



NSW Ombudsman

Report under Section 49(1) of the
Surveillance Devices Act 2007

for the 6 months ending 31 December 2009

March 2010



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Our logo has two visual graphic elements; the 'blurry square' and the 'magnifying glass' which represents our objectives. As we look at the facts with a magnifying glass, the blurry square becomes sharply defined, and a new colour of clarity is created.

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NSW Ombudsman

31 March 2010

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The Honourable John Hatzistergos MLC
NSW Attorney-General
Level 33, Governor Macquarie Tower
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Dear Attorney-General

Report under section 49(1) of the *Surveillance Devices Act 2007* for the six months ending 31 December 2009

The *Surveillance Devices Act 2007* requires the Ombudsman to inspect the records of each law enforcement agency authorised to use surveillance devices to determine the extent of compliance with the Act by the agency and the law enforcement officers of the agency.

The Act also requires me to report to you at six monthly intervals on the results of these inspections.

I am pleased to present you with the third report under section 49(1) of the *Surveillance Devices Act 2007* which covers our inspection of records relating to surveillance devices for the six months up to 31 December 2009.

Pursuant to section 49(2) of the Act, you are required to lay the report (or cause it to be laid) before both Houses of Parliament within 15 days.

Once tabled, it is my intention to publish the report on the Ombudsman's website www.ombo.nsw.gov.au

I would therefore appreciate your earliest advice as to the tabling of the report.

Yours sincerely

Bruce Barbour
Ombudsman

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1. Introduction

The *Surveillance Devices Act 2007 (NSW)* (SD Act) began operation on 1 August 2008 and repealed the *Listening Devices Act 1984 (NSW)* (LD Act). The SD Act allows for the use of surveillance devices to investigate crime and to enable evidence to be obtained of the commission of such crime or the identity or location of the offender(s). The SD Act covers the installation, use and maintenance of listening, optical, tracking, and data surveillance devices and restricts the communication and publication of private conversations, surveillance activities, and information obtained from their use.

The Act also establishes an accountability regime. Reporting and record keeping obligations are imposed on the law enforcement agencies eligible to use surveillance devices as are provisions for the safe keeping and destruction of information obtained from the use of surveillance devices.

The Act also requires the NSW Ombudsman to conduct inspections of the surveillance device records of law enforcement agencies to determine the extent of compliance by law enforcement agencies and law enforcement officers with the Act.

Four law enforcement agencies are currently the subject of these inspections:

- NSW Police Force
- NSW Crime Commission
- The Police Integrity Commission
- The Independent Commission Against Corruption.¹

The Ombudsman is required by sections 49(1) of the Act to report to the Minister at 6-monthly intervals on the result of inspections. The Minister is required by section 49(2) to lay the report or cause the report to be laid before both Houses of Parliament within 15 days after receiving the report.

This report is for the period 1 July 2009 until 31 December 2009.

Scope of the Inspection

The aim of the legislation is to enable law enforcement agencies to utilise surveillance devices to assist in the successful investigation and prosecution of certain offences. Such use is, of course, subject to meeting certain procedural and record keeping requirements. The inspection and monitoring by the Ombudsman aims to foster agencies compliance with the Act and to provide public accountability through regular reporting to the Minister and Parliament. The approach taken in the inspection conducted by the Ombudsman was to inspect the records of each agency for compliance with the record and document keeping requirements while at the same time considering such other aspects of compliance as it was possible to determine from those records and from questions asked of relevant law enforcement officers.

There are three main areas of compliance that are the focus of the inspection process carried out under the Act. Part 3 of the Act deals with warrants and emergency authorisations. Part 5 of the Act deals with compliance and monitoring and includes dealing with records obtained by use of surveillance devices, the use, communication or publication of protected information and reporting and record keeping. Part 6 requires the particulars of warrants sought under Part 3 to be notified to the Attorney-General and requires the person to whom a warrant was issued to inform the subject of the surveillance if directed by the eligible Judge.

Surveillance device warrants are issued by eligible Judges of the Supreme Court or eligible Magistrates in the case of a surveillance device warrant that authorises the use of a tracking device only or a retrieval warrant in respect of a tracking device. The Act requires that applications must include certain information and generally must be accompanied by an affidavit setting out the grounds on which the warrant is sought. While the inspection of the records includes an examination of the matters required to be specified it does not examine the sufficiency or otherwise of the information in support of the application. That is a matter for the relevant judicial officer to determine.

