



New South Wales

Workplace Surveillance Regulation 2005

under the

Workplace Surveillance Act 2005

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Workplace Surveillance Act 2005*.

BOB DEBUS, M.P.,
Attorney General

Explanatory note

The object of this Regulation is to:

- (a) prescribe the form of applications for covert surveillance authorities, and
- (b) prescribe the form of covert surveillance authorities, and
- (c) prescribe the form of reports on the use of covert surveillance authorities, and
- (d) provide for the Minister to be advised of any application for, or issue of, a covert surveillance authority.

This Regulation is made under the *Workplace Surveillance Act 2005*, including sections 23, 28, 35 and 44 (the general regulation-making power).

This Regulation relates to matters of a machinery nature.

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Workplace Surveillance Regulation 2005

under the

Workplace Surveillance Act 2005

1 Name of Regulation

This Regulation is the *Workplace Surveillance Regulation 2005*.

2 Commencement

This Regulation commences on 7 October 2005.

3 Definitions

- (1) In this Regulation:
the Act means the *Workplace Surveillance Act 2005*.
- (2) In this Regulation, a reference to a Form is a reference to a form set out in Schedule 1.
- (3) Notes included in this Regulation (other than in Schedule 1) do not form part of this Regulation.

4 Forms

- (1) **Form of application for covert surveillance authority**
For the purposes of section 23 (3) of the Act, an application to a Magistrate for a covert surveillance authority is to be in Form 1.
- (2) **Form of covert surveillance authority**
For the purposes of section 28 (1) of the Act, Form 2 is prescribed as the form of a covert surveillance authority.
- (3) **Form of application for variation of authority**
An application made under section 31 of the Act to a Magistrate for the variation of a covert surveillance authority is to be in Form 3.
- (4) **Form of application for cancellation of authority**
An application made under section 31 of the Act to a Magistrate for the cancellation of a covert surveillance authority is to be in Form 4.

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(5) **Form of report on use of authority**

For the purposes of section 35 (3) of the Act, a report on the use of a covert surveillance authority is to be in Form 5.

(6) **Form of application to judicial member of Industrial Relations Commission for authority**

An application made under section 41 of the Act to a judicial member of the Industrial Relations Commission to issue a covert surveillance authority is to be in Form 6.

(7) **Form of application to judicial member of Industrial Relations Commission for variation of authority**

An application made under section 41 of the Act to a judicial member of the Industrial Relations Commission to vary a covert surveillance authority is to be in Form 7.

(8) **Form of application to judicial member of Industrial Relations Commission for cancellation of authority**

An application made under section 41 of the Act to a judicial member of the Industrial Relations Commission to cancel a covert surveillance authority is to be in Form 8.

5 Records relating to covert surveillance authority

- (1) For the purposes of section 33 of the Act, a Magistrate who receives an application for, or issues, a covert surveillance authority is to ensure that the Minister is supplied with written advice of the receipt or issue as soon as practicable after receiving the application or issuing the authority.

- (2) Written advice supplied under subclause (1) is to contain only information that is required by the Minister for the purposes of a report under section 42 of the Act.

Note. Section 33 (2) of the Act provides that a Magistrate is to take all reasonable steps to preserve the confidentiality of information contained in records made under section 33 (1) of the Act. However, section 33 (2) of the Act does not prevent the Magistrate from supplying information to the Minister that is required for the purposes of an annual report under section 42 of the Act.

An annual report under section 42 of the Act:

- (a) must include details of the number of covert surveillance authorities sought, and the number of such authorities issued (together with a break down of the kinds of surveillance to which those issued authorities related), during the year to which the report relates, and
- (b) may report on such other matters relating to covert surveillance authorities and the use of covert surveillance as the Minister considers appropriate.

