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AUSTRALIAN FEDERAL POLICE

PARLIAMENTARY INQUIRY QUESTION TAKEN ON NOTICE:

Intelligence and Security

14 August 2019

Subject: PJCIS - Impact of the exercise of law enforcement and intelligence powers on press freedom

Asked

Question Submitted by: Mike Kelly and Mark Dreyfus

Question:

Dr MIKE KELLY: They didn't initiate the referral. In relation to that referral that came from the secretary, that was in documentary form, I take it?

Mr Gaughan: Just for the committee's information: as a result of some work Commissioner Colvin did with the board of secretaries some time ago, there's a pro forma, basically, that needs to be completed prior to a matter being accepted for referral, which goes into some detail in relation to it. So the answer to your question is yes.

Dr MIKE KELLY: In reference to the pro forma, is it possible for that pro forma to be made public? Can we have a copy of that referral?

Mr Gaughan: Obviously there would be certain things we'd have to redact, I'd suspect, such as, potentially, names of suspects, but we'll take that on notice—

CHAIR: Potentially, we could have a look at that in camera.

Dr MIKE KELLY: Either way, if that's possible, could we have a look at it?

Mr DREYFUS: Can I make it clear: we'd like to see the pro forma as the pro forma—that is, what does the form look like? And, if possible, can you provide us with an example—with whatever redactions you think are needed—so we can see what it looks like when it is filled out. So we'd like to see both the unfilled-out form and an example of the filled-out form.

Answer:

A copy of the AFP's pro forma is at Attachment A. The document has been redacted on the basis it contains information about sensitive police methodology.

A copy of the referral made on 30 April 2018 in relation to News Corp reporting is at Attachment B. The AFP client checklist was not completed for this referral as all supporting material was classified Top Secret.

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Asked

Question Submitted by: Mike Kelly

Question:

Dr MIKE KELLY: In relation to this referral, in terms of what the public can know about this, did it refer to the breaches or potential breaches or alleged breaches of the Crimes Act by Annika Smethurst?

Mr Colvin: No; it related to the unauthorised disclosure of information that led to a media article.

Dr MIKE KELLY: Does the referral specify potential offences? Or does it just talk about actual physical incidents or—

Mr Colvin: We'd have to take that on notice and look again. Sometimes the secretary will actually draw our attention to the specific offences; other times it's implicit. And, frankly, that's our job: to determine what offences may or may not have been committed.

Answer:

No potential offences were mentioned in the referral on 30 April 2018 in relation to News Corp reporting.

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Asked

Question Submitted by: Mike Kelly

Question:

Dr MIKE KELLY: What other type of warrant was used in relation to Ms Smethurst—
covert warrant or otherwise? Just in terms of type—

Mr Gaughan: That's going down to methodology and a whole raft of other issues.
Again, that's probably something we could take in camera.

Answer:

A classified response to this question has been provided to the Committee.

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Asked

Question Submitted by: Mike Kelly

Question:

Dr MIKE KELLY: Obviously what underpins these in relation to this whole public interest regime is a demonstration of harm—the principle of harm. What evidence did the secretary from Defence provide in relation to the potential harm relating to this matter?

Mr Gaughan: I presume that would be in the referral notice that we got. Again, that would be something we would provide to the committee.

Answer:

The Secretary of Defence did not provide information on the potential harm in the referral on 30 April 2018 in relation to News Corp reporting.

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Asked

Question Submitted by: Mike Kelly

Question:

Dr MIKE KELLY: Sure. Does the affidavit refer to the harm in this matter? Without going into detail, did the affidavit specify the harm?

Mr Gaughan: I haven't read the affidavit; we'd have to check it.

Mr Colvin: We'd have to check it. At the end of the day, the affidavit follows the legal requirement. The law says that if a document that is classified is disclosed in an unauthorised manner—the law doesn't refer to harm. Harm is a subjective test about the public interest.

Answer:

A classified response to this question has been provided to the Committee.

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Asked

Question Submitted by: Kristina Keneally

Question:

Senator KENEALLY: Where can we find a copy of that guideline?