¹ The Act also empowers the use of surveillance devices by the Australian Crime Commission but the inspection and reporting of that agency's use of surveillance devices is carried out by the Commonwealth Ombudsman.

Inspection Overview

During the period 1 July 2009 to 31 December 2009 a total 394 surveillance device warrants were granted across the four NSW law enforcement agencies.

Table 1: Surveillance device warrants issued 2009

| | 01/01/09 – 30/06/09 | 01/07/09 – 31/12/09 |
|---|---------------------|---------------------|
| NSW Police Force | 259 | 291 |
| NSW Crime Commission | 53 | 92 |
| Police Integrity Commission | 0 | 3 |
| Independent Commission Against Corruption | 7 | 8 |
| Total | 319 | 394 |

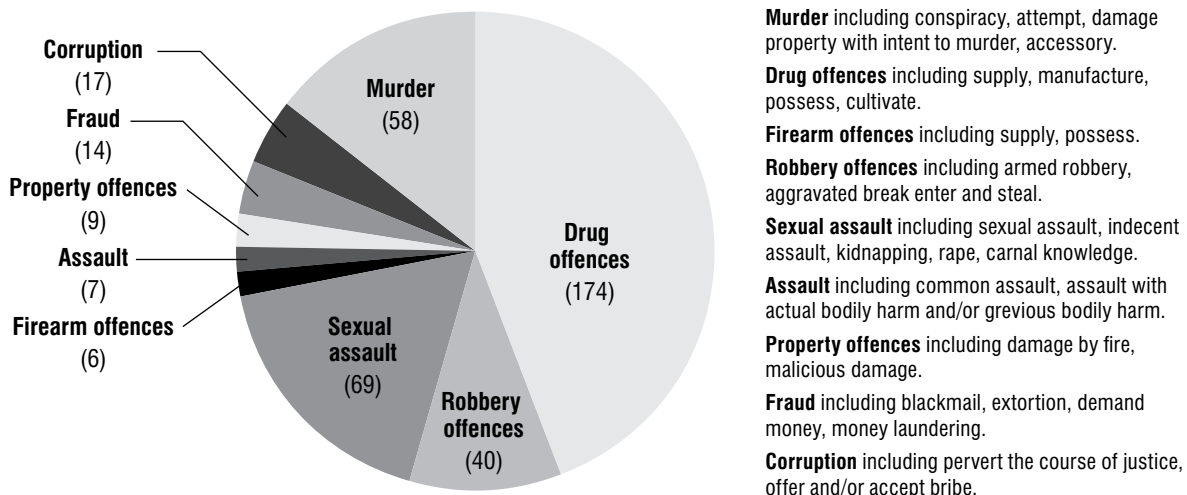
The 394 warrants authorised the installation of 2,140 different surveillance devices. Across all four law enforcement agencies the following devices were authorised during the relevant period.

Table 2: Surveillance devices authorised 01/7/09 – 31/12/09

| | Listening device | Optical device | Tracking device | Data surveillance device |
|---|------------------|----------------|-----------------|--------------------------|
| NSW Police Force | 745 | 321 | 225 | 22 |
| NSW Crime Commission | 409 | 188 | 173 | 18 |
| Police Integrity Commission | 2 | 2 | 1 | 0 |
| Independent Commission Against Corruption | 21 | 8 | 5 | 0 |
| Total | 1,177 | 519 | 404 | 40 |

The criminal offences targeted during these operations are detailed in figure 1.

Figure 1. Criminal offences targeted by use of surveillance devices 01/07/09 – 31/12/09



2. NSW Police Force

During the reporting period 346 surveillance device files were inspected, 291 warrants were issued during this period one of which was a retrieval warrant and three applications were refused, no emergency authorisations were granted and 52 applications were cancelled or not yet proceeded with as at 31 December 2009.

We were satisfied that the NSW Police Force had generally complied with its obligations under the Act. The exceptions are detailed below.

Compliance with obligations relating to the keeping of documents connected with warrants and emergency authorisations

Warrants

Section 17 Applications for a surveillance device warrant

All 294 applications were made to eligible Judges. No applications were made to eligible Magistrates in the case of applications for a surveillance device authorising the use of a tracking device only.

