



New South Wales

Workplace Surveillance Regulation 2017

under the

Workplace Surveillance Act 2005

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

MARK SPEAKMAN, MP
Attorney General

Explanatory note

The object of this Regulation is to repeal and remake, with minor amendments, the provisions of the *Workplace Surveillance Regulation 2012*, which would otherwise be repealed on 1 September 2017 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation:

- (a) prescribes the form of applications for covert surveillance authorities, and
- (b) prescribes the form of covert surveillance authorities, and
- (c) prescribes the form of reports on the use of covert surveillance authorities, and
- (d) requires a Magistrate or eligible Supreme Court Judge who receives an application for, or issues a covert surveillance authority to advise the Minister of the receipt of the application or issue of the authority, and
- (e) provides for the repeal of the *Workplace Surveillance Regulation 2012* and savings consequent on that repeal.

This Regulation is made under the *Workplace Surveillance Act 2005*, including sections 23, 28, 35, 41 and 44 (the general regulation-making power).

This Regulation comprises or relates to matters set out in Schedule 3 to the *Subordinate Legislation Act 1989*, namely matters of a machinery nature.

Contents

	Page
1 Name of Regulation	3
2 Commencement	3
3 Definition	3
4 Forms	3
5 Records relating to covert surveillance authority	4
6 Repeal and saving	4
Schedule 1 Forms	5

Workplace Surveillance Regulation 2017

under the

Workplace Surveillance Act 2005

1 Name of Regulation

This Regulation is the *Workplace Surveillance Regulation 2017*.

2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

Note. This Regulation repeals and replaces the *Workplace Surveillance Regulation 2012*, which would otherwise be repealed on 1 September 2017 by section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definition

(1) In this Regulation:

the Act means the *Workplace Surveillance Act 2005*.

Note. The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this Regulation.

- (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, a covert surveillance authority is to be in Form 2.

(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.

(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 eligible Supreme Court Judge for authority**

An application made under section 41 of the Act to an eligible Supreme Court Judge to issue a covert surveillance authority is to be in Form 6.

(7) **Form of application to eligible Supreme Court Judge for variation of authority**

An application made under section 41 of the Act to an eligible Supreme Court Judge to vary a covert surveillance authority is to be in Form 7.

(8) **Form of application to eligible Supreme Court Judge for cancellation of authority**

An application made under section 41 of the Act to an eligible Supreme Court Judge 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 or eligible Supreme Court Judge 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) The written advice supplied to the Minister 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 of the Act (including as applied by section 41) requires a Magistrate or eligible Supreme Court Judge to take all reasonable steps to preserve the confidentiality of information contained in records made under that section. The section provides that this requirement does not prevent the Magistrate or eligible Supreme Court Judge from supplying information to the Minister that is required for the purposes of an annual report under section 42 of the Act. See, in particular, section 42 (2).

6 Repeal and saving

(1) The *Workplace Surveillance Regulation 2012* is repealed.

(2) Any act, matter or thing that, immediately before the repeal of the *Workplace Surveillance Regulation 2012*, had effect under that Regulation continues to have effect under this Regulation.

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 while 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 that the applicant has for suspecting that a particular employee is or employees are involved in unlawful activity at work. Include the full 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 the outcome of any other managerial or investigative procedures]*.
- 3 Other applications for a covert surveillance authority have*/have not* been made to detect the unlawful activity. The results of other applications were *[describe the results of any 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*/places*/vehicles*/computers*/things* will regularly or ordinarily be the subject of the covert surveillance:
[describe who (including the names of employees where possible) and what premises, places, vehicles, computers or other things will regularly or ordinarily be the subject of the covert surveillance]
- 5 It is proposed that the covert surveillance conducted will be camera*/computer*/tracking* surveillance and that the following equipment will be used for that surveillance:
[provide details of the equipment that is proposed to be used for that surveillance]
- 6 It is proposed to conduct the covert surveillance during the following dates and times:
[Specify the 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 (2) of that Act, have the following qualifications or experience that suit the person*/persons* to be responsible for overseeing the conduct of the surveillance:
[insert full name of each person nominated to oversee the conduct of the covert surveillance operation, together with details of their qualifications and experience to satisfy the Magistrate that each person designated by the Magistrate as a surveillance supervisor has qualifications or experience that suit the person to be responsible for overseeing the conduct of the operation]
- 8 For the purpose of section 27 (3) of the *Workplace Surveillance Act 2005*, the person*/persons* nominated to oversee the conduct of the covert surveillance operation are, for the following reasons, competent and fit to oversee the conduct of the surveillance in the areas listed below and capable of adequately accommodating in the conduct of the operation the employees' heightened expectation of privacy:
[Delete this paragraph if authorisation is not sought to conduct covert surveillance of a recreation room, meal room or any other areas of the workplace where employees are not directly engaged in work. If authorisation is sought to conduct covert surveillance of any such areas, list the areas and

give reasons to satisfy the Magistrate that each person designated by the Magistrate as a surveillance supervisor is competent and fit to oversee the conduct in those areas, and capable of adequately accommodating in the conduct of the operation the employees' heightened expectation of privacy.]

