

**Report under Section 49(1) of the
Surveillance Devices Act 2007
for the period ending
31 December 2013**

April 2014

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Phone 02 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524
Facsimile: 02 9283 2911
Telephone typewriter: 133 677
Website: www.ombo.nsw.gov.au
Email nswombo@ombo.nsw.gov.au

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Introduction

The Surveillance Devices Act 2007 (NSW) (the 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 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 those agencies and their officers with the Act.

Four law enforcement agencies¹ are currently the subject of these inspections:

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

Legislative Changes

There were no legislative changes during the current reporting period.

Reporting requirements

The Ombudsman is required by section 49(1) of the Act to report to the Minister at six-monthly intervals on the results 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 2013 to 31 December 2013.

Scope of the inspection

The aim of the Act 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 agency compliance with the Act and to provide public accountability through regular reporting to the Minister and Parliament. The approach taken in the inspections conducted by the Ombudsman is to examine 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 can be determined from those records and from questions asked of relevant officers.

Inspections focus on compliance outlined in three main areas of the Act.

- Part 3 dealing with warrants and emergency authorisations.
- Part 5 covering compliance and monitoring, including dealing with records obtained by use of surveillance devices, the use, communication or publication of protected information, reporting and record keeping.
- Part 6 requiring notification to the Attorney about warrants sought, as well as notification to the subject of 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 authorising the use of a tracking device only or a retrieval warrant in respect of a tracking device. Applications are required to 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 provided in support of the application. That is a matter for the relevant judicial officer to determine.

¹ Note: 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.

The Ombudsman inspects each individual surveillance device warrant file at each agency. The inspection involves an examination of the application, warrant, notice to the Attorney General and the report to the issuing judicial officer and the Attorney General, and any other information contained on the file.

The inspection involves checking that:

- The application is made to an eligible Judge or in appropriate cases, an eligible Magistrate.
- The application includes the name of the applicant and the nature and duration of the warrant including the kind of device sought and is supported by an affidavit.
- The warrant contains the information required by s.20.
- Any extension or variation to the warrant complies with s.22.
- The revocation of a warrant complies with s.23.
- The appropriate law enforcement officer notifies the chief officer immediately they are satisfied the use of the warrant is no longer necessary, and the chief officer takes steps to discontinue the use of the device or devices as soon as practicable.
- Where a warrant has been revoked the use of the device is discontinued immediately.
- The s.51 notice contains the required information and has been provided to the Attorney General before the warrant has been issued and that the Attorney General has been given an opportunity to be heard on the application if so desired.
- The report under s.44 has been provided to the eligible judge and the Attorney General within the time specified in the warrant.
- The report complies with the requirements of s.41.
- The application for continued use of an authorised surveillance device in an emergency situation complies with ss.31-32.
- Where a surveillance device is used without a warrant, that an application for approval is made within two business days to an eligible judge and that such approval complies with s.33.
- The register of warrants and emergency applications contains the information required by s.47.
- That any directions under s.52 have been complied with.

The inspection also includes examining records relating to the use of protected information obtained by the use of surveillance devices and the security of those records at various locations.

Overview of records inspected

During the period 1 July 2013 to 31 December 2013 we conducted inspections across the four NSW law enforcement agencies over 17 days. The following tables set out the total number of warrants issued, warrant reports received, warrants revoked, emergency uses of devices and retrieval warrants issued.

Table 1. Surveillance device warrants issued 1 July 2013 to 31 December 2013

	Number of warrants issued
NSW Police Force	425
NSW Crime Commission	88
Independent Commission Against Corruption	4
Police Integrity Commission	3
	520

Table 2. Surveillance device warrant reports received 1 July 2013 to 31 December 2013

	Number of warrant reports received
NSW Police Force	494 ²
NSW Crime Commission	58
Independent Commission Against Corruption	3
Police Integrity Commission	6
	561

Table 3. Surveillance device warrants revoked 1 July 2013 to 31 December 2013

	Number of warrants revoked
NSW Police Force	58
NSW Crime Commission	26 ³
Independent Commission Against Corruption	0
Police Integrity Commission	2
	86

Table 4. Emergency use of surveillance devices 1 July 2013 to 31 December 2013

	Number of emergency uses of surveillance devices
NSW Police Force	1
NSW Crime Commission	1
Independent Commission Against Corruption	0
Police Integrity Commission	0
	2

Table 5. Retrieval warrants issued 1 July 2013 to 31 December 2013

	Number of retrieval warrants issued
NSW Police Force	8
NSW Crime Commission	1
Independent Commission Against Corruption	0
Police Integrity Commission	0
	9

2. Some of these reports relate to warrants issued during previous reporting periods and previously noted as delayed.

3. One retrieval warrant was also revoked.

NSW Police Force

During the reporting period 425 surveillance device warrants were issued, eight retrieval warrants were also issued. There was one emergency use of a surveillance device. 58 warrants were revoked in this period.

