



Australian Government
Office of the Australian Information Commissioner

Committee Secretary
Parliamentary Joint Committee on Law Enforcement
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Response to Question on notice from the Public Hearing on National Security Legislation Amendment Bill (No 1) 2014

At the Committee's Public Hearing on National Security Legislation Amendment Bill (No 1) 2014 on Monday 18 August 2014 the Chair asked me to provide a sense of the types of issues that came out of the 2007 review of the Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence) (AG Guidelines)¹. The question was taken on notice.

After reviewing our internal records management system, it appears that the then Office of the Privacy Commissioner (OPC), was not formally engaged in the review of the Attorney-General's Guidelines. Consequently, the OPC did not provide comments or a submission to the Attorney-General's Department (the AGD) on the review.

However, we note that the AGD wrote to the Law Council of Australia prior to the release of the revised AG Guidelines in October 2007. In this letter (attached), the AGD outlined a number of key issues that were considered by the AGD as part of the review. In relation to privacy, these included:

- the circumstances in which ASIO may retain and/or disclose information gathered in the course of an investigation
- ensuring ASIO treats personal information in accordance with the Information Privacy Principles² in the security and intelligence context, and
- a comparison of the previous and revised Guidelines to highlight that the revised Guidelines impose more comprehensive requirements on ASIO.

¹ The Attorney-General's Department, *Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence)*, viewed 3 September 2014, The Australian Security Intelligence Organisation website <
<http://www.asio.gov.au/img/files/AttorneyGeneralsGuidelines.pdf>>

² The Information Privacy Principles (IPPs) applied at this time. On 12 March 2014, the IPPs were replaced by the Australian Privacy Principles. However, the IPPs apply to acts or practices that occurred prior to 12 March 2014.

For Your Information: Australian Privacy: Law and Practice (ALRC Report 108)

Concurrent to the review of the AG Guidelines, the Australian Law Reform Commission (ALRC) conducted an inquiry into the extent to which the *Privacy Act 1988* (Cth), and related laws, provided an effective framework of protection of privacy in Australia. This inquiry culminated in the *For Your Information: Australian Privacy: Law and Practice (ALRC Report 108)* which was tabled in August 2008³. This report made reference to the AG Guidelines.

In the ALRC Report 108 the ALRC commented that the AG Guidelines should include:

- a requirement to notify the Inspector-General of Intelligence and Security (IGIS) of incidents involving the incorrect use and disclosure of personal information (see paragraph 34.102 of the ALRC Report 108), and
- more substantive requirements on the storage and security of personal information (see paragraph 34.104 of the ALRC Report 108).

We note the current section 13 of the AG Guidelines on the treatment of personal information does not include these requirements.

If the Committee requires any further information about the issues raised during the 2007 review of the AG Guidelines, we recommend those queries be directed to the Attorney-General's Department.

Yours sincerely

Timothy Pilgrim
Australian Privacy Commissioner

3 September 2014

³ Australian Law reform Commission, *For Your Information: Australian Privacy: Law and Practice (ALRC Report 108)*, viewed 3 September 2014, the Australian Law Reform Commission website
<<http://www.alrc.gov.au/publications/report-108>>



Australian Government
Attorney-General's Department

Secretary

07/21710
27 June 2008

Mr Bill Grant AM
Secretary-General
Law Council of Australia
PO Box 1989
CANBERRA ACT 2612

DATE RECEIVED - 1 JUL 2008
Action Officer/Rec. Init/Date
File No
Action Taken / Referred to Init / Date <i>HD</i>

Dear Mr Grant

ASIO Guidelines

I acknowledge Ms Margery Nicoll's letter dated 7 May 2008 concerning the revised ASIO Guidelines issued by the former Attorney-General, the Hon Philip Ruddock MP, on 12 October 2007.

The Guidelines set out the Attorney's expectations of ASIO in the performance of its functions. They replace two previous guidelines issued in the early 1990s: the Security Intelligence Guidelines and the Guidelines relating to Politically Motivated Violence.

The revised Guidelines take into account the current security environment, amendments to legislation and changes to ASIO's internal policies and procedures. They are simply drafted to make them easier to understand and apply in practice.

I enclose an attachment which responds to the questions raised by Mr Peter Webb in his letter dated 31 October 2007. However, you will appreciate that not all questions can be fully answered as they touch upon operational matters.

Finally, I note that the Australian Law Reform Commission's Final Report on its *Review of Privacy* is due to be released shortly. That report may contain recommendations relevant to the ASIO Guidelines which could require the Department to consider the Guidelines again.

If a further review occurs, the Law Council's questions and comments will also be taken into account at that time.

I trust this information is of assistance and thank you for your interest in this matter.

Yours sincerely

Robert Cornall AO
Secretary

RESPONSE TO LAW COUNCIL OF AUSTRALIA QUESTIONS ON ASIO GUIDELINES

1. Bases for Investigation

New paragraph 9.1(a) provides that ASIO shall consider what is known about 'the subject's associations and beliefs' in deciding whether to conduct an investigation. These factors are in addition to considering a 'subject's activities'. In all cases, there must also be an assessment of the extent to which those activities, associations and beliefs are, or are likely to be, relevant or prejudicial to security.

