

2012 Practice note: Procedures for processing surveillance device warrant applications

Practice Note for the Hearing of Applications for Surveillance Device Warrants and Declaratory Orders in the High Court and the District Courts

1 Background

- 1.1 This practice note governs the arrangements to apply in relation to applications to the High Court or District Court for surveillance device warrants and declaratory orders under the Search and Surveillance Act 2012.
- 1.2 The practice note records arrangements agreed to by the Chief High Court Judge and the Chief District Court Judge on behalf of the judiciary and by the Commissioner of Police on behalf of the New Zealand Police following discussions and a process of consultation. The document does not seek to describe the statutory requirements for the granting of the warrants and orders (which are defined in the Act), but rather to prescribe arrangements for making, and for the hearing and security of applications.
- 1.3 The practice note replaces the practice note, issued by the then Chief High Court Judge in October 2008, containing guidelines for the hearing of interception, tracking device and call data warrant applications.

2 Advice of an intended application for a surveillance device warrant or declaratory order.

- 2.1 Each High Court Registry and each District Court shall designate one or more registry contact persons ("nominated contact person") whom enforcement officers may contact in relation to intended applications.
- 2.2 When a decision is taken to make application for a surveillance device warrant or declaratory order an authorised enforcement officer shall advise the nominated contact person of the impending application, and any degree of urgency associated with it.

- 2.3 The written application for a surveillance device warrant or declaratory order shall be provided to the contact person in a secure envelope.¹

3 Application documentation for surveillance device warrants

- 3.1 The formal requirements for an application are those set out in ss 49 and 52 of the Act (Incorporating ss 98(2)–101). It is desirable that applications follow a standard format and that the amount of evidence is kept within reasonable bounds.

- 3.2 To these ends the desired format for lengthy applications should comprise:

- (a) an index; and
- (b) a brief summary or overview of the application designed to inform the Judge of its scope before the supporting evidence is set out.

- 3.3 In fulfilling the formal requirements, the following information should be provided in reasonable detail where possible:

- (a) a section devoted to identification of the suspects (including where appropriate an association diagram) and/or the object of the proposed surveillance;
- (b) background or historical information;
- (c) current information relied upon at the date of the application;
- (d) information about any applications for warrants on the same subject matter; and
- (e) a statement that the applicant has made the inquiries required by s 49(4) of the Act, that the contents are true and accurate (s 99), and that the applicant is aware that it is an offence to make any assertion or statement known to be false (s 175).

- 3.4 If the application is for/includes the use of a visual surveillance device then the following information should be provided:

- (a) the intended location or locations of the devices (as specifically as possible);
- (b) their intended field(s) of view;

¹ Any reference in this practice note to a “secure envelope” includes a reference to an electronic equivalent as may be devised by the Ministry of Justice and Court registry staff from time to time.

- (c) the procedures to be adopted to keep private, images (particularly of non-suspects) not required for the purposes of the investigation.
- 3.5 Consistent with this best practice format, the application should be divided into sections, with appropriate sectional headings.
- 3.6 The application should be accompanied by draft warrants completed in a manner consistent with the application, and able to be signed if the Judge is satisfied with the application. The draft warrants should contain conditions to ensure that the powers granted are in accordance with the information provided under 3.4.

4 Assessment of written applications for surveillance device warrants

- 4.1 The Judge will consider the application on the papers prior to the appearance of the applicant.
- 4.2 If, having considered the written application, the Judge is prepared to issue the warrant, then the Judge will sign the warrant and advise the nominated contact person.
- 4.3 If, having reviewed the application, the Judge requires further information or clarification, arrangements should be made for the applicant to appear before the Judge, or to communicate orally with the Judge pursuant to s 100(3) to address these matters. However, if significant deficiencies are identified, the Judge may prefer to record the additional information or clarification required in a minute.
- 4.4 Any hearing under 4.3 will take place in the Judge's chambers or another private facility. If the Judge considers it necessary, the Judge may direct that a legal advisor and, if required, a person having operational knowledge accompany the applicant at the hearing.
- 4.5 If any such hearing is not recorded, the Judge will make a contemporaneous note recording who was present at the hearing and any matters discussed.