Schedule 1 Forms

(Clause 3 (2))

Form 1

(Clause 4 (1))

Application under section 23 of the Workplace Surveillance Act 2005 for issue of covert surveillance authority

I, *[insert name of employer or employer's representative applying to Magistrate for issue of covert surveillance authority]* apply under section 23 of the *Workplace Surveillance Act 2005* for the issue of a covert surveillance authority authorising the carrying out of covert surveillance of employees at work for the employer.

1. The following employee, employees or class of employees are suspected, on the following grounds, of being involved in unlawful activity in the workplace:
[state the grounds applicant has for suspecting that a particular employee is or employees are involved in unlawful activity at work. Include the names of those employees where possible]
2. Other managerial or investigative procedures have/have not been undertaken to detect the unlawful activity. The outcome of other managerial or investigative procedures was *[describe what was the outcome of other managerial or investigative procedures]*
3. Other applications for a covert surveillance authority have/have not been made to detect the unlawful activity. The outcome of other applications for a covert surveillance authority was *[describe the outcome of other applications for a covert surveillance authority, including the results of any covert surveillance carried out under a covert surveillance authority]*
4. The following employees and premises/vehicles/computers will regularly or ordinarily be the subject of the covert surveillance:
[describe who (including the names of employees where possible) and what (including premises, vehicles and computers) will regularly and ordinarily be the subject of the covert surveillance]
5. It is proposed that the covert surveillance will be conducted by camera*/computer*/tracking* surveillance.
6. It is proposed to conduct the covert surveillance during the following dates and times:
[specify dates and times during which it is proposed to conduct covert surveillance. Note that any covert surveillance authority that is issued cannot specify a period of longer than 30 days during which it is to remain in force]
7. In accordance with section 23 (4) of the *Workplace Surveillance Act 2005*, the following person/persons are nominated to oversee the conduct of the covert surveillance operation and, for the purpose of section 27 of the Act, are competent and fit to oversee the conduct of the surveillance and have the following experience or qualifications:

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[insert full name and address of each person nominated to oversee the conduct of the covert surveillance operation and details of their qualifications, experience and any other information to satisfy the Magistrate that each person designated as a surveillance supervisor is competent and fit to do so (see section 27 (2) and (3))]

8. Verification of the employer's authority for me to act as an employer's representative for the purposes of the covert surveillance operation is attached.
[If applicant is an employer's representative attach verification. If the applicant is the employer, delete this paragraph. Section 23 (2) (h) of the Workplace Surveillance Act 2005 requires an applicant for the issue of a covert surveillance authority who is an employer's representative to include verification acceptable to the Magistrate to whom the application is made of the employer's authority for the person to act as employer's representative for the purposes of the covert surveillance operation.]

Dated

[signature]

[name of applicant]

Note. Under section 23 (5) of the *Workplace Surveillance Act 2005* the Magistrate to whom an application for issue of a covert surveillance authority is made cannot issue the authority unless the information given by the applicant in or in connection with the application is verified before the Magistrate on oath or affirmation or by affidavit. Under section 23 (7) of the Act, the Magistrate to whom the application is made may require the applicant to provide (either orally or in writing) such further information as the Magistrate requires concerning the grounds on which the authority is being sought.

** Delete whichever is inapplicable.*

Form 2

(Clause 4 (2))

Form of covert surveillance authority

I, *[insert name of Magistrate or judicial member of the Industrial Relations Commission issuing covert surveillance authority]*, under section 23 of the *Workplace Surveillance Act 2005*, issue a covert surveillance authority authorising the carrying out of covert surveillance of employees at work for the employer.

