



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

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY
Records from 1 July to 31 December 2013

AUSTRALIAN CRIME COMMISSION
Records from 1 July to 31 December 2013

AUSTRALIAN FEDERAL POLICE
Records from 1 July to 31 December 2013

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.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.

Broadly speaking, the Act allows certain surveillance activities to be conducted under either a warrant (issued by an eligible Judge or nominated Administrative Appeals Tribunal member) or an internally issued authorisation. For example, use of surveillance devices requiring entry on to premises can only be done under a warrant, whereas use of surveillance devices which does not involve entry on to premises can be done without a warrant, but in some cases requires an internally issued authorisation.

Section 55(1) of the Act requires the Commonwealth Ombudsman (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 Commission for Law Enforcement Integrity (ACLEI), the Australian Crime Commission (ACC) and the Australian Federal Police (AFP).

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.

This report includes the results of inspections finalised in the period 1 July to 31 December 2014, with the exception of ACLEI, which was finalised on 18 June 2014. The results of this inspection should have been included in our last 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).

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The following table is a summary of the inspections covered by this report.

Table 1 – Inspections finalised between 1 July and 31 December 2014 ²

				Finalised
Agency	Inspection period	Dates of inspection	Number of records inspected	Report to the agency completed
ACLEI	1 July to 31 December 2013	12 February 2014	2 / 2 warrants	18 June 2014
ACC	1 July to 31 December 2013	7 to 9 April 2014	61 / 103 warrants 4 / 4 TDA ³ s	11 August 2014
AFP	1 July to 31 December 2013	17 to 21 March 2014	100 / 308 warrants 18 / 34 TDAs	18 December 2014

Detailed internal reports on the results of each inspection were provided to each agency. This report outlines the overall findings for each agency and discusses some exceptions to compliance (including where we were unable to determine compliance) in greater detail.

We have not included sensitive information in this report.

² The inspection of ACLEI was finalised on 18 June 2014.

³ TDA means a 'tracking device authorisation'.

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 authorisations properly issued?**
3. **Were surveillance devices used lawfully?**
4. **Were revocations of warrants properly made?**
5. **Were records properly kept by the agency?**
6. **Were reports properly made by the agency?**
7. **Was protected information properly dealt with by the agency?**

All records held by an agency relating 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 inspections to those warrants and authorisations that had expired or were revoked during the relevant inspection period.

Details about what we assess under each inspection criterion and what other matters we take into consideration when forming an assessment are provided at **Appendix A**. We apply this inspection methodology to every agency that we inspect under the Act.

In performing these assessments, we may also apply our sampling methodology to the number of records we inspect.

We form our assessments based on the records made available at the inspection, discussions with relevant teams, processes we observe and information staff provide in response to any identified issues. To ensure that agencies are aware of what we will be assessing, we provide them a broad outline of this criterion prior to each inspection.

MATTERS RELEVANT TO THE INSPECTIONS

As a part of our assessments, we confirm whether the inspected warrants were issued by an eligible Judge or nominated Administrative Appeals Tribunal member (an issuing authority). In order to do this, we rely on the Attorney-General's Department's (AGD) administration of this process.

In seeking confirmation from the AGD, we received advice that one issuing authority, who had issued warrants to a law enforcement agency, was not authorised to do so under the Act.

The AGD has since advised that it has taken steps to address this matter, including notifying all affected agencies. The AGD has also committed to implementing an improved system of recording and disseminating information about issuing authorities moving forward.

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

Inspection results

Criteria	Assessment
1. Were applications for warrants and authorisations properly made?	Compliant.
2. Were authorisations properly issued?	N/A
3. Were surveillance devices used lawfully?	Nothing to indicate otherwise.
4. Were revocations of warrants properly made?	N/A
5. Were records properly kept by the agency?	Compliant.
6. Were reports properly made by the agency?	Compliant.
7. Was protected information properly dealt with by the agency?	Nothing to indicate otherwise.

No issues were identified and no recommendations were made as a result of the inspection carried out in February 2014.