- 4.6 If genuine urgency exists, then handwritten amendments can be made to the application and warrant as necessary but those amendments must be authenticated by signature. If there is no genuine urgency, the Judge may require an amended application and warrant to be filed. The approach to be taken is an issue for the Judge. Whatever approach is adopted, if the Judge ultimately decides to issue the warrant, the Judge should ensure that the application contains all of the material the Judge relied upon or took into consideration in issuing the warrant.

5 Applications for declaratory orders

- 5.1 The formal requirements for an application are those set out in s 67 of the Act. It is desirable that applications follow a standard format and that the amount of evidence is kept within reasonable bounds.
- 5.2 All applications for declaratory orders will be determined on the papers.
- 5.3 If, having considered the written application, the Judge requires further information or clarification of any matter, then a minute should be issued to that effect.
- 5.4 If the Judge is prepared to make the declaratory order, then the Judge will sign the order and advise the nominated contact person.

6 The surveillance device warrant or declaratory order.

- 6.1 Two copies of the surveillance device warrant or declaratory order, in the prescribed form, if any, shall be provided with the application. If the application is successful one signed copy of the warrant or declaratory order shall be returned to the applicant and the other retained with the application.
- 6.2 All the application documents, including any note made by the Judge, shall be placed in a secure envelope, which is to be sealed, dated and signed by the Judge before its return to a contact person for safe-keeping in secure storage in the court registry.
- 6.3 The registry shall maintain a register which identifies each application by number, the Judge's name and the date of hearing. Such identifying number shall be supplied to the authorised police person for future reference.

7 Subsequent applications for surveillance device warrants

- 7.1 The Act does not specifically refer to the renewal of warrants, but s 55(5) implies that a further application in respect of the same offence must be by way of fresh application. Where such an application is made, that application should be accompanied by information as to the number assigned to the original application. The nominated contact person should ensure that the secure envelope containing the original application is given to the Judge who is to hear the fresh application. If possible the Judge who considered the original application, should consider the fresh application.
- 7.2 A fresh application must disclose anything that has arisen subsequent to the original application that might be relevant to the Judge's decision. The fresh application will need otherwise to confirm the continued accuracy of the information originally provided, and explain any correction necessary. Explanation should be given as to why a further warrant is justified or required.
- 7.3 Otherwise the same arrangements as for an original application shall apply, save that the structure of the application may not need to follow the preferred format for an original application.
- 7.4 The documentation in connection with the fresh application shall be placed with the original application documents in the same secure envelope used for the original application, bearing the name (or names) of the Judge(s) and the dates of the original application and any subsequent applications.

8 Oral applications for surveillance device warrants

- 8.1 An application may be made orally if the Judge is satisfied that s 100(3) applies. When an oral application is made the arrangements set out in this practice note shall apply subject to any necessary modifications.
- 8.2 In particular, advice of the proposed oral application shall be given to the nominated contact person and a hearing will be arranged. Any materials relevant to the application will be placed in a sealed secure envelope, including the Judge's note of the particulars of the application and the terms of the warrant, and materials provided by the enforcement officer in support of the application, if any.

8.3 Once the grounds for allowing an application have been recorded by the Judge as required (s 100(5)), a copy of those reasons shall be placed by the Judge in the secure envelope.

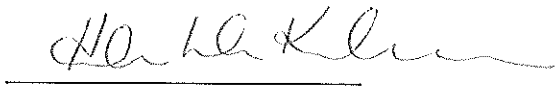
9 Surveillance device warrant report

9.1 The surveillance device warrant report, which is to be provided by the enforcement officer within one month after the expiry of the surveillance device warrant, or one month after the emergency or urgent use of a surveillance device, shall be delivered to a contact person in a secure envelope addressed to the Judge and bearing the number assigned to the original application.

9.2 After consideration of the report the Judge shall place all documents relevant to the application, including any directions given or orders made regarding the surveillance, in the secure envelope used for the original application, which envelope shall also be sealed, dated (as to original application, further application(s) and final report dates) and signed, before return to the nominated contact person to be returned to secure storage.

Dated this 14 day of August 2012.


Her Honour Judge J-M Doogue
Chief District Court Judge


Hon H D Winkelmann J
Chief High Court Judge