Mr Colvin: I think we have made it public before, and we are certainly happy to make it public again. I have a feeling we may have submitted it to the committee before, but we can do that again.

Senator KENEALLY: If you could, please. Does that guideline set out how you determine that a matter is politically sensitive. Is there a set of criteria?

Answer:

The AFP National Guideline on Politically Sensitive Investigations is publically available on the AFP Information Publication Scheme. A copy of the National Guideline is at Attachment C.

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Asked

Question Submitted by: Mark Dreyfus

Question:

Mr DREYFUS: Were there different officers? Did the officers who conducted the raid on Annika Smethurst's home also conduct the raid on the ABC?

Mr Gaughan: It's the same team, Mr Dreyfus, but they were not the same officers. There was one person who was common and that was the detective superintendent who had oversight. But he's not the case officer. I'll have to take on notice whether or not they were the same computer forensics guys, but, certainly in relation to the investigators, they were different officers.

Mr Colvin: But from the same team.

Mr Gaughan: But from the same team.

Mr DREYFUS: What was the point about resourcing that you were making on 6 June, then?

Mr Gaughan: Computer forensics officers.

Mr Colvin: Digital forensics people. They're not part of that small team. These are the capabilities that support our investigators.

Mr DREYFUS: So there were the same digital capability officers for both?

Mr Colvin: We'll take that on notice.

Answer:

The search warrants executed at Ms Annika Smethurst and the ABC's premises were attended by different AFP digital forensic team members.

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Asked

Question Submitted by: Mark Dreyfus

Question:

Mr DREYFUS: On the raid conducted on the Home Affairs employee's home, did anyone suggest to you the leaking of that information had harmed Australia's national security?

Mr Gaughan: I will take that one on notice.

Answer:

No information was provided to the AFP in relation to the harm on Australia's national security.

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Asked

Question Submitted by: Mark Dreyfus

Question:

Mr DREYFUS: Did you obtain a journalist information warrant in relation to the leak of the au pair emails?

Mr Colvin: I think we'd have to take that on notice, Mr Dreyfus, for two reasons: (1) I don't know that we know the answer to that, and (2) there are also limitations to what we can say publicly about that.

Mr DREYFUS: Sure. Understood. You can take that on notice. Did you obtain any other warrants in relation to the journalist to whom those au pair emails were leaked?

Mr Gaughan: My recollection is no, but for clarity for the committee we'll take it on notice.

Answer:

A classified response to this question has been provided to the Committee.

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Asked

Question Submitted by: Mark Dreyfus

Question:

Mr DREYFUS: Could you provide the committee with a copy of the referral? You can take that on notice too.

Mr Gaughan: It was the CDF and the acting secretary that referred it to us, but as far as what you've just asked for, yes, we'll have to take that on notice.

Answer:

A classified response to this question has been provided to the Committee.

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Asked

Question Submitted by: Mark Dreyfus

Question:

Senator KENEALLY: You can take my last question on notice: what is the total cost to the taxpayer associated with the investigations into both the ASD leak and the Afghan files link?

Mr Pezzullo: The cost borne by my department?

Senator KENEALLY: Yes. I can't ask you to provide—

Mr Pezzullo: I think the answer would be close to zero but I'll—

Senator KENEALLY: Can you provide us with that information for the AFP, or do we need to put that on separate notice to the AFP?

Mr Pezzullo: I think I'll just refer that to Commissioner Colvin. He'll take that as being on notice now and he'll contemplate that. It's his budget, so it's his financial resources that he'll need to look into.

Answer:

As at 6 August 2019, the total estimated cost of the investigations were:

- Investigation into the Afghan files disclosure: \$140 600
- Investigation into the ASD disclosure: \$134 900

These figures do not include ongoing legal costs in relation to the Federal Court of Australia and High Court of Australia proceedings.

