

Senate Legal and Constitutional Affairs References Committee

Inquiry into the current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters

Written question on notice

10 April 2014

To: AFP

1. Can you clarify the AFP's view in relation to whether the production order covered unsigned draft agreements or similar, and whether the two documents provided by Seven West during the execution of search warrants fell within the scope of the original production order? Why did officers present a different view on this matter at the committee's public hearing to that expressed by the AFP's counsel during court proceedings?

The AFP believes that the production order covered certain unsigned draft agreements or similar and that the two documents obtained from Seven West in under the search warrant fell within the scope of the original production order. We do not accept the proposition that there is necessarily any inconsistency between the evidence given before the committee and comments made by AFP's counsel during court proceedings. The production order required production of various categories of documents including:

- "Electronic and written records relating to payment arrangements and/or instructions from Seven West Media Limited and/or its associated companies" for the publication of Schapelle Corby's story
- "Electronic and written records in relation to any contractual arrangements entered into in order to secure CORBY'S participation and/or assistance in providing information and/or narrative and/or interviews for Corby's story."
- "Electronic and hardcopy communications between Seven West Media Limited and/or its associated companies and CORBY in relation to CORBY'S story".
- "Electronic and hardcopy communications between Seven West- Media Limited and/or its associated companies and any person on behalf of CORBY in relation to CORBY'S story."
- "Electronic and hardcopy instructions and/or arrangements relating to CORBY and/or any other person providing direction for any form of payment or benefit derived from the commercial exploitation of her criminal notoriety to a third party."

It is our view that relevant drafts of contracts which were actually finally entered into, or drafts of contracts not ever entered into but communicated between Seven West and MS Corby, would be captured by the terms of the production order, and that the terms of the production order were sufficiently clear to enable Seven West Media to understand the nature of the documents being sought.

Comments made by Mr Watson SC counsel for the AFP during the Federal Court proceedings were made on his feet, and were not part of the written submissions made by the AFP in those proceedings. Mr Watson was referring in his remarks to a transcript of a press conference given by Deputy Commissioner Phelan on 22 February 2014 where certain questions were being asked, presumably by a Seven West media representative. We understand Mr Watson was saying that although it had been stated on behalf of Seven West that all the AFP had to do was to ask Seven for copies of any relevant documents and they would have been provided, in fact the true situation was

that in response to the production order lawyers for Seven West had taken a legal point to the effect that no specific reference in the production order was made to “drafts” and that therefore they would not be provided. He went on to make the further point that there was no reason a search warrant could not seek information beyond that sought under the production order.

2. Failure to comply with a production order is an offence under subsection 211(1) of the Proceeds of Crime Act 2002. If the AFP is of the view that Seven West did not comply with the Production Order of 11 February 2014, as asserted at the committee's public hearing, why has action not been commenced against Seven West for failing to comply with a production order? Will the AFP commence such action?

The fact that the AFP was of the view that the production order had not been complied with is not the determining factor in whether or not action for breach should be commenced. Other considerations, such as the seriousness of the breach, whether or not the breach was intentional, whether all reasonable steps were taken within the time available to produce the documents, whether there was any ambiguity in the terms of the production order, etc are all relevant considerations before determining whether to bring proceedings. Based on these considerations, the AFP will not be taking action against Seven West on this matter.

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Inquiry into the current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters

Written question on notice

23 April 2014

To: AFP

1. On page 28 of the hearing transcript, the AFP discusses the timeframe of when the Ministerial liaison officer was briefed and when the relevant Minister was briefed. Could the AFP please provide precise details of when the Ministerial Liaison officer was briefed, and when he briefed the Minister and/or the Attorney General? Could the answer indicate clearly both local and Eastern Standard Times of any such discussions as well as their content?

The AFP's Ministerial Liaison officer was briefed by text message on 17 February 2014 at approximately 20.44hrs AEDST. The message advised that the AFP would be executing four (4) Proceeds of Crime Act 2002 (PoCA) search warrants on Channel 7 and related companies, in respect of an investigation into possible literary proceeds obtained by Ms Schappelle Corby. A subsequent exchange of SMS messages that same evening confirmed the warrants would commence at approximately 09.00hrs AEDST on Tuesday the 18th of February 2014, and that when the warrant execution commenced the Minister's office would be briefed.

At approximately 09.05hrs AEDST on 18 February 2014, the AFP Ministerial Liaison officer verbally briefed the Chief of Staff to the Minister for Justice that the AFP was currently executing search warrants on Channel 7 and related companies. Immediately after that conversation the AFP Ministerial Liaison officer participated in a teleconference with the Deputy Chief of Staff to the Attorney-General, where the same information was provided.

