

AFP National Guideline on investigations where parliamentary privilege may be involved

1. Disclosure and compliance

This document is classified **OFFICIAL** and is intended for internal AFP use.

Disclosure of any content must comply with Commonwealth law and the [AFP National Guideline on information management](#).

This instrument is part of the AFP's professional standards framework. The [AFP Commissioner's Order on professional standards \(CO2\)](#) outlines the conduct expected of AFP appointees. Inappropriate departures from the provisions of this instrument may constitute a breach of AFP professional standards and be dealt with under Part V of the [Australian Federal Police Act 1979](#) (Cth).

2. Guideline authority

This guideline was issued by Deputy Commissioner Investigations using their power under section 37(1) of the [Australian Federal Police Act 1979](#) (Cth), as delegated by the Commissioner under section 69C of the Act.

3. Introduction

This guideline outlines the obligations of AFP appointees involved in law enforcement investigations where parliamentary privilege may be involved. It is designed to:

- ensure that AFP appointees conduct investigations in a way which does not amount to a contempt of parliament
 - *in other words, to ensure action taken in the course of an investigation does not amount to an improper interference with the functions of the Parliament, a parliamentary committee or a parliamentarian in the course of their duties or performance as a member*
- give an opportunity for claims of parliamentary privilege to be raised and resolved
- ensure that material subject to such claims is managed appropriately.

This guideline cannot prevent a claim of privilege being raised in a different manner, but it reflects an understanding, negotiated with the parliament, of how such claims will usually be raised and resolved.

3.1 Role of the AFP

The AFP recognises the importance of parliamentary privilege and not improperly interfering with the business of parliament. The AFP may need to investigate

offences involving parliamentarians and their staff from time to time. The AFP, through this guideline, will ensure that parliamentary privilege is observed.

This guideline is designed to be read alongside [Attachment A: Memorandum of Understanding \(MOU\) between the Attorney-General, the Minister for Home Affairs, the Speaker of the House of Representatives and the President of the Senate](#).

4. Investigations oversight

The AFP Sensitive Investigation Oversight Board (SIOB), chaired by Deputy Commissioner Investigations, will oversee the investigations where parliamentary privilege may be involved unless the SIOB decides otherwise.

The SIOB provides strategic direction and management of designated sensitive investigations and ensures alignment of AFP capabilities and capacities to conduct sensitive investigations. The purpose of escalating particularly sensitive investigations to the SIOB is to enable the AFP senior executive to have direct awareness and oversight of the matter and, in some cases, to make certain operational and strategic decisions.

4.1 Training

The AFP will deliver online training on parliamentary privilege and the application of the MOU and this guideline to all AFP members. As part of any investigation that potentially involves parliamentary privilege, the lead investigator must ensure all officers involved, including constables assisting, are trained in the requirements of this guideline and their obligations, including not disclosing any details relating to the investigation outside of the investigations team. To inform a decision on an investigation where parliamentary privilege may be involved, investigators must consider this guideline.

5. Executing search warrants

This section outlines procedures that should be followed where the AFP proposes to execute a search warrant in relation to a person elected to a federal, state or territory parliament (a member) or their staff, or premises occupied or used by these individuals, including:

- office in the parliament, legislative assembly, house of assembly or legislative council
- electorate office
- residence of a member or their staff
- any other premises used by a member or their staff for private or official purposes on which there is reason to suspect that privileged material may be located
- any other premises not used or occupied by a member or their staff where the AFP suspects or is informed that documents on the premises may be subject to parliamentary privilege

- any other location where an individual claims that material is covered by parliamentary privilege.

5.1 Procedure prior to obtaining a search warrant

An AFP appointee who proposes to apply for a search warrant in respect of a person or premises listed above must seek approval through the SIOB before applying for the warrant unless there are circumstances of such seriousness or urgency and/or there is reasonable suspicion that evidence could be destroyed (for example, a crime scene). In these circumstances, verbal approval from a deputy commissioner (and subsequent approval of the SIOB) is appropriate.

If approval is given, the appointee may consult the office of the appropriate public prosecutor before applying for a search warrant. In cases involving alleged offences against Commonwealth law, the appropriate office is the Commonwealth Director of Public Prosecutions. AFP Legal will provide assistance to draft and/or review the affidavit and warrant, as well as providing legal advice in relation to the execution of the warrant.

AFP appointees should follow the [Better Practice Guide on Crimes Act 1914 search warrants](#).

5.2 Procedure prior to executing a search warrant

The AFP should, unless a deputy commissioner or the SIOB determines that to do so would affect the integrity of the investigation, contact the member or a senior member of staff prior to executing the warrant with a view to agreeing on a time for execution of the search warrant so as to minimise any interference with the performance of the member's duties.