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REFERRAL TO AFP

Supporting material checklist

REFERRING AGENCY INFORMATION

Referring Agency: Referral date:
 Contact Officer: Phone:
 Email:

Please provide or otherwise indicate availability of the following to assist the evaluation of your referral:

HARM STATEMENT	YES	NO	NOTES or N/A
What is the harm now and / or in the future to your agency / national security / Australia's interests. Please provide information within 7 days <ul style="list-style-type: none"> As per section 123.1 of the <i>Criminal Code Act 1995 (Cth)</i>, has or will an injunction or interim injunction been sought to restrain the material from further publication? <ul style="list-style-type: none"> If not, please explain why 	<i>E.g. YES</i>		<i>If yes, please provide specific details</i>

PUBLIC INTEREST / MEDIA / FOI / PID	YES	NO	NOTES or N/A
Has this matter been the subject of media reporting			
Has the disclosed material been released pursuant to a Freedom of Information request			
Is this matter the subject of a Public Interest Disclosure complaint (internal or external)			

POLITICAL INTEREST/PARLIAMENTARY PRIVILEGE	YES	NO	NOTES or N/A
Has this matter been the subject of political interest			
Were the documents brought in to existence in the course of, or for purpose of or incidental to, the transacting business of a House or a committee			<i>If yes, falls within proceeding of parliament</i>
Have the documents been subsequently used in the course of, or for purpose of or incidental to, the transacting of the business of a House or a committee			<i>If yes, falls within proceeding of parliament</i>
Is there any contemporary or contextual evidence that the documents were retained or intended for use in the course of, or for purpose of or incidental to, the transacting of the business of a House or committee			<i>If yes, falls within proceeding of parliament</i>



[REDACTED]

DEPARTMENTAL CORRESPONDENCE	YES	NO	NOTES or N/A
Internal investigation report or full chronology of enquiries / actions to date	<i>E.g. YES</i>		<i>E.g. Provided in referral</i>
Has the full extent of the alleged conduct / disclosure / access / distribution been identified			
Have relevant internal / external source documents been identified			
Have internal interviews / statements / reports / legal advising's been provided			
Has an agency security advisor or high level committee endorsed this referral			

SOURCES OF POTENTIAL EVIDENCE	YES	NO	NOTES or N/A
[REDACTED]	<i>E.g. YES</i>		<i>E.g. Provided in referral</i>
[REDACTED]			
[REDACTED]			
[REDACTED]			
[REDACTED]			
[REDACTED]			
[REDACTED]			
[REDACTED]			
[REDACTED]			
[REDACTED]			
[REDACTED]			
[REDACTED]			
[REDACTED]			

SUSPECT INFORMATION	YES	NO	NOTES or N/A
Is the suspect aware of the allegations / internal investigation / referral to AFP			
What is the current status of the suspect (suspension, leave, pending departure, left agency)			
Has the suspect corresponded directly with your agency in respect of this matter prior to referral			
Are there any declared associations between the suspect and others (e.g. journalists, known criminal entities) AFP should be aware of			
Content of suspects personnel file to be made available			

WITNESS INFORMATION	YES	NO	NOTES or N/A
Full names and contact details of identified witnesses / suspect to be provided			
What is the current status of identified witnesses (suspension, leave, pending departure, resigned)			

[REDACTED]



Are any other Commonwealth Departments / agencies or companies involved in this referral			
Full names and contact details of identified witnesses / suspect to be provided			

INTELLIGENCE LINKAGES	YES	NO	NOTES or N/A
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Have any open source enquiries been undertaken, if so please provide chronology			
Is there a requirement for specialist systems to communicate relevant information to the AFP			

PROCEEDS OF CRIME	YES	NO	NOTES or N/A
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Is there any expectation of financial return to the Commonwealth Government in respect of the allegations			
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OVERSEAS / INTERNATIONAL NEXUS	YES	NO	NOTES or N/A
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Is there an overseas nexus with this matter			
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AGENCY SUPPORT	YES	NO	NOTES or N/A
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Have alternative treatments been considered e.g. admin action, civil action, pecuniary penalties			
Does your agency have specialist skills to support the AFP investigation			



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Australian Government
Department of Defence

