

**VICTORIAN
INSPECTORATE**

Inspection Report:

Surveillance Devices Act 1999 (Vic)

Report by the Victorian Inspectorate on surveillance device records inspected during the period 1 January 2022 to 30 June 2022

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Overview

This report presents the results of inspections conducted by the Victorian Inspectorate (the VI) from 1 January to 30 June 2022 for records belonging to Victorian agencies authorised to use surveillance devices. The following seven agencies may exercise surveillance device powers:

- Department of Environment, Land, Water and Planning (DELWP)¹
- Environment Protection Authority (EPA)
- Game Management Authority (GMA)
- Independent Broad-based Anti-corruption Commission (IBAC)
- Office of the Special Investigator (OSI)
- Victorian Fisheries Authority (VFA)
- Victoria Police

The *Surveillance Devices Act 1999* (Vic) (the SD Act) provides the legislative framework for these agencies to use surveillance devices to investigate, or obtain evidence of the commission of, an offence that has been, is being, is about to be, or is likely to be, committed. Law enforcement officers of these agencies can apply to the Supreme Court for a surveillance device warrant authorising use of the following types of devices: data, listening, optical, and tracking. For tracking devices only, an application may be made to the Magistrates' Court. Victoria's Public Interest Monitor (PIM) is entitled to make submissions on warrant applications. In addition to court-issued warrants, senior officers of Victoria Police, IBAC, and the OSI can, in certain emergency situations, authorise the use of surveillance devices.

The role of the VI is established by the SD Act, and it ensures independent oversight of agencies' compliance with the SD Act. The VI is required to inspect, from time to time, the records of each agency and report on the results of its inspections at six-monthly intervals to each House of Parliament as well as the Attorney-General. The use of surveillance devices by Victorian government agencies is highly intrusive, and therefore the VI's role is designed to independently assess the extent to which agency actions comply with the SD Act.

This report gives the inspection results for warrants that ceased in the six-month period ending 31 December 2021 ("the reporting period"), as well as destruction activity undertaken and evidentiary certificates issued during the same period. The VI inspected 100% of eligible records made available at the inspections.

During the reporting period, the SD Act was amended to also authorise the EPA (from 1 July 2021), and the OSI (from 1 December 2021) to use surveillance devices. The VI received written confirmation from each agency that it has yet to exercise its new powers under the SD Act. As a result, the VI has not inspected any records at either agency.

¹ As a result of machinery of government changes that took effect on 1 January 2023, the relevant agency is now known as the Department of Energy, Environment and Climate Action.

The VI notes in this report the cooperative and transparent engagement by the officers of each agency whose records were inspected. While this report identifies some errors, no significant compliance issues were identified. The VI has not made any recommendations as a result of its inspections of surveillance device records for the reporting period.

Introduction

The SD Act imposes strict controls on the use of surveillance devices by Victorian law enforcement agencies, including the use and communication of information obtained by the use of such devices. It also imposes reporting obligations, requirements for the secure storage and destruction of records and reports containing information obtained by the use of surveillance devices.

OUR ROLE

The VI performs an independent oversight function to determine the extent of compliance achieved by law enforcement agencies that have exercised their powers under the SD Act.

The VI is required to inspect the records of these agencies from time to time to determine the extent of compliance with the SD Act. In order to fulfil our requirement to report to Parliament at six-monthly intervals, the VI conducts biannual inspections of:

- surveillance device warrants;
- emergency authorisations; and
- retrieval warrants;

which ceased during the preceding 6-month period.

HOW WE ASSESS COMPLIANCE

The VI inspects hard-copy documents and electronic registers with the primary purpose of ensuring that records connected with the issue of surveillance device warrants, and other records connected with the use of devices, are being properly kept. The VI also confirms that each law enforcement agency has met its prescribed reporting obligations. We assess compliance based on the records made available to us at the time of inspection, our discussions with the agency, as well as the action they take in response to any issues we have raised.

HOW WE REPORT ON COMPLIANCE

To ensure procedural fairness, each agency is given an opportunity to comment on the VI's findings from our inspections and to furnish additional records that might assist our assessment. Following this process, the inspection results are considered finalised.

The report provides detail where there is a finding of non-compliance. The VI may, at its discretion, not report on administrative issues (such as typographical or transposition errors) or instances of non-compliance where the consequences are negligible.

The following sections of this report provide the results of the VI's inspection of surveillance records during the period 1 January to 30 June 2022. Inspection results are separately reported for each Victorian law enforcement agency with the authority to exercise powers under the SD Act.