1. The covert surveillance authority is issued for the purpose of:
[state purpose for which the authority has been issued]
2. The following employees are suspected of being involved in the unlawful activity in respect of which this authority has been issued:
[insert the full name and address of each person suspected of being involved]
3. The following employees and premises*/vehicles*/computers* will regularly or ordinarily be the subject of the covert surveillance:
[describe who (including the names of employees where possible) and what (including premises, vehicles and computers) will regularly and ordinarily be the subject of the covert surveillance]

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4. The covert surveillance authority authorises the use of the following equipment for the covert surveillance of *[describe the premises, place, computer, vehicle or other thing that is to be the subject of covert surveillance and details of the equipment that is authorised to be used for that surveillance]*
5. The covert surveillance is authorised to take place during the following dates and times:
[specify dates and times during which covert surveillance is authorised. Note that any covert surveillance authority that is issued cannot specify a period of longer than 30 days during which it is to remain in force]
6. In accordance with section 23 (4) of the *Workplace Surveillance Act 2005*, the following persons are designated as surveillance supervisors to oversee the conduct of the covert surveillance operation:
[insert full name and address of each person designated to oversee the conduct of the covert surveillance operation]
7. The covert surveillance authority is issued subject to the following conditions:
- (a) except as provided by paragraph (b), a surveillance supervisor for the authority and any of his or her supervisees must not give any other person access to any surveillance record made as a consequence of the covert surveillance,
 - (b) a surveillance supervisor for the authority and any of his or her supervisees may supply the employer, or employer's representative, only with any portions of a surveillance record made as a consequence of the covert surveillance that are relevant to establishing the involvement of any employee in an unlawful activity while at work for the employer in accordance with the authority conferred by the authority or for identifying or detecting any other unlawful activity at a workplace of the employer or of an employee while at work for the employer,
 - (c) a surveillance supervisor for the authority must erase or destroy (or cause a supervisee to erase or destroy) within 3 months of the expiry of the authority all parts of surveillance records made by the surveillance supervisor or his or her supervisees as a consequence of the covert surveillance that are not required for evidentiary purposes,
 - (d) if, as a consequence of the carrying out of covert surveillance of an employee, the employer or employer's representative takes, or proposes to take, any detrimental action against the employee, the employer or employer's representative must, within a reasonable period after being requested to do so by the employee (or his or her lawyers), give the employee (and his or her lawyers, if any) access to any part of the surveillance record supplied to the employer or employer's representative that relates to the employee or the detrimental action,
- [specify further conditions (if any) that apply to the covert surveillance authority for the purposes of section 29 of the Workplace Surveillance Act 2005]*
8. Section 35 of the *Workplace Surveillance Act 2005* requires the following:
- (a) The employer or employer's representative to whom a covert surveillance authority is issued must furnish a report in compliance with that section to

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[insert name of Magistrate or judicial member of the Industrial Relations Commission who issued the authority] within 30 days after the expiry of the authority.

- (b) The report is to be in writing, setting out briefly the result of the surveillance carried out and specifying the following:
 - (i) if practicable, the names of any employee who was the subject of the surveillance,
 - (ii) the period during which the surveillance was conducted,
 - (iii) details of the type of surveillance device used and of the type of place where any surveillance device was installed or used,
 - (iv) whether any surveillance device has been removed and, if not, why not,
 - (v) details of the conditions of the covert surveillance authority,
 - (vi) details of any surveillance record made as a consequence of the surveillance,
 - (vii) any action taken or proposed to be taken in light of the information obtained,
 - (viii) any reason why an employee who was the subject of the surveillance should not be informed of the surveillance,
 - (ix) details of any previous use of covert surveillance in connection with suspected unlawful activity with which the authority is concerned.
- (c) The report is to be in Form 5 set out in Schedule 1 to the *Workplace Surveillance Regulation 2005*.
- (d) If [insert name of Magistrate or judicial member of the Industrial Relations Commission who issued the authority] has died, has ceased to be a Magistrate/judicial member of the Industrial Relations Commission or is absent, the report is to be furnished to another Magistrate/judicial member of the Industrial Relations Commission.