The majority of records are located at Police Prosecutions, Covert Applications Unit. These include applications, warrants, s.51 notices and s.44 reports. In relation to the protected information received as a result of surveillance device warrants this information is kept with the officer responsible for the warrants at particular operational commands or local area commands as the case may be. The law enforcement officer responsible for the warrant is responsible for recording the use, communication or publication of protected information obtained under their warrant.

Any exceptions we have identified with the NSW Police Force's compliance with the Act are detailed below.

Warrant requirements

Section 17 Applications for a surveillance device warrant

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

In 23 cases the warrant application was not on the warrant file when we conducted our inspections, however, the relevant applications were stored electronically. This was raised with the staff of the Covert Applications Unit and the applications have since been placed on the related warrant file. Covert Applications Unit staff have also been reminded that current inspection procedures require that a hard copy of all applications are to be placed on the warrant files.

One warrant had an incorrect date on the face of the warrant. Covert Applications Unit staff were made aware of this error and the issue has been addressed.

Section 18 Remote Application

There were 12 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

Twenty six warrants were varied and/or extended during the reporting period. Twenty three warrants were extended, 2 warrants were varied and 1 warrant was extended and varied.

Section 23 Revocation of surveillance device warrant

There were 58 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 must be discontinued as soon as practicable. The NSW Police Force uses a Notification of Discontinuance form to record such action. Section 24(2)(b) further requires that when an application for discontinuance is made, an application is also 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 specified for making an application for the revocation of the warrant.

Section 25 Application for retrieval warrant

Eight applications were made for retrieval warrants and all were granted.

Section 26 Remote application for retrieval warrants

No remote applications were made for retrieval warrants.

Section 30 Revocation of retrieval warrant

No retrieval warrants were revoked.

Emergency authorisations requirements

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

There was one emergency use of surveillance device warrants under this section.

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

There was no emergency use of surveillance device warrants in participating jurisdictions.

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

The application for the emergency use of a surveillance device warrant was approved in accordance with the Act.

Compliance and monitoring requirements

The law enforcement officer responsible for the warrant is responsible for recording the use, communication or publication of protected information obtained under their warrant. We test the compliance of these individual law enforcement officers by conducting 'field' inspections by visiting specialist commands or local area commands throughout the metropolitan and regional areas.

Section 40 Prohibition on use, communication or publication of protected information

Compliance on this section of the Act was not specifically tested during this reporting period as no additional inspections were carried out.

Section 41 Dealing with records obtained by use of surveillance devices

NSW Police Force personnel use the protected information registers to record any dealing with protected information. Senior officers at each Local Area Command are also tasked with inspecting these records in addition to our inspections. As we did not conduct any 'field' inspections during this period we did not specifically test compliance with this section of the Act.

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

Section 44 of the Act requires a report to be furnished to the eligible Judge, or eligible Magistrate, as the case may be, and to the Attorney General within the time frame specified in the warrant. The maximum penalty for failure to comply with Sections 44 (1),(2) and (6) is 20 penalty units or imprisonment for a term of 12 months, or both. During the reporting period 494 s.44 reports were received representing a significant improvement in timeliness when compared with previous reporting periods.

In relation to this inspection period, however, we identified the following exceptions in relation to the provision of s.44 reports within the requisite time frame.

- The reports for the following warrants have not been reported on:

Warrant Number	Expiry
SD13/459	5-Sep-13
SD13/472	16-Sep-13
SD13/520	3-Sep-13
SD13/592	30-Sep-13
SD13/617	12-Oct-13
SD13/627	29-Sep-13
SD13/633	16-Oct-13

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 NSWPF 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

In general the NSWPF was compliant in this regard, with the exceptions outlined below:

There were 12 instances where police failed to provide advice in the Section 51 Report as to whether there were alternative means of obtaining evidence. This issue was raised with police following our inspections. The NSWPF advised that there had been inadvertent amendments made to the template Section 51 notices used by individual staff which had resulted in the omission of the paragraph which contains information about whether there are alternative means of obtaining evidence. To address this issue, the NSWPF advised that a new Section 51 Notice template has been developed and those areas where mandatory information is required pursuant to section 51 of the Act have been highlighted. In addition all staff of the Covert Applications Unit has been directed to utilise the updated template, effective immediately.