Department of Environment Land Water and Planning²

DELWP's Major Operations and Investigations Unit administers surveillance device warrants issued to the agency.

There were no ceased warrants or other surveillance device records at DELWP for reporting period and as a result the VI did not conduct an inspection or inspect any DELWP records on this occasion.

² Since 1 January 2023, this agency has become the Department of Energy, Environment and Climate Action.

Environment Protection Authority

Since it became authorised to use surveillance devices on 1 July 2021, the EPA has not yet made an application under the SD Act. Therefore, the VI did not conduct an inspection or inspect any records at the EPA.

Game Management Authority

The GMA has yet to make an application under the SD Act, and as a result the VI did not conduct an inspection or inspect any records at the GMA.

Independent Broad-based Anti-corruption Commission

IBAC's Legal Compliance Unit administers surveillance device warrants issued to IBAC. The VI inspected one surveillance device file associated with a retrieval warrant at IBAC on 3 May 2022, which was the only warrant issued to IBAC under the SD Act that ceased within the reporting period. IBAC executed this warrant to retrieve a device installed under an earlier surveillance device warrant that was previously inspected.

FINDINGS - WARRANTS

Were applications for warrants (including extensions and variations) properly made?

There were no surveillance warrants that ceased, during the reporting period and IBAC did not make an application for a surveillance device warrant that was refused.

The VI determined that the one application made for a retrieval warrant by IBAC complied with the requirements of section 20C of the SD Act as the following requirements were met:

- the applicant was a law enforcement officer;
- approval was provided by a senior officer;
- a sworn affidavit was provided in support of the application;
- the PIM was notified of the application; and
- the application was made to a Supreme Court judge or magistrate, as appropriate.

IBAC did not apply to extend or vary a warrant under section 20 of the SD Act during the period.

Were warrants, including retrieval warrants, and emergency authorisations in the proper form, and were revocations properly made?

The one issued retrieval warrant complied with section 20F of the SD Act by specifying the following:

- the name of the applicant and the date the warrant was issued;
- the kind of surveillance device authorised for retrieval and the premises or object from which it is to be retrieved;
- the duration of the warrant (not more than 90 days);
- the name of the law enforcement officer primarily responsible for executing the warrant;
- any conditions for entry of premises;
- when the report under section 30K of the SD Act must be made; and
- the name and signature of the issuing authority (magistrate or judge).

IBAC did not make an application for an emergency authorisation for the use of a surveillance device or revoke a warrant via a written instrument signed by a delegate of the IBAC Commissioner.

FINDINGS - RECORDS

Did IBAC keep all records connected with warrants and emergency authorisations?

IBAC is required to keep records connected with warrants and emergency authorisations in accordance with section 30M of the SD Act, including:

- each warrant issued;
- each notice given under section 20A(3) for the revocation of a warrant;
- each emergency authorisation and application made for such;
- a copy of each warrant application and any application for its extension, variation, or revocation;
- a copy of each application for approval to exercise powers under an emergency authorisation;
- a copy of each report made under section 30K of the SD Act to a magistrate or judge; and
- a copy of each evidentiary certificate issued under section 36 of the SD Act.

IBAC complied with these record-keeping requirements with respect to the one retrieval warrant for the relevant period. The VI was informed that IBAC did not make any evidentiary certificates during the reporting period.

Did IBAC keep all other necessary records?

IBAC is also required to keep other records in accordance with section 30N of the SD Act, including details of:

- each use made of information obtained by the use of a surveillance device;
- each communication of information obtained by the use of a surveillance device to a person other than an IBAC law enforcement officer;
- each occasion information obtained by the use of a surveillance device was given in evidence in a relevant proceeding; and
- the destruction of records or reports obtained by the use of surveillance devices.

During the reporting period, there were no ceased surveillance device warrants and IBAC did not destroy any records or reports. The VI however found that IBAC kept a record confirming the application for the retrieval warrant was made with the approval of a senior officer.

Did IBAC maintain an accurate register of warrants and emergency authorisations?

The VI found that IBAC kept a register of warrants, as required by section 30O of the SD Act.

The register specified, with respect to the one retrieval warrant file inspected, the following particulars:

- the date the warrant was issued;
- the name of the magistrate or judge who issued the warrant, as well as the name of the law enforcement officer primarily responsible for its execution;

- the offence in relation to which the warrant was issued;
- the period during which the warrant was in force; and
- any variation or extension of the warrant.

FINDINGS - REPORTS

Were reports to the magistrate or judge properly made?

