

November 2021

How we use Search Warrants and Production Orders

This policy's purpose

This policy sets out the approach we take to using search warrants or production orders under the Search and Surveillance Act 2012 (SSA). We use these at times to obtain evidence about breaches under the following Acts, and the regulations under them:

- Health and Safety at Work Act 2015 (HSWA)
- Electricity Act 1992
- Gas Act 1992
- Hazardous Substances and New Organisms Act 1996.

This policy should be read alongside our [How we investigate policy](#), and [Transparency statement about information gathering](#).

We need to gather information and evidence, and hswa gives us broad powers

HSWA provides our inspectors with powers to enter¹ and inspect any workplace in order to determine compliance and gather evidence. The Electricity Act, Gas Act, and Hazardous Substances and New Organisms Act also provide powers for our inspectors to enter any place or premises (except dwellings, unless by consent) to carry out an inspection under these Acts.

We can also obtain information and evidence in the performance of our functions by:

- Asking people to share it with us voluntarily.
- Asking other government agencies and authorities to share it with us. This is sometimes specifically enabled by legislation and is always carried out consistently with our legal obligations. It may also be governed by memoranda of understanding between us and other agencies.
- Performing a search with consent. We only do this where consent is reliable, given freely, and provided in writing.

These powers give us wide scope to obtain information and evidence.

However, sometimes this won't be enough for us to secure what we need. In those circumstances we consider using search warrants and production orders under the SSA.

About search warrants

Under section 173 of HSWA, section 159 of the Electricity Act, section 43W of the Gas Act and section 119 of the Hazardous Substances and New Organisms Act, we can authorise an employee or other suitable person to apply for a search warrant under the SSA. With a search warrant we can search a place, vehicle or thing, even if it isn't a workplace.²

¹ Section 169 of the HSWA requires that we obtain a warrant for entry under the SSA to enter a workplace that is, or is within, a home; or enter a workplace through a home.

² The Courts have determined that a search includes a specified person searching cupboards, drawers or bags; checking the contents of a vehicle; climbing over a locked gate to see if the occupant or owner is in the backyard; obtaining/assessing computer records.

Before seeking a search warrant there must be reasonable grounds to:

- suspect that a person has breached, or is breaching, relevant legislation, and
- believe that the search will find evidential material in or on any part of the place, vehicle, or thing.

About production orders

Under section 71 of the SSA a person who is authorised to obtain a search warrant may apply for a production order.

A production order requires a person to provide specified documents³ to us.

If the person no longer possesses any of the documents we've sought then they're required to tell us where the documents are (to the best of their knowledge).

Before seeking a production order there must be reasonable grounds to:

- suspect that a person has contravened, or is contravening, relevant legislation, and
- believe that the documents sought:
 - constitute evidential material in respect of the offence; and
 - are in the possession or under the control of the person against whom the order is sought, or will come into their possession or control while the order is in force.

How we decide between a search warrant or a production order

We're likely to use a search warrant (rather than a production order) when:

- We're seeking evidence that has been withheld or concealed, and is not able to be obtained by exercising our powers under the HSWA.
- There's a risk the evidence will be destroyed or lost.

We're likely to use a production order (rather than a search warrant) when:

- We're seeking documents from third parties to a business or undertaking, e.g. service providers to a business.

Principles that guide our use of search warrants and production orders

We only consider seeking or using a search warrant or production order when:

- it's necessary to meet our statutory obligations as a regulator, and
- we've used or considered using other practicable methods (including our other statutory powers) to obtain the information or evidence, and
- the evidence sought is relevant. We can't and won't use search warrants or production orders to fish for evidence, and
- any risks to our people's health, safety, and wellbeing in executing the search warrant or production order are appropriately managed. We'll ask the Police to assist us when we need them to.

We comply with the SSA when applying for and using a search warrant or production order.

This includes complying with the identification and notice requirements for a person exercising search powers (other than a remote access search).

We're mindful of our obligations under Te Tiriti o Waitangi when making decisions under this policy. We're also mindful of our responsibilities under the Enduring Letter of Expectations, in which WorkSafe is expected to embody the Government's good faith and collaborative approach to the Māori-Crown relationship.

How we manage electronic searches

The SSA makes no distinction between evidence in physical or electronic form.

We ensure an electronic search is done well and appropriately. There is particular potential for breaches of privacy and legal privilege and the possibility of accessing irrelevant material during an electronic search.

Electronic searches require specialist capabilities that WorkSafe doesn't have. Whenever we intend to conduct an electronic search we engage a specialist electronic forensic unit⁴ to conduct the search, and we follow the protocols established by those units.

The SSA and the Privacy Act 2020

Seeking information under the SSA is not inconsistent with the Privacy Act 2020. However, the Privacy Act applies when applications for search warrants or production orders fall within the exceptions to the information principles outlined in the Privacy Act.⁵

Consideration of the Privacy Act may be necessary if a person provides more personal information than is required. For example, if personal health or financial information, photos or correspondence are received that is not relevant to the search warrant or production

³ The SSA notes 'document' includes call associated data and the content of telecommunications. We consider documents to include written, printed, or electronic matter.

⁴ Such as those established within Inland Revenue and the Police.

⁵ That is, when a search warrant or production order is authorised, or required by, or under the law; or non-compliance with information privacy principles is necessary to avoid prejudice to the maintenance of the law.

order is provided. In these circumstances, we keep the information confidential and return it at the earliest possible time. WorkSafe's transparency statement about information gathering should be used to determine if other steps need to be taken.

How we use search warrants and production orders

We make sure:

- Search warrants and production orders are only requested and used by authorised people. These are authorised inspectors or other employees who we're satisfied are suitably experienced and trained.
- Our applications for production orders and search warrants meet a high standard.
- All applications for search warrants and production orders are reviewed and approved by a Manager who holds the relevant delegation.
- All approved applications for a search warrant or production order are considered by an Issuing Officer.⁶ Their role is to independently decide whether the grounds for the application are reasonable.
- We seek support from our Maruiti team if we are intending to search a culturally sensitive area, such a marae or papakāinga⁷, to ensure the warrant or production order is carried out in a culturally safe manner.
- An authorised inspector is in charge of the search when executing the search warrant, or giving the production order. Other people (including from other agencies) may assist in the search, but will be under the authorised inspector's supervision and control.

⁶ A judge or a person such as such as a Justice of the Peace, Community Magistrate, Registrar, or Deputy Registrar is authorised as an Issuing Officer under section 108 of the SSA.

⁷ Papakāinga - a group of houses, of three or more, on whenua Māori, a 'community' which may include broader support and occupant involvement.