9. Section 37 of the *Workplace Surveillance Act 2005* requires the following:

- (a) A person must not make use of or disclose to another person surveillance information or a surveillance record knowing or having reasonable cause to suspect that the information has been obtained or the record made as a result, direct or indirect, of covert surveillance of an employee while at work for an employer carried out or caused to be carried out by the employer unless that use or disclosure is for a relevant purpose as provided by that section.
- (b) If the covert surveillance of an employee was authorised by a covert surveillance authority issued to an employer, only the following use or disclosure of the surveillance information or record is for a relevant purpose:
 - (i) use or disclosure that is authorised or required by the conditions of the covert surveillance authority or an order of a Magistrate under section 35 of the Act,
 - (ii) use or disclosure for a purpose that is directly or indirectly related to establishing whether or not an employee is involved in unlawful activity while at work for the employer in accordance with the authority conferred by the covert surveillance authority,

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- (iii) use or disclosure for a purpose that is directly or indirectly related to taking disciplinary action or legal proceedings against an employee as a consequence of any alleged unlawful activity while at work for the employer,
 - (iv) use or disclosure for a purpose that is directly or indirectly related to establishing security arrangements or taking other measures to prevent or minimise the opportunity for unlawful activity while at work for the employer of a kind identified by the surveillance record to occur while at work for the employer,
 - (v) use or disclosure that is reasonably believed to be necessary to avert an imminent threat of serious violence to persons or of substantial damage to property,
 - (vi) disclosure to a member or officer of a law enforcement agency for use in connection with the detection, investigation or prosecution of an offence,
 - (vii) use by a member or officer of a law enforcement agency for any purpose in connection with the detection, investigation or prosecution of an offence,
 - (viii) use or disclosure for a purpose that is directly or indirectly related to the taking of proceedings for an offence,
 - (ix) use or disclosure for a purpose that is directly or indirectly related to taking any other action authorised or required by the *Workplace Surveillance Act 2005*.
- (c) If the covert surveillance of an employee was not authorised by a covert surveillance authority, only the following use or disclosure of the information or record is for a relevant purpose:
- (a) disclosure to a member or officer of a law enforcement agency for use in connection with the detection, investigation or prosecution of an offence,
 - (b) use or disclosure for a purpose that is directly or indirectly related to the taking of proceedings for an offence,
 - (c) use by a member or officer of a law enforcement agency for any purpose in connection with the detection, investigation or prosecution of an offence.
- 10.** The covert surveillance authority remains in force from [*specify period for which the covert surveillance authority remains in force*].

Dated

[signature]

[name of Magistrate or judicial
member of the Industrial Relations
Commission]

* Delete whichever is inapplicable.

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Schedule 1 Forms

Form 3

(Clause 4 (3))

Application under section 31 of the Workplace Surveillance Act 2005 for variation of covert surveillance authority

I, *[insert name of the employee, employer or other person affected by the covert surveillance authority applying to a Magistrate for variation of the authority]* apply under section 31 of the *Workplace Surveillance Act 2005* for the variation of the covert surveillance authority issued to *[insert name of employer or employer's representative to whom authority was issued]* on *[insert date on which authority issued]* by *[insert name of person who issued the authority sought to be varied]* authorising the carrying out of covert surveillance of employees at work for the employer during the period from _____ on _____ 20____, to _____ on _____ 20____ *[insert times and dates specified in the covert surveillance authority as the period during which it is to remain in force]*.

The following are the variations sought to the covert surveillance authority described above: *[describe variation/variations sought by applicant]*

The following are the grounds on which variation of the authority is sought: *[state the ground/grounds on which applicant seeks variation]*

Dated _____

[signature]

[name of applicant]

Form 4

(Clause 4 (4))

Application under section 31 of the Workplace Surveillance Act 2005 for cancellation of covert surveillance authority

I, *[insert name of the employee, employer or other person affected by the covert surveillance authority applying to a Magistrate for cancellation of the authority]* apply under section 31 of the *Workplace Surveillance Act 2005* for the cancellation of the covert surveillance authority issued to *[insert name of employer or employer's representative to whom authority was issued]* on *[insert date on which authority issued]* by *[insert name of person who issued the authority sought to be cancelled]* authorising the carrying out of covert surveillance of employees at work for the employer during the period from _____ on _____ 20____, to _____ on _____ 20____ *[insert times and dates specified in the covert surveillance authority as the period during which it is to remain in force]*.

