

South Australia

Workplace Privacy Bill 2004

A BILL FOR

An Act to regulate covert surveillance of employees in the workplace; and for other purposes.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Interpretation
- 4 Covert surveillance

Part 2—Surveillance offences

- 5 Offences relating to covert surveillance
- 6 Offence of using information obtained by surveillance for irrelevant purpose

Part 3—Covert surveillance authorities

- 7 Authority conferred by covert surveillance authority
- 8 Application for covert surveillance authority
- 9 False or misleading information in application
- 10 How an application for a covert surveillance authority is to be dealt with
- 11 Reasonable grounds for issue of covert surveillance authority must exist
- 12 Privacy must be considered
- 13 Form of authority
- 14 Duration of authority
- 15 Conditions of covert surveillance authority
- 16 Contravention of condition of authority
- 17 Variation or cancellation of authority
- 18 Further application for authority after refusal
- 19 Records relating to covert surveillance authority
- 20 Defects in authority
- 21 Report on use of authority

Part 4—Miscellaneous

- 22 Application to judicial member of Industrial Relations Commission
 - 23 Annual report
 - 24 Offences by bodies corporate
 - 25 Regulations
 - 26 Review of Act
-

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Workplace Privacy Act 2004*.

2—Commencement

- 5 This Act will come into operation on a day to be fixed by proclamation.

3—Interpretation

In this Act, unless the contrary intention appears—

covert surveillance authority means an authority issued under Part 3;

covert surveillance—see section 4;

5 **detrimental action** means action causing, comprising or involving any of the following:

- (a) discrimination, disadvantage or adverse treatment in relation to employment;
- (b) dismissal from, or prejudice in, employment;
- (c) a disciplinary proceeding;

10 **employee** means an individual who works under a contract of employment or apprenticeship;

employer means a person who employs persons under contracts of employment or apprenticeship;

15 **employer's representative** means a person authorised by an employer to act on behalf of the employer for the purposes of this Act;

exercise a function includes perform a duty;

function includes a power, authority or duty;

law enforcement agency means any of the following:

- (a) the South Australia Police;
- 20 (b) a police force or police service of another State or a Territory of the Commonwealth;
- (c) the Australian Federal Police;
- (d) the Police Complaints Authority;
- (e) the Australian Crime Commission;
- 25 (f) the Department for Correctional Services;
- (g) any other authority or person responsible for the enforcement of the criminal laws of the Commonwealth or of the State;
- (h) a person prescribed for the purposes of this definition by the regulations;

30 **licensed security agent** means a person holding a security agents licence issued under the *Security and Investigation Agents Act 1995* or a licence of a corresponding kind issued under any Act that replaces that Act;

nominated licensed security agent means a licensed security agent or agents nominated in the application for a covert surveillance authority in accordance with section 8(3);

35 **related corporation**, in relation to an employer that is a corporation means a corporation that is, with respect to the employer, a related body corporate within the meaning of the *Corporations Act 2001* of the Commonwealth;

surveillance means—

- (a) video surveillance; or
- (b) the monitoring of telephone calls; or
- (c) the monitoring of internet sites accessed; or
- 5 (d) the monitoring, interception, storage or retrieval of email messages;

video surveillance means surveillance by a closed-circuit television system or other electronic system for visual monitoring of activities on premises or in any other place;

work means work as an employee;

workplace means premises or a place where persons work, or part of such premises or
10 place.

4—Covert surveillance

- (1) For the purposes of this Act, surveillance of an employee by an employer in the workplace is *covert surveillance* unless—
 - 15 (a) the employee has been notified in writing of the intended surveillance, and the nature of that surveillance, at least 14 days (or, if the employer has obtained the agreement of the employee to a lesser period of notice, that period) before the intended surveillance; and
 - (b) signs notifying people that they may be under surveillance in the workplace, and of the nature of that surveillance, are clearly visible at each entrance to
20 that part of the workplace in which surveillance is taking place.
- (2) Despite subsection (1), surveillance of an employee in the workplace is not *covert surveillance* if the employee has agreed to the use of surveillance of the premises or place constituting the workplace for a purpose other than surveillance of the activities
25 of employees in the workplace and surveillance is carried out in accordance with that agreement.
- (3) For the purposes of this section—
 - (a) employees at a workplace are to be taken to have agreed to intended use of surveillance by their employer if a body representing a substantial number of the employees has agreed on their behalf; and
 - 30 (b) an employee who is first employed at a workplace less than 14 days before the intended use of surveillance at the workplace is to be taken to have agreed to a lesser period of notice of the intended surveillance if the employee was notified in writing of it before commencing work.

