

**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 2010

AUSTRALIAN CRIME COMMISSION
Records from 1 July 2009 to 31 December 2009

AUSTRALIAN FEDERAL POLICE
Records from 1 July 2009 to 31 December 2009

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

March 2011

ISSN 1833-9263

Date of publication: March 2011

Publisher: Commonwealth Ombudsman, Canberra, Australia

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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 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 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 (ACLEI) and police forces and other specified law enforcement agencies in each State and Territory.

The Ombudsman is also required under s 61 of the Act to report to the relevant Minister (the Attorney-General) at six-monthly intervals on the results of each inspection. Reports to the Minister 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 Minister.

The following is a summary of the inspections to which this report relates.

Table 1. Inspections which were finalised between 1 July and 31 December 2010

Agency	Records covered by inspection	Date of inspection	Report to the agency completed
ACC	1 July to 31 December 2009	8 to 10 February 2010	27 August 2010
AFP	1 July to 31 December 2009	22 to 25 March 2010	21 September 2010

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.

CONDUCT OF INSPECTIONS

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 and their efforts to implement the recommendations made by this office is recognised.

SUMMARY OF AGENCY COMPLIANCE

Australian Crime Commission

The ACC continues to improve practices relating to compliance. It is responsive to the recommendations made by the Ombudsman and has incorporated our input into policy and training.

No issues were identified during this reporting period.

The improvements made by the ACC are discussed in greater detail under 'Australian Crime Commission – Improvements'.

Australian Federal Police

We found the AFP compliant with the Act during this reporting period.

The most significant issue identified relates to the practice of obtaining new warrants to continue using surveillance devices for a particular person, premises or object, rather than extending the original warrant. Prolonged surveillance is permitted by the Act with appropriate scrutiny by the judiciary (in their role as issuing authorities). However, the length of time surveillance devices have been used for a particular person, premises or object can be obfuscated (to the issuing authorities and to this office) when a new warrant is applied for, instead of seeking an extension to the original warrant.

Other issues raised in this reporting period, include:

- eligibility requirements to apply for an extension to a warrant (this issue was also raised in my previous report)
- access to records which confirm lawful access to premises under person warrants.

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The AFP agreed with our findings and is taking steps to improve practices in the areas identified by the inspection. The AFP also continues to educate its investigators to the requirements of the Act.

These issues are discussed in greater detail under ‘Australian Federal Police – Issues arising from the inspection’.

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 8 to 10 February 2010. The inspection examined surveillance device warrants and authorisations (and associated records) that expired during the period 1 July to 31 December 2009. A report of this inspection was provided to the ACC on 27 August 2010.

Based on the examination of 34 warrants and authorisations (72% sample), the ACC was assessed as compliant with the Act. No recommendations were made as a result of the inspection.

Improvements

The ACC has a strong culture of compliance. The EPMC has established a high standard for record keeping and compliance and investigators appear to have a good understanding of the requirements of the Act. I note, as we have done in previous reports, the ACC's policy requiring staff to undertake compliance training prior to applying for an authorisation or warrant and the continued improvement in the level of compliance that has been achieved.

I also note the segregation of the surveillance teams, who are responsible for installing, maintaining and removing the devices, and the investigators, who obtain the product from the devices. This arrangement, in my view, significantly mitigates the risk of unlawful use of surveillance devices by ACC officers.

My most recent inspections (which are yet to be finalised) have taken into greater consideration those mechanisms and internal controls employed by agencies to mitigate the risk of non-compliance. To this end, the ACC has already facilitated a study by my office of its operating procedures and systems relating to its use of surveillance devices. Future reports will focus in this area.

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 22 to 25 March 2010. The inspection examined a sample of surveillance device warrants and authorisations (and associated records) that expired during the period 1 July to 31 December 2009. A report of this inspection was provided to the AFP on 21 September 2010.

Based on the examination of 105 warrants and authorisations (78% sample), the AFP was assessed as compliant with the Act. Two recommendations to improve compliance have been made as a result of the inspection and a number of issues are noted where improvement may be made.

Issues arising from inspection

Obtaining new warrants to continue use of surveillance devices for a person, premises or object

Section 19 of the Act outlines the process for extending a surveillance device warrant. An application to extend a warrant must meet the same requirements as the original warrant application, as outlined under sections 14 and 15, and must be accompanied by the original warrant.

If a Judge or AAT member is satisfied that there are reasonable grounds to extend a warrant – or that the benefits of prolonged surveillance exceed the impact on a person's privacy – then a warrant may be extended. If the extension is granted, the Judge or AAT member must endorse the new expiry date on the original warrant.

There were six instances where a new warrant was obtained to continue surveillance in relation to the same person, premises or object. There did not appear to be any circumstances that would have prevented obtaining an extension to the original warrant.

While the practice of obtaining a new warrant is not unlawful, it is preferable to use the extension provisions in the Act. Use of these provisions ensures that the issuing officer is aware that surveillance upon a particular person, premises or object will extend beyond the usual three months.

The use of surveillance devices is extremely intrusive and it is essential that the safeguards within the Act are allowed to operate.

Recommendation 1

The AFP should ensure that the process set out in s 19 of the *Surveillance Devices Act 2004* for the extension of a surveillance device warrant is utilised when extending the use of a surveillance device – rather than apply for a new warrant.

Those who may apply for an extension

Section 19(1) states that a law enforcement officer to whom a surveillance device warrant has been issued (or another person *on his or her behalf*) may apply, at any time before the expiry of the warrant for an extension of the warrant for a period not exceeding 90 days from the day on which it would otherwise expire.

Seventeen applications to extend warrants were made by someone other than the original applicant. Fifteen of these applications did not state that the applicant was applying *on behalf of* the original applicant – and of course they should have.

This issue was raised at the previous inspection and the AFP advised our office in February 2010 that ‘this issue has been addressed in each instance with relevant staff and the AFP is implementing further measures to ensure this issue is addressed Agency wide’. We note that the effects of these measures may not have been fully evident at the time of inspection, therefore no further recommendation is made. It is stated here as a reminder.

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

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 operations some 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 outlined in s 18(2)(c)(i), 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 records relating to ten warrants 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 example, the records relating to one 'person warrant' indicated that a surveillance device was installed in a vehicle. A vehicle is defined as a premises in the Act and therefore this type of installation is authorised by a 'person warrant' as long as it is a premises where the person is reasonably believed to be or likely to be. However, the records relating to the installation did not identify the vehicle as being connected to the person (e.g. owned by, registered to, belonging to a friend or associate). Nor did the subsequent records relating to the activities conducted under the warrant show this link.

The AFP generally records details which link the location of installed devices with persons named in warrants. In instances where this was done, compliance with s 18(1)(c) could be verified. The AFP should ensure that the records relating to 'person warrants' demonstrate compliance with s 18(2)(c)(i).

Recommendation 2

The AFP should ensure that the records relating to 'person warrants' demonstrate compliance with s 18(2)(c)(i) by showing that the target is reasonably believed to be or likely to be at the premises the surveillance device is installed.

Allan Asher
Commonwealth Ombudsman