Section 18 Remote application

There were nine remote applications made.

All applications were notified to the Attorney-General and affidavits were provided to the issuing judicial officer within the legislative time frame.

Section 22 Extension and variation of surveillance device warrant

15 warrants were varied and several warrants were varied multiple times.

Section 23 Revocation of surveillance device warrant

There were 51 revocations during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

Section 24(2)(a) requires that a surveillance device which is no longer necessary for the purpose of enabling evidence to be obtained is discontinued as soon as practicable. NSW Police Force utilise a Notification of Discontinuation form to record such action. Section 24(2)(b) further requires that following a discontinuation an application be made for the revocation of the warrant under section 23.

While the Act requires that a surveillance device be discontinued as soon as practicable after the chief officer of the law enforcement agency is satisfied that the use of the device is no longer necessary, there is no time limit required for the making of an application for revocation of the warrant. As a matter of administrative practicality, I have taken the view that where a warrant expires within 5 days of the formal discontinuance of the use of a surveillance device, I will not consider the failure to make application for a revocation to be unreasonable. Our inspections identified the following warrants as lacking a formal notification of discontinuance:

SD09/496, SD09/498, SD09/499 and SD09/570.

In all other cases inspected where there was a revocation, there was a notice of discontinuance of the use of the surveillance device on file.

Section 25 Application for retrieval warrant

One application was made for a retrieval warrant and the warrant was granted.

Section 26 Remote application

No remote applications were made for retrieval warrants.

Section 30 Revocation of retrieval warrant

No retrieval warrants were revoked.

Emergency authorisations

Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage

There was no emergency use of surveillance device warrants under this section.

Section 32 Emergency authorisation – continued use of surveillance devices in participating jurisdiction

There was no authorisation of surveillance devices for use in emergency situations in participating jurisdictions under this section.

Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

There was no case requiring application for approval after use of a surveillance device under this section.

Compliance and monitoring

Section 41 Dealing with records obtained by use of surveillance devices

The NSW Police Force has established guidelines for dealing with protected information.

There were no destructions carried out of protected information at the time of these inspections.

Of the 291 warrants issued during this reporting period, 136 have been reported on. In relation to 56 warrants information was obtained and the investigations are continuing. In relation to 38 warrants charges have been laid. In relation to 20 warrants the surveillance devices were deployed but no relevant information was obtained and on the remaining 21 warrants no devices were deployed due to operational reasons. One warrant was a retrieval warrant and the device was retrieved within the time specified.

Of the 124 warrants issued during the previous reporting period but reported on in this period, in relation to 38 warrants information was obtained and the investigations are continuing. In relation to 32 warrants charges have been laid. In relation to 32 warrants the surveillance devices were deployed but no relevant information was obtained and on the remaining 22 warrants no devices were deployed due to operational reasons.

Section 44 Reports to eligible Judge or eligible Magistrate and Attorney-General

Section 44 of the *Surveillance Devices Act 2007* requires a report to be furnished to the eligible Judge, or eligible Magistrate, as the case may be, and to the Attorney-General. Apart from the warrant files mentioned below, there were copies of the relevant reports required on all files.

The following warrant files contained no reports to the eligible Judge and the Attorney-General within a specified number of days following the expiry of the warrant as required:

| | | |
|----------|----------|----------|
| SD09/386 | SD09/399 | SD09/407 |
| SD09/387 | SD09/400 | SD09/410 |
| SD09/392 | SD09/401 | SD09/411 |
| SD09/393 | SD09/403 | SD09/441 |
| SD09/396 | SD09/406 | |

No other reports were delayed.

Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars. The register contained the required particulars.

Evidentiary certificates

Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were issued during this reporting period.

Notifications to the Attorney-General

Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney-General

The registered source number in the section 51 notification for warrant SD09/625 was slightly different to the source number listed in the warrant, this appeared to be a typographical error.

In the section 51 notice in relation to SD09/632 paragraph (d) did not specify the place where the surveillance device was intended to be used.

Section 52 Requirement to inform subject of surveillance

No orders were made requiring the subject of the surveillance to be informed.

Concluding comments

For the reporting period, compliance by the NSW Police Force with the Surveillance Devices Act was found to be of a high standard.

The timely reporting of the results of the use of surveillance device appears to be a problem which still needs to be addressed but this has improved greatly with a dedicated person in Special Application section now tasked with ensuring compliance in this regard.