Part 2—Surveillance offences

5—Offences relating to covert surveillance

- (1) An employer must not carry out, or cause to be carried out, covert surveillance of an employee of the employer (or of a related corporation of the employer) in the workplace unless—
- (a) it is carried out, or caused to be carried out, solely for the purpose of establishing whether or not the employee is involved in any unlawful activity in the workplace; and
 - (b) it is authorised by a covert surveillance authority.

Maximum penalty: \$2 500.

Note—

Section 7 makes it clear that a covert surveillance authority does not authorise covert surveillance for the purpose of monitoring an employee's work performance or to carry out video surveillance of an employee in any toilet facility or shower or other bathing facility. An employer who carries out or causes to be carried out any such surveillance will be guilty of an offence.

- (2) Nothing in this section makes it an offence—
- (a) for a member or officer of a law enforcement agency to carry out, or cause to be carried out, surveillance in the exercise of a function conferred or imposed on the member or officer by or under any other Act or law; or
 - (b) for a person to carry out, or cause to be carried out, surveillance in a correctional centre or in any other place where a person is in lawful custody; or
 - (c) for a person to carry out, or cause to be carried out, surveillance for the purpose of monitoring operations carried out in the casino in accordance with the *Casino Act 1997*; or
 - (d) for a person to carry out, or cause to be carried out, surveillance of any legal proceedings or proceedings before a law enforcement agency in the exercise of a function conferred or imposed on the person by or under any other Act or law.
- (3) It is a defence to a prosecution for an offence against this section for an employer to prove—
- (a) that the covert surveillance of the workplace was carried out, or caused to be carried out, solely for the purpose of ensuring the security of the workplace or persons in it and that surveillance of any employee was extrinsic to that purpose; and
 - (b) that there was a real and significant likelihood of the security of the workplace or persons in it being jeopardised if covert surveillance had not been carried out; and
 - (c) that the employer notified employees at the workplace (or a body representing a substantial number of the employees) in writing of the intended surveillance for the purpose referred to in paragraph (a) before it was carried out.

- 5 (4) Evidence of any recording, or information, obtained by surveillance of a workplace for the purpose referred to in subsection (3), that is unrelated to the security of the workplace or persons in the workplace, is not to be admitted in evidence in any disciplinary or legal proceedings against an employee unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

6—Offence of using information obtained by surveillance for irrelevant purpose

- 10 (1) A person is guilty of an offence if information obtained as a consequence of covert surveillance of an employee in the workplace authorised by a covert surveillance authority is used by the person in relation to the employee or any other person for an irrelevant purpose.

Maximum penalty: \$2 500.

- 15 (2) Nothing in this section makes it an offence for a member or officer of a law enforcement agency to use information referred to in subsection (1) for any purpose relating to the detection or investigation of an unlawful activity of a person other than an employee in the workplace.

- (3) In this section—

irrelevant purpose means a purpose that is not directly or indirectly related—

- 20 (a) to establishing whether or not an employee is involved in unlawful activity in the workplace in accordance with the authority conferred by a covert surveillance authority; or
- (b) to taking disciplinary action or legal proceedings against an employee as a consequence of any alleged unlawful activity in the workplace so established;
- 25 or
- (c) to establishing security arrangements or taking other measures to prevent or minimise the opportunity for unlawful activity of a kind identified by the information to occur in the workplace; or
- (d) to taking any other action authorised or required by or under this Act.

30 Part 3—Covert surveillance authorities

7—Authority conferred by covert surveillance authority

- 35 (1) A covert surveillance authority that is issued to an employer or employer's representative authorises the covert surveillance generally of any of the employer's employees for the purpose of establishing whether or not one or more particular employees are involved in any unlawful activity in the workplace.

- (2) The authority conferred is subject to the following:

- (a) the condition that the nominated licensed security agent oversees the conduct of the covert surveillance authorised by the authority;
- (b) any other conditions imposed on the authority by or under this Act.

- (3) A covert surveillance authority does not authorise the carrying out, or causing to be carried out, of covert surveillance of any employee of an employer—
- (a) for the purpose of monitoring in the workplace the employee's work performance; or
 - (b) in any change room or toilet facility or shower or other bathing facility in the workplace.