The following are the grounds on which cancellation of the authority is sought: *[state the ground/grounds on which applicant seeks cancellation]*

Dated _____

[signature]

[name of applicant]

Form 5

(Clause 4 (5))

Form of report on use of authority

I, *[insert name of the employer or employer's representative]* furnish this report under section 35 (1) of the *Workplace Surveillance Act 2005*, confirming that covert surveillance was carried out in accordance with a covert surveillance authority during the period from _____ on _____ 20____, to _____ on _____ 20____
[insert times and dates specified in the covert surveillance authority as the period during which the covert surveillance was carried out].

1. The following employees were the subject of covert surveillance:
[if practicable, state the name of any employee who was the subject of covert surveillance]
2. The covert surveillance was conducted with *[give details of the types of devices used for conducting covert surveillance]*. These devices were *[give details of the location in which these devices were installed and used]*
3. The devices installed have*/have not* been removed. *[if devices have not been removed, give reasons]*
4. The surveillance record includes the following:
[give details of any surveillance record made as a consequence of the covert surveillance including a summary of any information found during the covert surveillance]
5. The covert surveillance authority was issued subject to the following conditions:
[give details of the conditions that the covert surveillance authority was subject to].
6. As a result of the information found during the covert surveillance, it is proposed that *[insert name of the employer]* will take the following action:
[provide details of the action proposed to be taken as a consequence of the covert surveillance]
7. The employees who were the subject of the surveillance should*/should not* be informed of the covert surveillance for the following reasons:
[give reasons that the employees should not be informed of the covert surveillance]
8. There has*/has not* been any previous use of covert surveillance in connection with suspected unlawful activity with which the authority is concerned. *[give details of any previous use of covert surveillance carried out in connection with suspected unlawful activity with which the authority is concerned]*

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Dated

[signature]

[name of employer or employer's
representative]

* Delete whichever is inapplicable.

Form 6

(Clause 4 (6))

Application under section 41 of the Workplace Surveillance Act 2005 for issue of covert surveillance authority

I, [insert name of employer or employer's representative aggrieved by Magistrate's decision to refuse to issue the covert surveillance authority] apply under section 41 of the *Workplace Surveillance Act 2005* for the issue of a covert surveillance authority authorising the carrying out of covert surveillance of employees at work.

1. A Magistrate refused to issue the covert surveillance authority sought on [insert date of refusal].
2. The following employee, employees or class of employees are suspected, on the following grounds, of being involved in unlawful activity in the workplace:
[state the grounds applicant has for suspecting that a particular employee is or employees are involved in unlawful activity at work. Include the names of those employees where possible]
3. Other managerial or investigative procedures have*/have not* been undertaken to detect the unlawful activity. The outcome of other managerial or investigative procedures was [describe what was the outcome of other managerial or investigative procedures]
4. Other applications for a covert surveillance authority have*/have not* been made to detect the unlawful activity. The outcome of other applications for a covert surveillance authority was [describe the outcome of other applications for a covert surveillance authority, including the results of any covert surveillance carried out under a covert surveillance authority]
5. The following employees and premises*/vehicles*/computers* will regularly or ordinarily be the subject of the covert surveillance:
[describe who (including the names of employees where possible) and what (including premises, vehicles and computers) will regularly and ordinarily be the subject of the covert surveillance]
6. It is proposed that the covert surveillance will be conducted by camera*/computer*/tracking* surveillance.

