications Interception Division (TID) in Canberra from 5 to 7 October 2010. The inspection examined surveillance device warrants and authorisations (and associated records) that expired during the period 1 January to 30 June 2010. A report of this inspection was provided to the AFP on 28 April 2011.

Based on the examination of 56 warrants and authorisations (30% sample), the AFP was assessed as compliant with the Act. However, some minor issues were identified where improvements may be made. No recommendations were made as a result of the inspection.

Improvements

In the previous report to the Attorney-General of March 2011, I recommended that the AFP ensure that, when extending the use of a surveillance device, they follow the process for the extension of a surveillance device warrant rather than apply for a new warrant. This process is set out in s 19 of the Act.

I note that the AFP has directly addressed this recommendation through the implementation of an ongoing education process by the TID to notify investigators of the requirements regarding extensions of surveillance device warrants.

Issues arising from inspection

Access to records to confirm lawful access to premises under person warrants

Out of 16 person warrant records, seven did not contain sufficient information to establish a link between the person named in the warrant and the premises where the device/s were installed. As a consequence we were unable to verify compliance with s 18(2)(c)(i) for these records.

This issue was raised in the previous report to the Attorney-General of March 2011 and the AFP advised that it will review and amend procedures relating to capturing information which details the connection between the premises and the person named on the warrant. The effectiveness of these measures will be reported in the next report to the Attorney-General.

For more information on the nature of 'person warrants' and the information required, please see 'Summary of Agency Compliance and Improvements' on pages 3–4.

VICTORIA POLICE (ETHICAL STANDARDS DEPARTMENT)

Inspection results

The inspection of the Victoria Police's surveillance device records was conducted at the Victoria Police Ethical Standards Department's Flinders Street office in Melbourne on 25 November 2010. The inspection examined surveillance device warrants and authorisations (and associated records) that expired during the period 1 July 2009 to 31 July 2010. A report of this inspection was provided to the Victoria Police on 14 April 2011. This was the first time the Ombudsman has inspected the surveillance device records of the Victoria Police.

Based on the examination of four warrants and authorisations (100% sample), the Victoria Police was assessed as compliant with the Act. One issue was identified where improvement may be made. No recommendations were made as a result of the inspection.

Issues arising from inspection

Access to records to confirm lawful access to premises under 'person warrants'

Out of three person warrant records, one did not contain sufficient information to establish a link between the person named in the warrant and the premises where the device/s were installed. As a consequence we were unable to verify compliance with s 18(2)(c)(i) for these records.

The Victoria Police acknowledged that while there was insufficient information to establish a link at the time of inspection, such information would be made available at the next inspection.

Further, the Victoria Police advised that any future installation of surveillance devices at a premises under s 18(2)(c)(i) will be accompanied by records that outline the basis for identifying it as a premises where the person is reasonably believed or likely to be.

For more information on the nature of 'person warrants' and the information required, please see 'Summary of Agency Compliance and Improvements' on pages 3–4.

Allan Asher
Commonwealth Ombudsman