8—Application for covert surveillance authority

- (1) An employer or employer's representative may apply to a Magistrate for the issue of an authority authorising covert surveillance generally of any of the employer's employees for the purpose of establishing whether one or more particular employees are involved in any unlawful activity in the workplace.
- (2) The application for the authority must include the following information:
- (a) the grounds the employer or employer's representative has for suspecting that a particular employee is or employees are involved in unlawful activity;
 - (b) whether other managerial or investigative procedures have been undertaken to detect the unlawful activity and what had been the outcome;
 - (c) who and what will regularly or ordinarily be under surveillance;
 - (d) the dates and times during which the covert surveillance is proposed to be conducted;
 - (e) in the case of an application made by an employer's representative, verification acceptable to the Magistrate of the employer's authority for the person to act as an employer's representative for the purposes of the covert surveillance operation.
- (3) An application for an authority must also nominate each licensed security agent who will oversee the conduct of the covert surveillance operation.
- (4) A Magistrate must not issue an 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.
- (5) A Magistrate may administer an oath or affirmation or take an affidavit for the purposes of an application for an authority.
- (6) The applicant must provide (either orally or in writing) such further information as the Magistrate requires concerning the grounds on which the authority is being sought.

9—False or misleading information in application

- (1) A person must not, in or in connection with an application for a covert surveillance authority, give information to a Magistrate that the person knows is false or misleading in a material particular.
Maximum penalty: \$10 000 or imprisonment for 2 years.
- (2) This section applies whether or not the information given is also verified on oath or affirmation or by affidavit.

10—How an application for a covert surveillance authority is to be dealt with

An application for a covert surveillance authority must be dealt with in camera but is otherwise to be dealt with, subject to this Part and the regulations, in such manner as is decided by the Magistrate to whom the application is made.

11—Reasonable grounds for issue of covert surveillance authority must exist

- (1) A Magistrate must not issue a covert surveillance authority unless the Magistrate is satisfied that the application for the authority shows that reasonable grounds exist to justify its issue.
- (2) When determining whether there are reasonable grounds to issue a covert surveillance authority authorising covert surveillance of a recreation room, meal room or any other area at a workplace where employees are not directly engaged in work, a Magistrate must:
 - (a) have regard to the affected employees' heightened expectation of privacy when in such an area; and
 - (b) be satisfied that each licensed security agent nominated in the application for the authority is both competent and fit to oversee the conduct of the surveillance in such an area, and is capable of adequately accommodating in the conduct of the operation the employees' heightened expectation of privacy.

12—Privacy must be considered

A Magistrate must not issue a covert surveillance authority unless the Magistrate has had regard to whether covert surveillance of the employee or employees concerned might unduly intrude on their privacy or the privacy of any other person.

13—Form of authority

- (1) A covert surveillance authority is to be in the form prescribed by the regulations.
- (2) The authority is to specify—
 - (a) the purpose for which it authorises the carrying out of covert surveillance; and
 - (b) each nominated licensed security agent who is to oversee the conduct of the covert surveillance.

14—Duration of authority

A covert surveillance authority, unless sooner cancelled, remains in force for the period (not exceeding 30 days or such other period as may be prescribed by the regulations) specified in the authority.

15—Conditions of covert surveillance authority

- (1) A covert surveillance authority issued to an employer (or employer's representative) is subject to the following conditions:
 - (a) except as provided by paragraph (b), the nominated licensed security agent and any of his or her supervisees must not give any other person access to any information or recordings made as a consequence of the covert surveillance;

- 5 (b) the nominated licensed security agent and any of his or her supervisees may supply the employer, or employer's representative, only with any information gained, or portions of a recording made, as a consequence of the covert surveillance, that are relevant to establishing the involvement of any employee in an unlawful activity in the workplace in accordance with the authority conferred by the authority or for identifying or detecting any other unlawful activity in the workplace;
- 10 (c) the nominated licensed security agent specified in the authority must destroy or erase (or cause a supervisees to destroy or erase) within 3 months of the expiry of the authority all records of any information gained, and all parts of recordings made, as a consequence of the covert surveillance that are not required for evidentiary purposes;
- 15 (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 the employer's representative must give the employee (and his or her lawyers, if any) access to the information or recording within a reasonable period after being requested to do so by the employee (or his or her lawyers);
- 20 (e) such other conditions as are prescribed by the regulations or specified in the authority.

(2) In this section—

supervisees, in relation to a nominated licensed security agent, means any person conducting covert surveillance under the oversight of the nominated licensed security agent.

25 **16—Contravention of condition of authority**

A person who, being the holder of, or a licensed security agent nominated in, a covert surveillance authority, contravenes any condition of the covert surveillance authority is guilty of an offence.

Maximum penalty: \$5 000.