Under section 30K of the SD Act, IBAC is required within the time specified in the warrant to make a report to the magistrate or judge who issued the warrant. In the case of a retrieval warrant, the report must give the following details:

- any premises entered, anything opened and any object removed and replaced under the warrant;
- whether the surveillance device was retrieved under the warrant;
- if the device was not retrieved, state the reason why;
- compliance with any warrant conditions, as applicable; and
- if the warrant was revoked by the chief officer under section 20H(3) of the SD Act, the reasons for the revocation and whether the PIM was notified.

The report made by IBAC for the one retrieval within the reporting period was made within the requisite timeframe and complied with these requirements.

FINDINGS - TRANSPARENCY AND COOPERATION

The VI considers an agency's transparency, cooperation during inspection, and responsiveness to suggestions and issues to be a measure of its compliance culture.

Did IBAC self-disclose compliance issues?

IBAC did not make any self-disclosures at the inspection.

The VI previously reported that IBAC self-disclosed three instances where an assistance order made under section 22 of the SD Act was approved by a judge but was not in the proper form—that is, not endorsed on the face of the relevant surveillance device warrant in accordance with section 22(4)(a) of the SD Act. The VI further reported that IBAC advised it would amend its surveillance device warrant procedures to ensure any future assistance order will be made in the correct form.

At the time of the inspection conducted in May 2022, IBAC had not yet updated its procedures. The VI was informed by IBAC that it is in the process of changing the case management system used for the administration of records, including surveillance device records, and procedures will be updated

once this change has occurred. The VI will follow-up on the progress of the procedure updates at the next scheduled inspection.

Were issues identified at previous inspections addressed?

There were no historical issues to be addressed on this occasion as no issues were identified during the VI's previous inspection of IBAC surveillance device records.

OTHER MATTERS

IBAC informed the VI that it will now keep an electronic copy of inspection records, including issued warrants, unless the original signed document is available. This process change recognises the move towards the electronic delivery of documents prompted by COVID-19 workplace restrictions.

Office of the Special Investigator

The OSI was authorised to use surveillance devices under the SD Act on 1 December 2021. It has not used these powers, and as a result the VI has not conducted an inspection or inspected any records at the OSI.

Victorian Fisheries Authority

The VFA did not have any relevant records associated with warrants that ceased within the reporting period. The VI however re-inspected one surveillance device record at the VFA on 23 March 2022.

At its previous inspection of VFA records in November 2021, the VI found the use and communication register kept by the VFA for one surveillance device warrant omitted a use of information obtained by the use of a device. The VI re-inspected this file and confirmed the VFA had corrected its use and communications register to show information was used in a decision to make two applications for a search warrant (sections 30N(c) and (d) of the SD Act).

The VI has previously reported the VFA is developing Standard Operating Procedures (SOPs) to be made available to its officers with responsibilities under the SD Act. The VFA provided no update at the inspection for progress on the SOPs. The VI will continue to engage with the VFA on the development of these procedures at future inspections.

Victoria Police

There are two units within Victoria Police that administer surveillance device warrants and emergency authorisations:

- Special Projects Unit (SPU), the major user of surveillance device warrants; and
- Technical Projects Unit (TPU), within Professional Standards Command.

In addition, the Technical Surveillance Unit (TSU) within Victoria Police is responsible for the installation, maintenance, and retrieval of surveillance devices under the authority of warrants or emergency authorisations. Records held by the TSU in relation to these matters are inspected annually and cross-checked against records held by the SPU and TPU. The VI inspected all available TSU records on 2 June 2022 and cross-checked its findings against records held by the SPU and TPU.

The VI inspected 51 surveillance device files administered by Victoria Police's SPU and TPU. This represents all surveillance device records made available for inspection for the reporting period.

Type	Number
Surveillance device warrant	44
Surveillance device warrant extension	3
Retrieval warrant	2
Emergency authorisation	2

For the total number of warrants granted to Victoria Police for the period, nine were not executed (seven surveillance device warrants and two retrieval warrants)—this represents 19.5% of all issued warrants. It is noted that Victoria Police revoked all warrants that were not executed.

A warrant may not be executed for a number of reasons. Generally, this is due to the operation concluding before there was an opportunity to install a surveillance device.

Five surveillance device files at the TPU were inspected on 28 April 2022, and 46 files at the SPU were inspected from 17-19 May 2022.

FINDINGS - WARRANTS

Were applications for warrants (including extensions and variations) properly made?

The VI found that all applications made for a surveillance device warrant complied with the requirements of section 15 of the SD Act.

Specifically, the VI found the following requirements were met:

- the applicant was a law enforcement officer;
- approval was provided by an authorised police officer;
- the applicant's name as well as the nature and duration of the warrant were specified, including the type of device sought;
- a sworn affidavit was provided in support;
- the PIM was notified of the application; and
- the application was made to a Supreme Court judge or magistrate, as appropriate.