Recommendation

Nil recommendations.

Action on recommendations from previous report

NSWPF/5. That steps are taken to improve the database used to record details of warrants and applications. This is important since the database is used as the register of warrants and emergency authorisations required by section 47 of the Act. This would assist greatly in ensuring that reports to the eligible Judge and Attorney-General are provided within the time specified in the warrant.

Improvements have been made to the database and these improvements are continuing. My staff have been consulted in relation to further requirements to be included in the database.

3. NSW Crime Commission

During the reporting period 92 surveillance device files were inspected. One application was refused and 91 warrants issued during the reporting period.

We were satisfied that the NSW Crime Commission had generally complied with its obligations under the Act.

Compliance with obligations relating to the keeping documents connected with warrants and emergency authorisations

Warrants

Section 17 Applications for a surveillance device warrant

All 92 applications were made to eligible Judges. No applications were made to eligible Magistrates in the case of applications for a surveillance device authorising the use of a tracking device only.

Section 18 Remote application

There were no remote applications made.

Section 22 Extension and variation of surveillance device warrant

Six warrants were varied or extended.

Section 23 Revocation of surveillance device warrant

There were nine revocations during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

Section 24 of the *Surveillance Devices Act 2007* ('the Act') requires the use of a surveillance device to be discontinued as soon as practicable after the chief officer of the law enforcement agency is satisfied that the use of the device is no longer necessary.

All warrants which had been used were discontinued in a timely manner. Some warrants were never used and were subsequently revoked.

Section 25 Application for retrieval warrant

No applications were made for retrieval warrants.

Section 26 Remote application

No remote applications were made for retrieval warrants.

Section 30 Revocation of retrieval warrant

No retrieval warrants were issued and consequently none were revoked.

Emergency authorisations

Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage

There were no emergency uses of surveillance devices under this section.

Section 32 Emergency authorisation – continued use of surveillance devices in participating jurisdiction

There was no authorisation of surveillance devices for use in emergency situations in participating jurisdictions under this section.

Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

There was no case requiring application for approval after use of a surveillance device under this section.

Compliance and monitoring

Section 41 Dealing with records obtained by use of surveillance devices

The Commission has established guidelines for dealing with protected information.

There were no destructions carried out of protected information at the time of these inspections.

Of the 91 warrants issued during this reporting period 12 have been reported on. Two of those operations resulted in information being obtained under the warrants and investigations are ongoing. One resulted in charges being laid. In relation to the seven operations no surveillance devices were installed due to operational reasons and on the other two operations devices were installed but no relevant information were obtained.

There were 49 warrants which were issued in the previous reporting period but reported on in this period. In relation to 15 warrants information was obtained and investigations are ongoing. 11 warrants resulted in charges being laid. In relation to four operations no surveillance devices were installed due to operational reasons and on the other 19 operations surveillance devices were installed but no relevant information was obtained.

Section 44 Reports to eligible Judge or eligible Magistrate and Attorney-General

All reports were provided to the eligible Judge and Attorney-General within the time specified in the warrant and the reports contained all the required information.

Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars.

The register of warrants contained all the particulars required and was accurate.

Evidentiary certificates

Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were issued during this reporting period.

Notifications to the Attorney-General

Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney-General

Section 51 notifications were provided in relation to all warrant applications.

Section 52 Requirement to inform subject of surveillance

No orders were made requiring the subject of the surveillance to be informed.

Concluding comments

For the reporting period the overall compliance by NSW Crime Commission with the Surveillance Devices Act was found to be of a very high standard.

Recommendations

No recommendations

4. Independent Commission Against Corruption

During the reporting period eight surveillance device files were inspected and all warrants were granted.

We were satisfied that the Independent Commission Against Corruption had generally complied with its obligations under the Act.

Compliance with obligations relating to the keeping documents connected with warrants and emergency authorisations

Warrants

Section 17 Applications for a surveillance device warrant

All eight applications were made to eligible Judges. No applications were made to eligible Magistrates in the case of applications for a surveillance device authorising the use of a tracking device only.

Section 18 Remote application

There were no remote applications made.

Section 22 Extension and variation of surveillance device warrant

There were no variations or extensions to the warrants issued.

Section 23 Revocation of surveillance device warrant

There were four revocations during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

No surveillance devices were discontinued.