Clause 3 of the Guidelines sets out the principles governing the work of ASIO. In particular, clause 3.2 provides that ASIO's security functions 'are concerned with protection and are anticipatory in nature'. Paragraph 9.1(a) is consistent with the anticipatory aspect of ASIO's work. It recognises the current security environment and various legislative changes, including the new terrorist organisation offences in Division 102 of Part 5.3 of the *Criminal Code*.

2. Definition of information that is relevant to security

Clause 10.1 requires that the information obtained by ASIO assist *in determining* a connection or possible connection between a subject and activities relevant to security (emphasis added). While the former provision required the information to *indicate* such a connection, the new test still needs a positive link.

The addition of paragraph 10.1(c) recognises that in the course of an investigation, ASIO may obtain information that may assist in determining whether a person, group or entity, other than the subject of the particular investigation, has a connection or a possible connection with activities prejudicial to security. This clarifies that information obtained about one person, group or entity may lead to information about another person, group or entity. At all times, however, the information must assist in determining whether that other person, group or entity has a connection or possible connection to activities relevant to security (as defined in paragraph 4.1(a)).

3. Meaning of the term 'individuals or groups of interest'

Clause 10.3 provides an example of the type of information that may be obtained by ASIO. In effect it illustrates the general concept, set out in clause 10.1, of what information may be obtained. Paragraph 10.3(a) provides that such information may include the identity and relevant activities of individuals and groups of interest, adopting the words used in clause 3.8 of the former guidelines relating to Politically Motivated Violence. The reference to 'individuals and groups of interest' is not intended to add to or detract from the term 'subjects' used elsewhere in the Guidelines.

4. Removal of the distinction between preliminary investigations and general investigations

The previous distinction between 'preliminary' and 'general' investigations has been removed and replaced with the concepts of 'inquiry' and 'investigation'. Both new expressions are defined in clause 4 of the Guidelines.

The previous concepts of preliminary and general investigations did not reflect the reality of ASIO's intelligence gathering functions and served no practical purpose. Rather, the new terminology recognises that there may be a series of inquiries to determine any linkage between the

activities of the subject and national security, followed by a more structured investigation when it has been determined that such linkage could, in fact, exist.

In relation to the review of inquiries and investigations, clause 11.1 requires investigations to be reviewed no less than annually. This annual review does not apply to inquiries reflecting the ongoing strategic nature of such activity. Investigations, on the other hand, are targeted to a specific subject. The seriousness of conducting an investigation is illustrated by clause 8.1, which provides that the *initiation and continuation* of investigations shall be authorised by the Director-General or his delegate, who must be at or above Executive Level 2. This ensures, in addition to each annual review, that persons with appropriate training and experience have an ongoing obligation to assess the necessity of the investigation.

5. The types of politically motivated violence to be given priority by ASIO

Clauses 15.1 and 15.2 reflect corresponding parts of the previous guidelines on Politically Motivated Violence (see clauses 3.14 to 3.17). The addition of paragraph 15.1(b) characterises the list in former clause 3.15. To provide further information about what may be encompassed by the phrase 'use of tactics that can reasonably be assessed as likely to result in violence' raises operational issues.

6. Special measures where politically motivated violence threatens "protected persons"

Clauses 15.9 to 15.12 provide clearer guidance on the performance of ASIO's functions in relation to paragraph (d) of the definition of politically motivated violence (as set out in section 4 of the ASIO Act). Clause 15.12 is in similar terms to clause 3.25 of the former guidelines on politically motivated violence.

Both clause 15.2 and the former clause 3.25 recognise that even where information relevant to paragraph (d) of the definition of politically motivated violence is of low reliability, it may nevertheless be necessary to use a higher degree of intrusion than would normally be the case based on such information because of the seriousness to security of such attacks.

7. The circumstances in which ASIO may retain and/or disclose information gathered in the course of an investigation

The media has incorrectly reported that the revised Guidelines permit ASIO to retain information indefinitely even if it is not relevant to national security. Section 17 of the *ASIO Act* states that ASIO's functions relating to obtaining, correlating, evaluating and communicating intelligence must be *relevant to security* (emphasis added). The Guidelines reflect this legislative requirement. In particular, clause 11 of the new Guidelines requires ASIO investigations to be reviewed at least annually, and records to be destroyed under disposal agreements between ASIO and the National Archives of Australia if they are no longer relevant to security. Paragraph 11.2 of the new Guidelines is in similar terms to paragraph 2.18 of the previous Security Intelligence Guidelines.

Additionally, paragraph 13 of the new Guidelines deals specifically with the treatment of personal information by ASIO, and places obligations on ASIO that reflect those aspects of the Information Privacy Principles that can be appropriately applied to the security and intelligence context. The new Guidelines impose more comprehensive requirements for the handling of personal information by ASIO than was the case in the previous Guidelines. Privacy issues were taken into account when drafting the revised Guidelines.

The IGIS has indicated that his office will monitor the changes to the Guidelines to ensure that the safeguards provided in the legislation and Guidelines are adequately implemented at the operational level.

8. New powers conferred on ASIO since the old Guidelines were published

As stated above, a key catalyst for the review of the ASIO Guidelines was the significant changes to the legislative framework within which ASIO operates. Additional factors include the changed security environment – particularly the ongoing threat of terrorism, changes in ASIO's internal policies and procedures, and the need to incorporate the use of new, advanced analytical and investigative methodologies to assist in preventing terrorism. There was also a need for the Guidelines to be clearer and more easily understood by those applying them.

Attorney-General's Department
27 June 2008