Victoria Police also made two applications for a retrieval warrant that complied with the following requirements under section 20C of the SD Act:

- the applicant was a law enforcement officer;
- approval was provided by an authorised police officer;
- a sworn affidavit was provided in support;
- the PIM was notified of the application; and
- the application was made to a Supreme Court judge or magistrate, as appropriate.

In addition to meeting these requirements, Victoria Police made a total of three applications to extend a warrant – each was made to the relevant judge as required by section 20 of the SD Act.

Were warrants, including retrieval warrants, and emergency authorisations in the proper form and revocations properly made?

Issued surveillance device warrants must specify the following matters in accordance with section 18 of the SD Act:

- the name of the applicant and alleged offence;
- the date the warrant was issued, and the kind of surveillance device authorised;
- the premises, object or class of object, or the name of the person (if known) in respect of which the device will be used (as applicable);
- the duration of the warrant (not more than 90 days);
- the name of the law enforcement officer primarily responsible for executing the warrant;
- any conditions for the installation or use of the device;
- when the report under section 30K of the SD Act must be made; and
- the name and signature of the issuing authority (magistrate or judge).

The 44 surveillance device warrants issued to Victoria Police complied with these requirements.

The two issued retrieval warrants complied with section 20F of the SD Act by specifying the following:

- the name of the applicant and the date the warrant was issued;
- the kind of surveillance device authorised for retrieval and the premises or object from which it is to be retrieved;
- the duration of the warrant (not more than 90 days);
- the name of the law enforcement officer primarily responsible for executing the warrant;
- any conditions for entry of premises;
- when the report under section 30K of the SD Act must be made; and

- the name and signature of the issuing authority (magistrate or judge).

Two emergency authorisations were given by a senior officer at Victoria Police. The application for approval of the exercise of powers under the emergency authorisation was made to a Supreme Court judge within two business days and was supported by a sworn affidavit. It specified the following in accordance with section 28 of the SD Act:

- the name of the applicant; and
- the kind of surveillance device to be approved.

For the inspected warrants, Victoria Police revoked a warrant on 39 occasions via written instruments signed by a delegate of the Chief Commissioner of Police, in accordance with section 20A of the SD Act. Victoria Police revoked warrants in cases where it decided the use of a surveillance device was no longer necessary for the purpose of enabling evidence to be obtained of the commission of the offence or the identity or location of the offender. For each revoked warrant where a surveillance device had been installed, Victoria Police first discontinued the use of the device pursuant to section 20B of the SD Act.

FINDINGS - RECORDS

Did Victoria Police keep all records connected with warrants and emergency authorisations?

Victoria Police is required to keep records connected with surveillance device warrants in accordance with section 30M of the SD Act, including:

- each warrant issued;
- each notice given under section 20A(3) for the revocation of a warrant;
- each emergency authorisation, and the application made for such;
- a copy of each warrant application, and any application for its extension, variation, or revocation;
- a copy of each application for approval to exercise powers under an emergency authorisation;
- a copy of each report made under section 30K of the SD Act to a magistrate or judge; and
- a copy of each evidentiary certificate issued under section 36 of the SD Act.

Victoria Police complied with these record-keeping requirements. Two evidentiary certificates were inspected for the period.

Did Victoria Police keep all other necessary records?

Victoria Police is also required to keep other records in accordance with section 30N of the SD Act, including details of:

- each use made of information obtained by the use of a surveillance device;
- each communication of information obtained by the use of a surveillance device to a person other than a Victoria Police law enforcement officer;

- each occasion information obtained by the use of a surveillance device was given in evidence in a relevant proceeding; and
- the destruction of records or reports obtained by the use of surveillance devices.

The VI found that Victoria Police complied with these requirements except in one instance where the register omitted 'covert purposes' as a use of the information obtained. This error—subsequently corrected—was a result of the SPU having not received a memo made by the TSU that reports a data surveillance device was activated under the warrant (see Finding 1 on pages 20 and 21).

Victoria Police kept details on the destruction of records and reports related to 24 surveillance device warrants in accordance with section 30N(f) of the SD Act.

Did Victoria Police maintain an accurate register of warrants and emergency authorisations?

The VI found that Victoria Police kept an accurate register of warrants, as required by section 30O of the SD Act.

The register specified for each warrant file inspected the following particulars:

- the date the warrant was issued;
- the name of magistrate or judge who issued the warrant, as well as the name of the law enforcement officer primarily responsible for its execution;
- the offence in relation to which the warrant was issued;
- the period during which the warrant was in force; and
- any variation or extension of the warrant.