Section 25 Application for retrieval warrant

No applications were made for retrieval warrants.

Section 26 Remote application

No remote applications were made for retrieval warrants.

Section 30 Revocation of retrieval warrant

No retrieval warrants were issued and consequently none were revoked.

Emergency authorisations

Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage

There were no emergency uses of surveillance devices.

Section 32 Emergency authorisation – continued use of surveillance devices in participating jurisdiction

There was no authorisation of surveillance devices for use in emergency situations in participating jurisdictions under this section.

Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

There was no case requiring application for approval after use of a surveillance device under this section.

Compliance and monitoring

Section 41 Dealing with records obtained by use of surveillance devices

The Commissioner has established guidelines for dealing with protected information.

There were no destructions carried out of protected information at the time of these inspections.

All 8 warrants issued during this reporting period have been reported on. Six warrants resulted in information being obtained and that information will be used for further investigations and in relation to the two remaining warrants no surveillance devices were installed due to operational reasons.

Section 44 Reports to eligible Judge or eligible Magistrate and Attorney-General

All reports were provided to the eligible Judge and Attorney-General within the required time frame and all reports contained the required information.

Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars.

The register of warrants contained all the particulars required and was accurate.

Evidentiary certificates

Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were issued during this reporting period.

Notifications to the Attorney-General

Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney-General

All notifications were provided to the Attorney-General in relation to each application and contained all the required particulars.

Section 52 Requirement to inform subject of surveillance

No orders were made requiring the subject of the surveillance to be informed.

Concluding comments

For the reporting period the overall compliance by the Independent Commission Against Corruption with the Surveillance Devices Act was found to be of a high standard.

Recommendations

No recommendations

5. Police Integrity Commission

During the reporting period three new surveillance device warrants were applied for and issued.

We were satisfied that the Police Integrity Commission had generally complied with its obligations under the Act.

Compliance with obligations relating to the keeping documents connected with warrants and emergency authorisations

Warrants

Section 17 Applications for a surveillance device warrant

The three applications were made to eligible judges.

Section 18 Remote application

There were no remote applications made.

Section 22 Extension and variation of surveillance device warrant

All three warrants were extended and none were varied.

Section 23 Revocation of surveillance device warrant

There were no revocations during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

There were no situations where the use of any surveillance device was discontinued during the reporting period and therefore no requirement to seek revocations of any warrants.

Section 25 Application for retrieval warrant

No applications were made for retrieval warrants.

Section 26 Remote application

No remote applications were made for retrieval warrants.

Section 30 Revocation of retrieval warrant

No retrieval warrants were issued and consequently none were revoked.

Emergency authorisations

Section 31 Emergency use of surveillance devices – threat of serious personal violence or substantial property damage

There were no emergency uses of surveillance devices.

Section 32 Emergency authorisation – continued use of surveillance devices in participating jurisdiction

There was no authorisation of surveillance devices for use in emergency situations in participating jurisdictions under this section.

Section 33 Application for approval after use of surveillance device without warrant or under emergency authorisation

There was no case requiring application for approval after use of a surveillance device under this section.

Compliance and monitoring

Section 41 Dealing with records obtained by use of surveillance devices

The Commissioner has established guidelines for dealing with protected information.

There were no destructions carried out of protected information at the time of these inspections.

As the three warrants issued to the Commission have been extended the results are not yet known and will be reported on in the next report.

Section 44 Reports to eligible Judge or eligible Magistrate and Attorney-General

All reports were provided to the eligible Judge and Attorney-General within the required time frame and all reports contained the required information.

Section 47 Register of warrants and emergency authorisations

The Act requires the chief officer of the law enforcement agency to keep a register of warrants and emergency authorisations. The register is required to specify certain particulars.

The register of warrants contained all the particulars required and was accurate.

Evidentiary certificates

Section 50 Provision for the issue of evidentiary certificates

No evidentiary certificates were issued during this reporting period.

Notifications to the Attorney-General

Section 51 Particulars of warrants sought under Part 3 to be notified to the Attorney-General

There were no fresh applications during the reporting period.

Section 52 Requirement to inform subject of surveillance

No orders were made requiring the subject of the surveillance to be informed.

Concluding comments

For the reporting period the overall compliance of the Police Integrity Commission with the Surveillance Devices Act was found to be of a high standard.

Recommendations

No Recommendations.

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