- 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 the 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 an 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 must not 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 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 eligible Supreme Court Judge issuing covert surveillance authority]*, under Division 2 of Part 4 of the *Workplace Surveillance Act 2005*, issue a covert surveillance authority authorising the carrying out of covert surveillance of employees while 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 the authority has been issued:
[insert full name of each person suspected of being involved]
- 3 The following employees and premises*/places*/vehicles*/computers*/things* will regularly or ordinarily be the subject of the covert surveillance:
[describe who (including the names of employees where possible) and what premises, places, vehicles, computers or other things will regularly or ordinarily be the subject of the covert surveillance]
- 4 The covert surveillance authority authorises camera*/computer*/tracking* surveillance and the use of the following equipment for that surveillance:
[provide 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 the 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 The following persons are designated as surveillance supervisors to oversee the conduct of the covert surveillance operation:
[insert full name 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 [insert name of Magistrate or eligible Supreme Court Judge 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 name 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 2017*.
 - (d) If [insert name of Magistrate or eligible Supreme Court Judge who issued the authority] has died, has ceased to be a Magistrate*/eligible Supreme Court Judge* or is absent, the report is to be furnished to another Magistrate*/eligible Supreme Court Judge*.

- 9** Section 37 of the *Workplace Surveillance Act 2005* requires that 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. Section 37 specifies the limited cases in which the use or disclosure would be regarded as being for a "relevant purpose".

10 The covert surveillance authority remains in force for the period from [time] on [date] to [time] on [date].

Dated

[signature]

[name of Magistrate or eligible Supreme Court Judge]

* Delete whichever is inapplicable.

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 was issued] by [insert name of person who issued the authority sought to be varied] authorising the carrying out of covert surveillance of employees while at work for the employer during the period from [time] on [date] to [time] on [date].

The following are the variations sought to the covert surveillance authority described above:

[describe variations sought by applicant]

The following are the grounds on which variation of the authority is sought:

[state the 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 was issued] by [insert name of person who issued the authority sought to be cancelled] authorising the carrying out of covert surveillance of employees while at work for the employer during the period from [time] on [date] to [time] on [date].

The following are the grounds on which cancellation of the authority is sought:

[state the 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 [time] on [date] to [time] on [date].

- 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 using [give details of the types of devices used for conducting covert surveillance]. Those devices were installed or used in the following types of places:
[give details of the types of places in which those devices were installed or used]
- 3 The devices installed have*/have not* been removed. [If the 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 of the covert surveillance authority]
- 6 As a result of the information found during the covert surveillance, the following action has been taken*/is proposed to be taken* by [insert name of the employer]:
[provide details of the action taken or 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 why 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.]

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 while 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 that the applicant has for suspecting that a particular employee is or employees are involved in unlawful activity at work. Include the full 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 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 results of other applications for a covert surveillance authority were *[describe the results 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*/places*/vehicles*/computers*/things* will regularly or ordinarily be the subject of the covert surveillance:
[describe who (including the names of employees where possible) and what (premises, places, vehicles, computers or other things) will regularly or ordinarily be the subject of the covert surveillance]
- 6 It is proposed that the covert surveillance conducted will be camera*/computer*/tracking* surveillance and that the following equipment will be used for that surveillance *[provide details of the equipment that is proposed to be used for that surveillance]*.
- 7 It is proposed to conduct the covert surveillance during the following dates and times:
[Specify the 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 The following person*/persons* are nominated to oversee the conduct of the covert surveillance operation and, for the purpose of section 27 (2) of the *Workplace Surveillance Act 2005*, have the following qualifications or experience that suit the person*/persons* to be responsible for overseeing the conduct of the surveillance:
[insert full name of each person nominated to oversee the conduct of the covert surveillance operation, together with details of their qualifications and experience to satisfy the eligible Supreme Court Judge that each person designated by the Judge as a surveillance supervisor has qualifications or experience that suit the person to be responsible for overseeing the conduct of the operation]
- 9 For the purpose of section 27 (3) of the *Workplace Surveillance Act 2005*, the person*/persons* nominated to oversee the conduct of the covert surveillance operation are, for the following reasons, competent and fit to oversee the conduct of the surveillance in the areas listed below and capable of adequately accommodating in the conduct of the operation the employees' heightened expectation of privacy:
[Delete this paragraph if authorisation is not sought to conduct covert surveillance of a recreation room, meal room or any other areas of the workplace where employees are not directly engaged in work. If authorisation is sought to conduct covert surveillance of any such areas, list the areas and give reasons to satisfy the eligible Supreme Court Judge that each person designated by the Judge as a surveillance supervisor is competent and fit to oversee the conduct of the surveillance in those areas, and capable of adequately accommodating in the conduct of the operation the employees' heightened expectation of privacy.]
- 10 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 the applicant is an employer's representative, attach verification. If the applicant is the employer, delete this paragraph.]*

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 an eligible Supreme Court Judge under section 41 of the Act in the same way as it applies to the issue, variation or cancellation by a Magistrate under that Part. 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.*

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 an eligible Supreme Court Judge 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 was issued]* by *[insert name of person who issued the authority sought to be varied]* authorising the carrying out of covert surveillance of employees while at work for the employer during the period from *[time]* on *[date]* to *[time]* on *[date]*.

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

The following are the grounds on which variation of the authority is sought:
[state the 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 an eligible Supreme Court Judge for cancellation of the authority]*, apply under section 41 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 was issued]* by *[insert name of person who issued the authority sought to be cancelled]* authorising the carrying out of covert surveillance of employees while at work for the employer during the period from *[time]* on *[date]* to *[time]* on *[date]*.

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

Dated

[signature]

[name of applicant]