Additionally, a senior AFP appointee (commander or above) should:

- contact the relevant presiding officer before executing the search warrant and notify that officer of the proposed search
or
- if a presiding officer is not available, contact the Clerk or Deputy Clerk or, where a committee's documents may be involved, the chair (or if unavailable, the secretary) of that committee.

5.3 Procedure for executing the search warrant

Where possible, the executing officer should comply with the following procedures unless compliance would affect the integrity of the investigation:

- A search warrant should not be commenced on a sitting day unless otherwise agreed.
- A search warrant should be executed at a time when the member or a senior member of their staff will be available to be present.
- The member or their staff should be given reasonable time to consult the relevant presiding officer and/or a lawyer before the warrant is executed.

If the member or their staff is present when the search is conducted, the executing officer should ensure that they have a reasonable opportunity to claim parliamentary privilege in respect of any documents or other material.

There is a public interest in maintaining the free flow of information between constituents and their parliamentary representatives. Accordingly, even if there is no claim for privilege, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search. The executing officer should consider inviting the member or staff to identify where documents or other material that fall within the scope of the search warrant are located. When viewing electronic evidence, the executing officer should also consider strategies, for example key word searches, to find documents that meet conditions of the warrant rather than seizing entire drives or computers in the first instance. If relevant documents are identified, they should be transferred to another external storage device and secured along with other material.

5.4 Procedure if privilege is claimed or identified

The executing officer should follow this procedure if they identify that any material collected under the warrant might be subject to a claim of parliamentary privilege. It also applies if a claim of parliamentary privilege is made.

If a claim is made, the executing officer should ask the individual to identify the basis for the claim. The executing officer should make a diary note of this request and then follow the quarantine procedure outlined below.

The executing officer should advise the person making the claim of the following procedure to ensure that the relevant documents or other material are protected until the claim has been resolved.

Quarantine procedure:

1. The relevant material should be placed in secure audit bags in accordance with the [AFP National Guideline on property and exhibits](#).
2. A list of the exhibits will be prepared by the executing officer, with the member or their staff to provide particulars where required.
3. The member or their staff must be given an opportunity to take or be provided with copies of any documents or other material before they are secured. The copying should be done in the presence of the executing officer.
4. The secured exhibits should be delivered into the safekeeping of the Clerk or a person suitably identified by the presiding officers.

- a. In circumstances where electronic devices are seized or moved and require further examination to retrieve information (for example from a computer hard drive), access to the devices can be facilitated by consultation between the AFP with the presiding officers (or clerk) and the relevant member, where appropriate. The timeframes for return to the owner will vary based on the investigation and will occur in consultation with the presiding officers and the relevant member. Information that is able to be retrieved should be transferred to a separate external storage device and secured consistent with quarantine procedures.
5. The member has ten business days (or other period agreed by the AFP and the member) from the delivery of the exhibits to the third party to notify the executing officer either that the claim for parliamentary privilege has been abandoned or confirm they intend to formally request the appropriate House consider whether the material seized is covered by parliamentary privilege. Such notification will be in writing.
6. When a member notifies the executing officer that they will seek a ruling on a claim of parliamentary privilege, the exhibits are to remain in the possession of the Clerk or a person suitably identified by the presiding officers until the disposition of the material is determined in accordance with the ruling.
7. If the member has not contacted the AFP within ten business days (or other period agreed by the AFP and the member), the AFP will be entitled to assume that the claim for parliamentary privilege has been abandoned. The AFP will take reasonable steps to confirm the claim is not being pursued, including attempting to seek that confirmation from the member. Following this, the Clerk or their nominee should deliver the material to the executing officer to proceed as required.

The executing officer may consider and agree to an alternative procedure, in consultation with the member or the presiding officer where circumstances require.

5.5 Obligations at the conclusion of a search

The executing officer must provide a receipt recording exhibits seized under the search warrant. If the member or their staff do not hold copies of the exhibits that have been seized, the receipt should contain sufficient particulars to enable the member to obtain further advice.

The executing officer should inform the member that to the greatest extent possible the AFP will provide or facilitate access to the exhibits where such access is necessary for the performance of the member's duties. The AFP should provide or facilitate access on those terms. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.

The AFP will comply with any law, including the requirements set out in the legislation under which the relevant search warrant was issued.

If material is relevant to an investigation and a claim of privilege is upheld, the AFP must, in accordance with disclosure guidelines, notify the prosecutor that material subject to parliamentary privilege has been quarantined. The prosecutor will then assess whether to advise the court and defence counsel.

If the relevant House determines that material is protected by parliamentary privilege, the AFP will not make any use of that material. If the AFP is in possession of material that is subject to an upheld privilege claim, the AFP will consult with the affected member to either return or destroy that material.

5.6 Information held by a third party

Where information is held by a third party and the third party is holding that information on behalf of a person – for example a cloud service provider – and the AFP is aware that an issue of parliamentary privilege may arise, the executing officer should request the information directly from the person for whom the third party is holding the information.