Progress made since previous report

In our last report to the Attorney-General, we noted that ACLEI did not have records on file to demonstrate that the surveillance devices were used on premises that the person named on the warrant was reasonably believed to be or likely to be, as required by s 18(2)(c)(i) of the Act.

As ACLEI did not apply for any warrants in respect of a person during 1 July to 31 December 2013, no assessment of ACLEI's progress in addressing this issue could be made.

AUSTRALIAN CRIME COMMISSION

Inspection results

Criteria	Assessment
1. Were applications for warrants and authorisations properly made?	Compliant.
2. Were authorisations properly issued?	Compliant.
3. Were surveillance devices used lawfully?	Nothing to indicate otherwise.
4. Were revocations of warrants properly made?	Compliant.
5. Were records properly kept by the agency?	Compliant.
6. Were reports properly made by the agency?	Compliant.
7. Was protected information properly dealt with by the agency?	Nothing to indicate otherwise.

No issues were identified and no recommendations were made as a result of the inspection carried out in April 2014.

Progress made since previous report

In our last report to the Attorney-General, we noted that the ACC did not complete the destruction of protected information obtained under a warrant to the extent where the information it was irretrievable, which may not have met the destruction requirements of the Act.

There was nothing to indicate this issue had occurred again in relation to the destructions undertaken by the ACC. We continue to work with agencies to enhance our understanding of the electronic systems used to store and destroy protected information along with the administrative processes that support such systems.

AUSTRALIAN FEDERAL POLICE

Inspection results

Criteria	Assessment
1. Were applications for warrants and authorisations properly made?	Compliant with two exceptions.
2. Were authorisations properly issued?	Compliant.
3. Were surveillance devices used lawfully?	Not compliant in three instances. Unable to determine compliance in multiple instances.
4. Were revocations of warrants properly made?	Compliant with two exceptions.
5. Were records properly kept by the agency?	Compliant with one exception.
6. Were reports properly made by the agency?	Not compliant in multiple instances. Unable to determine in five instances.
7. Was protected information properly dealt with by the agency?	Nothing to indicate otherwise except in three instances.

Although no recommendations were made as a result of the inspection carried out in March 2014, we noted a number of instances of non-compliance and a number of instances where we could not determine compliance. Some of these issues are discussed below.

A number of suggestions were also made regarding how the AFP could better comply with relevant provisions under the Act.

Additionally, we requested documents relevant to the inspection which were not provided by the AFP. As the documents fell within the scope of s 55(3) of the Act, which entitles the Ombudsman to full and free access to all records relevant to an inspection, the Ombudsman issued to the AFP a Notice to Produce under s 56(2) of the Act on 21 October 2014.

The AFP complied with the Notice, and the documents were considered in finalising our inspection findings.

Exceptions noted under criterion 3 (including where we were unable to determine compliance)

Use of devices without the authority of a warrant or authorisation

The AFP self-disclosed three instances where surveillance devices had been used without lawful authority.

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The first instance involved a tracking device being used despite not being authorised by a warrant. The AFP advised that this was due to the relevant officer being unaware that a device installed under the warrant was a tracking device. The AFP further advised that it sought a variation to the warrant to include the tracking device so it could be lawfully retrieved.

The second instance related to a tracking device being installed despite not being authorised by a warrant. The AFP advised that it relied upon the information contained within the application, which listed a tracking device, rather than the information listed on the warrant.

The third instance related to surveillance devices installed on premises under a warrant which authorised the installation, use and maintenance of devices on premises where the person named on the warrant is reasonably believed to be or likely to be. However, use of the surveillance devices continued after it was identified the person listed on the warrant was no longer at the premises.

The AFP advised that once this issue was identified, the use of the devices was discontinued and the unlawfully obtained product was quarantined.

In response to all three of these issues, the AFP advised that it has introduced a range of new administrative practices and processes to prevent similar occurrences in future.