Attachment B
COMMISSIONER'S OFFICE

30 APR 2018

CMS: 2018-3958

Secretary

Telephone: [Redacted]
Facsimile: [Redacted]

SEC(S)/OUT/2018/64

Dec, for urgent resolution and advice pb. 30/4

Commissioner Andrew Colvin APM OAM
Australian Federal Police
Edmund Barton Building
47 Kings Ave
BARTON ACT 2600

*NMCO For attention please
S Dec 30/4*

Dear Commissioner Colvin

In accordance with agreed procedure for referring matters to the AFP involving the unauthorised disclosure of Commonwealth information, please accept this letter as a formal request for an AFP investigation.

As you are aware, on 29 April 2018 News Limited journalist, Ms Annika Smethurst, published an article which referred to highly classified information. The article referred to correspondence between the Secretary of the Department of Home Affairs and me, as well as a Ministerial Submission from the Australian Signals Directorate regarding a Home Affairs proposal for legislative amendments.

The Secretary of the Department of Home Affairs supports this referral and will receive a copy of this letter. My points of contact for this referral are [Redacted]

Yours sincerely

[Redacted Signature]

Greg Moriarty

30 April 2018

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FOR INTERNAL AFP USE ONLY



AFP National Guideline on politically sensitive investigations

1. Disclosure and compliance

This document is classified **For Official Use Only** and is intended for internal AFP use.

Compliance

This instrument is part of the AFP's professional standards framework. The [AFP Commissioner's Order on Professional Standards \(CO2\)](#) outlines the expectations for appointees to adhere to the requirements of the framework.

provisions of the [Australian Federal Police Act 1979](#) (Cth).

2. Acronyms

AFP	Australian Federal Police
MHA	Minister for Home Affairs
MP	Member of Parliament

3. Definitions

AFP Senior Executive - means an Assistant Commissioner, a Deputy Commissioner or the Commissioner.

Relevant manager - means the portfolio Commander responsible for the relevant incident type(s), which will generally be Manager Special References.

Member of Parliament (MP) - means a member of the Commonwealth House of Representatives or the Senate, or a state or territory equivalent.

Parliamentary privilege - means the protection of the proceedings of parliament.

Politically sensitive matter - means matters under investigation which either:

- are likely to be of particular interest to:
 - the Commonwealth Government
 - MPs

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- foreign governments
- the media
- the community.
- involve interference with the administration of good government
- have the ability to adversely impact on international relationships
- have potential adverse implications concerning:
 - an MP
 - MP staff
 - a senior member of the Commonwealth Public Service
 - another politically significant figure.
- are triggered by Australia's international obligations.

Examples of politically sensitive matters include:

- war crimes
- bribery or corruption of domestic and foreign officials
- unauthorised disclosure of Commonwealth information
- ministerial misconduct.

4. Guideline authority

This guideline was issued by National Manager Crime Operations using power under s. 37(1) of the [Australian Federal Police Act 1979](#) (Cth) as delegated by the Commissioner under s. 69C of the Act.

5. Introduction

This guideline outlines the framework for managing politically sensitive investigations and politically sensitive matters that have been referred to the AFP for evaluation, but that have not yet been accepted for investigation. It does not cover counter terrorism investigations.

6. Policy

Politically sensitive investigations within the AFP are managed, reported and undertaken with complete impartiality. This approach is consistent with the AFP's approach to all investigations. The AFP's investigation management principles must be strictly adhered to. Politically sensitive investigations must also consider broader Australian policy and Australia's international obligations.

7. Matter referral

When politically sensitive matters are referred to the AFP, the relevant manager must be consulted during the referral process.

Where a matter is referred directly to the AFP and not via the Minister for Home Affairs (MHA), the AFP must advise the MHA at the earliest opportunity unless there may be a conflict of interest in accordance with s. 11.3 of this guideline.

All reporting to ministers must be conducted in consultation with the relevant manager and in

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accordance with the [AFP Practical Guide on ministerial and parliamentary procedures](#).