There were also several instances where typographical errors were made in the Section 51 Reports in relation to basic information including dates, times, addresses and timeframes for warrants. Police advise that the staff of the Covert Applications Unit have been reminded to pay close attention to the particulars of each relevant document to avoid typographical errors. In addition, the updated Section 51 Notice template document has highlighted particulars which will aid in ensuring that typographical errors are reduced in the future.

Section 52 Requirement to inform subject of surveillance

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

Concluding Comments

The NSW Police Force was generally compliant with the requirements of the Act during this reporting period apart from the exceptions outlined above.

Previous Recommendations

- 1. The current practice of the NSW Police Force recording information outside the terms of a warrant cease immediately. The use of a surveillance device after expiry of the warrant be used solely for the purposes of location and retrieval of the device or equipment. If the device cannot be located and retrieved within the warrant period or the window period of days after the expiry of the warrant, then a retrieval warrant must be sought to enable the use of the device to determine its location.**

Discussions are continuing in relation to this aspect of compliance. The NSWPF advised that their staff will be discussing further the technical implications of this recommendation.

- 2. The Commissioner continue to have staff address the failure of officers to provide s.44 reports to the Attorney General and/or Eligible Judge as required by the Act and within the statutory timeframe.**

There has been a marked improvement in the provision of reports under Section 44. There is now an officer dedicated to this aspect of compliance. Also procedures are in place to alert supervisors of the failure of investigators to complete reports within the time frame specified in the warrant.

Recommendations

While no specific recommendations are made at this time, during our next inspections we will ensure the updated template has assisted officers to comply with mandatory reporting requirements under s.51 of the Act, particularly as to whether there was an alternate means to obtain evidence other than the use of surveillance devices.

NSW Crime Commission

During the reporting period 88 surveillance device warrants were issued. There was also one emergency use of a device in the period, and 26 surveillance device warrants were revoked. One retrieval warrant was issued, and one was revoked. All applications for warrants were granted.

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

Warrant requirements

Section 17 Applications for a surveillance device warrant

All 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

Ten warrants were extended and three of these were further extended.

Section 23 Revocation of surveillance device warrant

There were 26 revocations of surveillance device warrants during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

Section 24 of 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

There was one application for a retrieval warrant.

Section 26 Remote application for retrieval warrant

There were no remote applications for a retrieval warrant.

Section 30 Revocation of retrieval warrant

One retrieval warrant was revoked.

Emergency authorisations requirements

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

There was one emergency use of a surveillance device during the reporting period.

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

There was no emergency use of surveillance device warrants in participating jurisdictions.

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

The application for the emergency use of a surveillance device warrant was approved in accordance with the Act.

Compliance and monitoring requirements

Section 40 Prohibition on use, communication or publication of protected information

While protected information was obtained through the use of surveillance devices, the information may be used in the future and the records of each use, communication and publication will be inspected in the future.

Section 41 Dealing with records obtained by use of surveillance devices

The Commission has established guidelines for dealing with protected information. Protected information is stored in the Commission premises with those officers authorised to deal with it.

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

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

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 at the NSWCC 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. The notifications contained the information required.

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 NSW Crime Commission was compliant with the Act.

Recommendations

No specific recommendations are made.

Independent Commission Against Corruption

During the reporting period four surveillance device files were inspected, all applications for warrants were granted.

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

Warrants requirements

Section 17 Applications for a surveillance device warrant

All 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

No surveillance device warrants were extended or varied.

Section 23 Revocation of surveillance device warrant

There were no revocations of surveillance device warrants during the reporting period.

Section 24 Discontinuance of use of surveillance device under warrant

Section 24 of 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.

Section 25 Application for retrieval warrant

There were no applications for a retrieval warrant.

Section 26 Remote application for retrieval warrant

There were no applications for a retrieval warrant.

Section 30 Revocation of retrieval warrant

No retrieval warrants were issued and consequently none were revoked.

Emergency authorisations requirements

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

There was no emergency use of a surveillance device during the reporting period.

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

There was no emergency use of surveillance device warrants in participating jurisdictions.

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

There was no application for approval after use of a surveillance device.

Compliance and monitoring requirements

Section 40 Prohibition on use, communication or publication of protected information

While protected information was obtained through the use of surveillance devices, the information may be used in the future and the records of each use, communication and publication will be inspected in the future.

Section 41 Dealing with records obtained by use of surveillance devices

The Commission has established guidelines for dealing with protected information. Protected information is stored in the Commission premises with those officers authorised to deal with it.