30 **17—Variation or cancellation of authority**

- (1) A Magistrate may at any time vary or cancel a covert surveillance authority (whether issued by that Magistrate or another Magistrate).
- 35 (2) A Magistrate may vary or cancel an authority on the Magistrate's own initiative or on application made by any employee, employer or other person affected by the authority.
- (3) The Magistrate may deal with a variation or cancellation of an authority, subject to this Part and the regulations, in such manner as is decided by the Magistrate.

18—Further application for authority after refusal

40 If an application by a person for a covert surveillance authority is refused by the Magistrate, a further application in respect of the same surveillance cannot be made unless the further application provides additional relevant information.

19—Records relating to covert surveillance authority

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- (1) A Magistrate who issues, varies or cancels a covert surveillance authority is to cause a record to be made of all relevant particulars of the issue, variation or cancellation of the authority and the grounds on which the Magistrate has relied to justify the issue, variation or cancellation.
- (2) The Magistrate is to take all reasonable steps to preserve the confidentiality of information contained in such records and the privacy of any persons concerned.
- 10 (3) However, nothing in subsection (2) prevents the Magistrate from supplying any information to the Minister that is required for the purposes of a report under section 23.
- (4) The regulations may make provision for or with respect to—
- (a) the keeping of records in connection with the issue of covert surveillance authorities; and
- (b) the inspection of any such records; and
- 15 (c) any other matter in connection with any such records.

20—Defects in authority

A covert surveillance authority is not invalidated by any defect, other than a defect which affects the substance of the authority in a material particular.

21—Report on use of authority

- 20 (1) The employer or employer's representative to whom a covert surveillance authority is issued must furnish a report in writing to the Magistrate who issued the authority setting out briefly the result of the surveillance carried out.
- (2) The report is to be made within 30 days after the expiry of the authority.
- 25 (3) If the Magistrate who issued a covert surveillance authority has died, has ceased to be a Magistrate or is absent, the report is to be furnished to another Magistrate.

Part 4—Miscellaneous

22—Application to judicial member of Industrial Relations Commission

- 30 (1) An applicant for a covert surveillance authority who is aggrieved by a decision of a Magistrate to refuse to issue or to vary or cancel a covert surveillance authority may make an application to a judicial member of the Industrial Relations Commission of South Australia (a *judicial member*) to issue, vary or cancel the authority.
- (2) An employee affected by a covert surveillance authority who is aggrieved by a decision of a Magistrate to refuse to vary or cancel a covert surveillance authority may make an application to a judicial member to vary or cancel the authority.
- 35 (3) The application must be made within 30 days after the decision is given or within such further period as the judicial member allows.
- (4) Part 3 applies to or in respect of the issue, variation or cancellation of a covert surveillance authority by a judicial member to whom an application is made under this section in the same way as it applies to the issue, variation or cancellation of such an authority by a Magistrate.
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- (5) An application to a Magistrate for the issue or for a variation or cancellation of an authority is to be taken (for the purposes only of an application under this section) to have been refused if it has not been decided within the period of 30 days after the making of the application to the Magistrate.

5 **23—Annual report**

- (1) The Minister must, as soon as practicable after 31 December in each year, prepare a report in respect of covert surveillance operations during the year and table the report, or cause it to be tabled, in both Houses of Parliament as soon as practicable after it is prepared.
- 10 (2) A report under this section—
- (a) must include details of the number of covert surveillance authorities sought, and the number of such authorities issued, during the year to which it 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.
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24—Offences by bodies corporate

- (1) If a body corporate commits an offence against this Act, any director or manager of the body corporate is also guilty of an offence and liable to the same penalty as may be imposed for the principal offence unless it is proved that he or she could not, by the exercise of reasonable diligence, have prevented the commission of the principal offence by the body corporate.
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- (2) A person may be prosecuted and convicted of an offence under this section whether or not the body corporate has been prosecuted or convicted of the offence committed by the body corporate.

25 **25—Regulations**

- (1) The Governor may make regulations as contemplated by this Act, or as necessary or expedient for the purposes of this Act.
- (2) Without limiting the generality of subsection (1), the regulations may—
- 30 (a) make provision for the use, possession, storage and destruction of any video recording or any other recording of information made in the course of covert surveillance of the activities of an employee; and
- (b) make provision with respect to applications for the issue, variation and cancellation of covert surveillance authorities and how such applications are to be dealt with; and
- 35 (c) impose penalties, not exceeding \$750, for a contravention of, or failure to comply with, a regulation.

26—Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
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- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.