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7. It is proposed to conduct the covert surveillance during the following dates and times:
[specify dates and times during which it is proposed to conduct covert surveillance. Note that any covert surveillance authority that is issued cannot specify a period of longer than 30 days during which it is to remain in force].
8. In accordance with section 23 (4) of the *Workplace Surveillance Act 2005*, the following person*/persons* are nominated to oversee the conduct of the covert surveillance operation and, for the purpose of section 27 of the Act, are competent and fit to oversee the conduct of the surveillance and have the following experience or qualifications:
[insert full name and address of each person nominated to oversee the conduct of the covert surveillance operation and details of their qualifications, experience and any other information to satisfy the Magistrate that each person designated as a surveillance supervisor is competent and fit to do so (see section 27 (2) and (3))]
9. Verification of the employer's authority for me to act as an employer's representative for the purposes of the covert surveillance operation is attached.
[If applicant is an employer's representative attach verification. If the applicant is the employer, delete this paragraph. Section 23 (2) (h) of the Workplace Surveillance Act 2005 requires an applicant for the issue of a covert surveillance authority who is an employer's representative to include verification acceptable to the Magistrate to whom the application is made of the employer's authority for the person to act as employer's representative for the purposes of the covert surveillance operation.]

Dated

[signature]

[name of applicant]

Note. Section 41 (4) of the *Workplace Surveillance Act 2005* applies Part 4 of the Act to the issue, variation or cancellation of a covert surveillance authority by a judicial member of the Industrial Relations Commission under section 41 of the Act in the same way as it applies to the issue, variation or cancellation by a Magistrate under section 23. Section 23 (2) (h) of the Act requires an applicant for the issue of a covert surveillance authority who is an employer's representative to include verification acceptable to the Magistrate to whom the application is made of the employer's authority for the person to act as the employer's representative. Under section 23 (5) of the Act, the Magistrate to whom an application for issue of a covert surveillance authority is made cannot issue the authority unless the information given by the applicant in or in connection with the application is verified before the Magistrate on oath or affirmation or by affidavit. Under section 23 (7) of the Act, the Magistrate to whom the application is made may require the applicant to provide (either orally or in writing) such further information as the Magistrate requires concerning the grounds on which the authority is being sought.

* *Delete whichever is inapplicable.*

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Schedule 1 Forms

Form 7

(Clause 4 (7))

Application under section 41 of the Workplace Surveillance Act 2005 for variation of covert surveillance authority

I, *[insert name of the employee, employer or other person affected by the covert surveillance authority applying to a judicial member of the Industrial Relations Commission for variation of the authority]* apply under section 41 of the *Workplace Surveillance Act 2005* for the variation of the covert surveillance authority issued to *[insert name of employer or employer's representative to whom authority was issued]* on *[insert date on which authority issued]* by *[insert name of person who issued the authority sought to be varied]* authorising the carrying out of covert surveillance of employees at work for the employer during the period from on 20 , to on 20 *[insert times and dates specified in the covert surveillance authority as the period during which it is to remain in force]*.

The following are the variations sought to the covert surveillance authority described above: *[describe variation/variations sought by applicant]*.

The following are the grounds on which variation of the authority is sought: *[state the ground/grounds on which applicant seeks variation]*

Dated

[signature]

[name of applicant]

Form 8

(Clause 4 (8))

Application under section 41 of the Workplace Surveillance Act 2005 for cancellation of covert surveillance authority

I, *[insert name of the employee, employer or other person affected by the covert surveillance authority applying to a judicial member of the Industrial Relations Commission for cancellation of the authority]* apply under section 41 of the *Workplace Surveillance Act 2005* for cancellation of the covert surveillance authority issued to *[insert name of employer or employer's representative to whom authority was issued]* on *[insert date on which authority issued]* by *[insert name of person who issued the authority sought to be cancelled]* authorising the carrying out of covert surveillance of employees at work for the employer during the period from on 20 , to on 20

[insert times and dates specified in the covert surveillance authority as the period during which it is to remain in force].

The following are the grounds on which cancellation of the authority is sought:
[state the ground/grounds on which applicant seeks cancellation]

Dated

[signature]

[name of applicant]