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

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

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 at the ICAC 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. The notifications contained the relevant information required.

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 Independent Commission Against Corruption was compliant with the Act.

Recommendations

No specific recommendations are made.

Police Integrity Commission

During the reporting period 3 surveillance device warrants were applied for and granted.

We were satisfied that the Police Integrity Commission had complied with its obligations under the Act with only one exception identified, as outlined below.

Warrants requirements

Section 17 Applications for a surveillance device warrant

All 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

None of the warrants issued during this reporting period were extended or 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 for retrieval warrant

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 requirements

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 emergency use of surveillance device warrants in participating jurisdictions.

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

There were no emergency uses of surveillance devices.

Compliance and monitoring requirements

Section 40 Prohibition on use, communication or publication of protected information

While protected information was obtained through the use of surveillance devices, the records of each use, communication and publication are contained in a register for this purpose.

Section 41 Dealing with records obtained by use of surveillance devices

The Commissioner has established guidelines for dealing with protected information. The protected information is stored on the Commission premises and restricted to those authorised to deal with it.

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

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

There were 6 reports provided to the Attorney General or Eligible Judge during the reporting period.

The Section 44 reports for two warrants, one for a tracking device and the other for a listening device, were combined. The report indicated the surveillance devices were used between 07/05/2013 and 04/09/2013. While the expiry date for both warrants was 04/09/2013, it was clear from the file that the devices ceased to be used, from 21/08/2013 for one warrant and, from the 23/08/2013 in the case of the second warrant. As a result the Section 44 report which indicated both devices ceased being used on the 04/09/2013 was misleading.

The Commission accepted that the dates noted on the report were erroneous. Staff have been reminded of their obligations in relation to the reporting on the periods during which surveillance devices are used.

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, with the following exception.

Section 52 Requirement to inform subject of surveillance

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

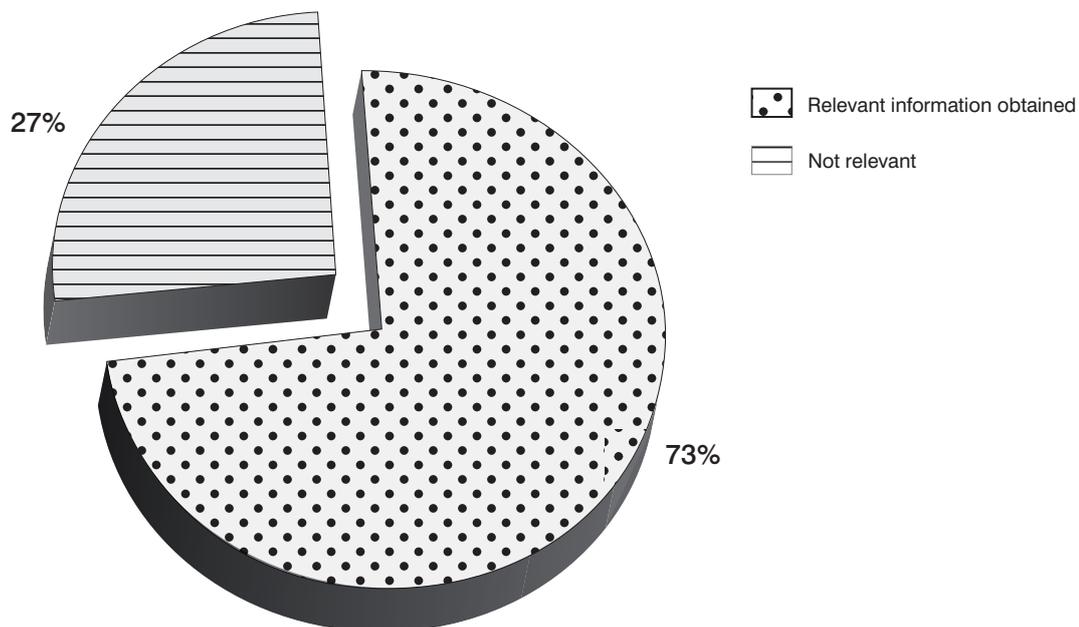
Concluding Comments

For the reporting period the Police Integrity Commission was compliant with the Act with the two exceptions noted above.

Recommendations

No specific recommendations are made.

Figure 3. Relevant information obtained when surveillance devices used - 2013





NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: 02 9286 1000
Toll free (outside Sydney Metro Area, NSW only): 1800 451 524
Tel. typewriter (TTY): 133 677
Facsimile: 02 9283 2911
Email: nswombo@ombo.nsw.gov.au

www.ombo.nsw.gov.au