Records to confirm actions taken under warrants

For a number of warrants authorising the installation, use and maintenance of devices on premises where the person named on the warrant is reasonably believed to be or likely to be, there was insufficient information to establish whether this was the case.

This issue has been regularly identified at the AFP and was reported on in our last report to the Attorney-General. We suggested to the AFP that its existing measures to demonstrate compliance no longer appear to be effective. The AFP has advised that it has implemented an additional procedure to ensure sufficient records are kept.

Exceptions noted under criterion 7

Keeping protected information for longer than five years

Under s 46(1)(b), as soon as practicable after a record or report comprising protected information is made, 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 certify to retain protected

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information if satisfied that it is still likely to be required. 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. An exception to this is under s 46(3), where protected information is received into evidence in a legal or disciplinary proceeding.

We identified that protected information obtained under three warrants had been kept for a period longer than five years, however there were no records on file to indicate the chief officer had certified that it could be retained or that the protected information had been entered into legal proceedings.

In response to this finding, the AFP advised that these instances occurred due to the relevant records being subject to an internal destruction freeze.

We suggested that in order to comply with the requirements under s 46(1)(b) in such instances, the AFP should seek the chief officer's certification to retain the protected information for a period longer than five years.

Progress made since previous report

The issue identified under, *Records to confirm actions taken under warrants*, was also discussed in our last report. The AFP's progress in addressing this issue is noted above.

In our last report to the Attorney-General, we also noted that the AFP did not advise us of all warrants and authorisations relevant to the inspection period. This issue was not noted at this inspection.

Colin Neave
Commonwealth Ombudsman

Appendix A

1. Were applications for warrants and authorisations properly made?

Under this criterion, we assess agency compliance with:

- making applications for surveillance device warrants under s 14
- making applications for extensions/variations to surveillance device warrants under s 19
- making applications for retrieval warrants under s 22
- making applications for emergency authorisations and subsequent applications to an eligible Judge or a nominated AAT member under ss 28, 29 and 33
- making applications for tracking device authorisations and retrieval of tracking devices under s 39
- keeping each document required by s 51(e) to (h).

2. Were authorisations properly issued?

Under this criterion, we assess agency compliance with the provisions below:

- written records for emergency authorisations were properly issued under s 31 and each written record of the authorisation was kept in accordance with s 51(c)
- tracking device authorisations were properly issued under ss 39 and 40, and each written record of the authorisation was kept in accordance with s 51(d)
- authorisations for the retrieval of tracking devices were properly issued under ss 39 and 40.

3. Were surveillance devices used lawfully?

Under this criterion, we assess agency compliance with the provisions below:

- whether surveillance devices were used in accordance with the relevant warrant (s 18)
- whether surveillance devices were used in accordance with the relevant emergency authorisation (ss 18 and 32)

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- whether retrieval of surveillance devices or tracking devices was carried out lawfully (ss 26 and 39(11))
- whether tracking devices were used in accordance with the relevant tracking device authorisation (s 39)
- whether extra-territorial surveillance was carried out lawfully (s 42).

4. Were revocations of warrants properly made?

Under this criterion, we assess agency compliance with the provisions below:

- revoking warrants under ss 20, 21 and 27 and
- keeping records of revocation under s 51(b).

5. Were records properly kept by the agency?

Under this criterion, we assess agency compliance with the provisions below:

- keeping the register under s 53
- keeping each warrant under s 51(a)
- keeping evidentiary certificates under s 51(k)
- keeping documents under s 52(1)(a) – (d).

6. Were reports properly made by the agency?

Under this criterion, we assess agency compliance with the provisions below:

- reporting to the Attorney-General under s 49 after the warrant ceased to be in force and keeping each report under s 51(j)
- reporting annually to the Attorney-General under s 50.

7. Was protected information properly dealt with by the agency?

Under this criterion, we assess the AFP's compliance with the provisions below:

- dealing with protected information under ss 46(1)(a) and 52(1)(e) to (h)
- destroying and retaining protected information under ss 46(1)(b) and 52(1)(j).