8. Referral evaluation

All matters which are considered to be politically sensitive must be evaluated in consultation with the relevant manager, who should determine their priority in accordance with the [Case Categorisation and Prioritisation Model](#).

As referral documentation may initially be limited, coordinating further information should be conducted in consultation with the referring body.

9. Parliamentary privilege

When parliamentary privilege issues are likely to be encountered during an investigation, the functional management team should be consulted in the first instance.

The relevant National Manager must be consulted prior to:

- conducting interviews with Members of Parliament (MP)
- executing search warrants upon MP's premises.

Members undertaking politically sensitive investigations should familiarise themselves with the [AFP National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved](#) which outlines procedures members must follow when seizing documents/property related to 'proceedings in parliament'.

When dealing with parliamentary privilege issues, members should also consider consulting with:

- AFP Legal
- the Commonwealth Director of Public Prosecutions
- the Attorney-General's Department
- the Australian Government Solicitor, on referral from AFP Legal.

10. Case security

The case officer should give early consideration to restricting access to any potentially sensitive information by those not required to access it.

Members must consider restricting access to case information by referring to [National PROMIS Procedure 13 - Team level cases and team level entries](#).

11. Record keeping and reporting

11.1 Recording critical decisions

All critical decisions should be comprehensively recorded in the PROMIS case. If the decision is made by a member of the AFP Senior Executive, the case officer should enter the details of that decision into PROMIS and ensure that the decision maker is provided with a copy of that log

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entry. Any notations or signing of a critical decision should also be scanned and uploaded into the PROMIS case by the case officer.

11.2 Internal reporting

Case officers must ensure that internal reporting is proactive, prompt, accurate and comprehensive and must consider early consultation with the relevant manager to develop agreed reporting timeframes and methodologies.

The senior investigating officer or case officer should also provide regular briefings to the relevant coordinator, when possible. In all circumstances, the relevant manager must be kept up to date on all politically sensitive investigations. Sharing information beyond this line of reporting must be conducted strictly on a need to know basis.

Internal reporting to the relevant manager team should include:

- milestone achievement
- investigation direction
- media interest
- communication strategies
- anticipated engagement with either:
 - a Member of Parliament (MP)
 - the staff of an MP
 - a Commonwealth Public Service employee
 - any other politically significant figure.

11.3 Ministerial reporting

All Ministerial reporting should be conducted in accordance with the [AFP Practical Guide on ministerial and parliamentary procedures](#) and take into account the individual characteristics of the particular investigation.

Where any perceived conflicts of interest in briefing the Minister of Home Affairs (MHA) exist, the AFP Senior Executive must be advised at the earliest opportunity so appropriate and preventative action can be taken.

To ensure the AFP's reporting obligations are maintained without compromise to any operational activity, case officers must:

- consult with the relevant manager when considering the timing and content of ministerial reports
- ensure they address any real or perceived conflict of interest when reporting on politically sensitive investigations involving MPs to the MHA
- consider briefing MHA parallel to, or after, operational activity has taken place to avoid any perception of irregularity.

11.4 Media reporting

Any media reporting must be conducted in accordance with the [AFP National Guideline on media issues](#).

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Functional areas should consider developing a media strategy which should be coordinated with the AFP National Media Team and take into account the information security considerations above.

The timing and contents of all AFP media reporting must be determined in consultation with the relevant manager and the AFP National Media Team, with all media reports being cleared, at a minimum, by the relevant manager.

12. Interdepartmental committee/emergency taskforce

Depending on the nature of the matter, a joint agency or whole of government response may be required. If so, an interdepartmental committee or emergency taskforce may be established by the lead Commonwealth agency and should include a representative from the relevant AFP function.

13. Further advice

Queries about the content of this guideline should be referred to Manager Special References on 02 61315786 or 145786.

14. References

AFP governance instruments

- [AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved](#)
- [AFP National Guideline on media issues](#)
- [AFP Practical Guide on ministerial and parliamentary procedures](#)

Other sources

- [National PROMIS Procedure 13 - Team level cases and team level entries](#)
- [Case Categorisation and Prioritisation Model](#)

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