With respect to the two emergency authorisations, the register specified the following matters:

- the date the emergency authorisation was given;
- the name of the senior officer who gave the authorisation, as well as the law enforcement officer to whom it was given;
- the offence connected to the authorisation; and
- the date the application was made for approval of powers exercised under the authorisation.

FINDINGS - REPORTS

Were reports to the magistrate or judge properly made?

Under section 30K of the SD Act, Victoria Police is required within the time specified in the warrant to make a report to the magistrate or judge who issued the warrant.

With respect to a surveillance device warrant, the report must state whether the warrant was executed and, if it was, give the following details for its use:

- the name of each person involved in the execution of the warrant;

- the kind of surveillance device used;
- the period the device was used;
- the name of any person whose activities or conversations were captured by the use of the device or whose geographic location was determined by the use of a tracking device, if known;
- the premises for installation of the device or the location for its use, as applicable;
- the object in or on which the device was installed or the premises at which the object was located when the device was installed, as applicable;
- the benefit to the investigation of the use of the device as well as the general use made or to be made of the information derived from its use;
- compliance with any warrant conditions, as applicable;
- if the warrant was extended or varied, the number of such occurrences and the reasons for them; and
- if the warrant was revoked by the chief officer under section 20A(2), the reason the device was no longer required and whether the PIM was notified of the revocation.

In the case of a retrieval warrant, the report must give the following details:

- any premises entered, anything opened and any object removed and replaced under the warrant;
- whether the surveillance device was retrieved under the warrant;
- if the device was not retrieved, state the reason why;
- compliance with any warrant conditions, as applicable; and
- if the warrant was revoked by the chief officer under section 20H(3) of the SD Act, the reason for the revocation and whether the PIM was notified.

All reports made by Victoria Police under section 30K of the SD Act for warrants that ceased between 1 July and 31 December 2021 were made within the requisite timeframe, however three reports connected to a surveillance device warrant contained at least one error. One of these was a significant omission as Victoria Police had reported to the relevant judge that no devices had been installed under the warrant, when in fact a surveillance device had been installed.

Finding 1 – Three instances where the report to the judge omitted a use of information obtained by a surveillance device or gave no details for the installation and subsequent use of a device

Victoria Police is required to report to the judge who issued the warrant the general use of information obtained by use of a surveillance device. The VI identified uses recorded in the use and communication register for one warrant that were not given in the report to the judge for the same warrant. Enquiries with the TPU found that entries to the register were backdated by investigators after the report was sent to the judge. The relevant entries had not been made at the time the report to the judge had been prepared, and as such, this information was not available to the TPU.

The TPU advised that an amended report would be made to the judge—the VI will inspect this report at the next scheduled inspection.

Two reports by the SPU to the relevant judge were found to contain errors. In each case, the report was made for a surveillance device warrant file inspected from the previous reporting period. The VI identified these errors by cross-referencing the results of its annual inspection of TSU records (June 2022) with warrant files previously inspected at the SPU (November 2021). For two surveillance device warrants, the VI found the TSU gave details for the activation and deactivation of a data surveillance device that was not reported in the corresponding warrant file inspected at the SPU. As a result, in one report to the judge, the period given for use of the device was incorrect; whereas in the other, the report incorrectly stated no devices were installed under the warrant.

In response to these findings, the SPU made supplementary reports to the relevant judge to provide the information previously omitted from the report. The VI has confirmed each supplementary report gives correct information. The VI was informed by the SPU that it has reminded the TSU to ensure it provides every covert memo it makes to avoid a recurrence of this non-compliance.

FINDINGS - TRANSPARENCY AND COOPERATION

The VI considers an agency's transparency, its cooperation during inspection, and its responsiveness to suggestions and issues to be a measure of its compliance culture.

Did Victoria Police self-disclose compliance issues?

Victoria Police's SPU made one self-disclosure at the inspection. SPU disclosed that during the period it had made a supplementary report to the judge under section 30K of the SD Act to report an additional use of information obtained under a surveillance device warrant that had not been included in its initial report. The requirement to make this correction was identified through SPU's quality assurance checks.

Were issues identified at previous inspections addressed?

The VI re-inspected two warrant files to confirm corrections were made for errors identified at previous inspections of Victoria Police records. The VI confirmed the TPU and SPU each made a supplementary section 30K report to the relevant judge. In the case of the TPU the supplementary report gave corrected use of information obtained by a surveillance device, whereas the SPU made an additional report to the magistrate who issued the warrant.