Where a deputy commissioner or the SIOB determines that this is likely to have an adverse impact on the investigation and information is to be sought from the third party, the executing officer should:

- notify the relevant presiding officer before executing the search warrant (If a presiding officer is not available, the executing officer should notify the Clerk or Deputy Clerk or, where a committee's documents may be involved, the chair (or if unavailable, the secretary) of that committee) and
- outline the reasons why requesting information directly from the person is likely to have an adverse impact on the investigation.

Members or their staff may make claims of parliamentary privilege in accordance with this guideline over material sought under warrant executed on a third party in this way. Once information is obtained from a third party, the executing officer must then inform members or their staff as soon as practicable with regard to operational requirements and ensure that they have a reasonable opportunity to claim parliamentary privilege in respect of any information obtained.

In addition, the disclosure of information by a third party to a parliamentarian for the purposes of assisting their parliamentary work may be protected by parliamentary privilege (in the same way that submission of evidence to a parliamentary committee is protected). If a third party claims information is protected by parliamentary privilege, the relevant parliamentarian should be given an opportunity to make that claim and, if a claim is made, the quarantine procedure outlined above should be followed.

6. Reporting

For the Commonwealth Parliament, the AFP will provide a confidential report to the relevant privileges committee and the relevant presiding officer annually on the number of instances in the last financial year where:

- prospective or historical telecommunication data requests are authorised in respect of a member or their staff
- surveillance device warrants are granted or renewed in respect of a member or their staff
- telecommunications interception warrants are granted or renewed in respect of a member or their staff.

The AFP will also provide a description of the general type of offences that are being investigated. There are risks associated with providing detailed information about law enforcement investigations and the use of covert powers as there is a potential for adverse inferences to be drawn from this data. Noting this, the AFP will only provide the number of instances in categories such as:

- 0
- 1–5
- 6–10
- 11–15.

In respect of telecommunications data, the AFP will not report data requests generated in response to investigations where the member or their staff is the victim or person requesting investigative activity, for example investigations into threats or abuse directed towards a member or their staff.

The AFP will only report on telecommunications data requests where it is known prior to the check being conducted that the person is a member or a staff member, and the investigative activity likely relates to their role as a member or staff member.

7. Review of this guideline

Note: Procedures to govern telecommunications data, telecommunications intercept and surveillance device warrants will be subject to further discussions to be conducted in the 47th Parliament, which may result in a further review and update of this guideline.

Otherwise, the guideline will be reviewed every three years.

8. Further advice

Queries about the content of this guideline should be referred to Commander Countering Foreign Interference and Special Investigations.

9. References

Relevant legislation

- [Australian Federal Police Act 1979](#) (Cth)
- [Australian Federal Police Regulations 1979](#) (Cth)
- [Parliamentary Privileges Act 1987](#) (Cth)

10. Shortened forms

AFP	Australian Federal Police
MOU	memorandum of understanding
SIOB	Sensitive Investigation Oversight Board

11. Definitions

A member is a person elected as a member of a parliament.

AFP appointee means a deputy commissioner, AFP employee, special member or special protective service officer and includes a person:

- engaged under section 35 of the AFP Act as a consultant or contractor to perform services for the AFP and determined under section 35(2) of the AFP Act to be an AFP appointee
- engaged overseas under section 69A of the AFP Act
- seconded to the AFP under section 69D of the AFP Act.

(See section 4 of the AFP Act.)

AFP member means a 'member of the Australian Federal Police' as defined in section 4 of the AFP Act and the [AFP Glossary](#).

Constables assisting means a person who is a constable and who is assisting in executing the warrant, or a person who is not a constable and who has been authorised by the relevant executing officer to assist in executing the warrant.

Clerk means:

- in the Senate, the incumbent person holding the office of Clerk of the Senate, appointed by the President of the Senate under section 58(1) of the *Parliamentary Service Act 1999*
- in the House of Representatives, the incumbent person holding the office of Clerk of the House of Representatives, appointed by the Speaker of the House under section 58(2) of the *Parliamentary Service Act 1999*
- or in state or territory jurisdictions, the equivalent position/role.

Houses means the Houses of Parliament: the Senate and the House of

Representatives, or relevant state or territory house of assembly or legislative council.

Investigator is an AFP appointee responsible for, or involved in, a particular investigation.

Presiding Officer means:

- in the Senate, the incumbent senator holding the office of President of the Senate under section 17 of the Constitution
- in the House of Representatives, the incumbent member of the House of Representatives holding the office of Speaker of the House under section 35 of the Constitution
- or in state or territory jurisdictions, the equivalent position/role.

12. Attachments

[Attachment A – Memorandum of Understanding between the Attorney-General, the Minister for Home Affairs, the Speaker of the House of Representatives and the President of the Senate on AFP investigations where parliamentary privilege may be involved.](#)