2. Did any representative of the AFP have any communications with any member of the Government in relation to a potential interview with Schappelle Corby being broadcast on Australian television or in relation to conducting a search at the premises of Seven West Media or its related entities prior to the search warrants being executed? If so, what were the times and details of such communications?

On 7 February 2014 the AFP provided the Minister's office with a written briefing about the potential release of Ms Corby from prison, the previous Literary Proceeds Order obtained against her, and that the AFP would investigate any future potential literary proceeds matters and consider any relevant action under Commonwealth proceeds of crime legislation.

3. Were any Seven West Media employees or any related entities subject of any phone surveillance prior to or subsequent to the execution of the AFP Search Warrants on the premises of Seven West Media? If so, which Seven West Media employees were involved?

It should be noted that Division 6 of Chapter 4 of the Telecommunications Interception Act prohibits the disclosure of information relating to an authorisation of the type referred to in the question, and this prohibition is defined as including the disclosure of the existence or non-existence of such an authorisation. The penalty for making such a disclosure is 2 years imprisonment.

However, it is important to note that this was a civil, not criminal matter. The AFP cannot intercept telecommunications for the investigation of non-criminal matters.

4. What time did the AFP apply for the warrants, and at what time were they granted?

The AFP had a 3.30pm appointment on 17 February 2014 to see Magistrate Curran to apply for the section 225 PoCA search warrants. The AFP sat before Magistrate Curran at approximately 3.40pm that date. The search warrants were granted at approximately 3.55pm on 17 February 2014 before Magistrate Curran.

5. On page 39 of the Proof Committee Hansard, Mr Jabbour stated, in response to questions regarding protection of journalists sources:

But you raise a valid point. Normally, legal professional privilege claims are covered through an arrangement. Further to 246 of the Evidence Act in relation to sources, I would suggest a protocol in relation to how we deal with those matters along the lines of the legal professional privilege arrangements would provide them with a level of comfort and would indeed be instructive. In my view, it would be along the guidelines.

(a) There does not appear to be a Section 246 of the Evidence Act 1995. Can the AFP please provide a clarification of this statement?

The reference to section 246 of the Evidence Act was an inadvertent error. The reference should be corrected to section 126H of the Evidence Act.

On page 19 of the Proof Committee Hansard, Mr Jabbour also stated, on the same line of questioning:

This works in combination with, for example, the Evidence Act; so, where there are protections and measures with regard to section 126H, we would comply with the conditions there as well. It does not work in isolation, if you understand me. We are certainly alive to other requirements within other acts, and we weave them all together ensure that those protections are afforded.

(b) It appears that Section 126H relates only to information provided in Court. Can the AFP please outline the relevant legislative or other requirements that relate to handling of evidence where journalists' privilege may be at stake?

There is no legislation governing journalist privilege during an investigation. The privilege enjoyed by journalists is not the same as legal professional privilege, but rather a product of evidence law and therefore refers to admissibility in court, as noted by the Senator.

In terms of other requirements within other Acts, the requirements in this matter were determined by the PoCA. Sections 228(2) and 266A of PoCA govern the sharing and disclosure of information obtained under a search warrant. Section 266A in particular sets out the authorities to whom disclosures may be made, and the purposes for which disclosure may be made. Recipients are limited to:

- authorities with one or more functions under PoCA (for the purpose of facilitating the authorities performance of its functions under the Act);
- authorities of the Commonwealth, State or Territory that have a function of investigating or prosecuting offences against the law of a Commonwealth, State or Territory (for the purpose of assisting in the prevention, investigation, or prosecution of an offence carrying a penalty of at least 3 years imprisonment);
- authorities of a foreign country that have a function of investigating or prosecuting offences against a law of the country (for the purpose of assisting in the prevention, investigation, or

- prosecution of a foreign offence that would also be an offence under Australian law carrying a penalty of at least 3 years); and
- the Australian Taxation Office (ATO) (for the purpose of protecting public revenue).

6. Further, where a warrant provides the AFP with access to an entire hard drive (as was the case in the Seven West example), how does the AFP ensure it only collects information relevant to the warrant? How does it protect or deal with information that it may collect (inadvertently or otherwise) during the process of carrying out the warrant?

As the focus of this inquiry is the use of powers in the investigation of non-criminal matters, the AFP will answer this question by reference to PoCA. Section 228 of PoCA governs what can be done under a search warrant, including what things can be seized. This includes seizing tainted property or evidential material specified in the warrant. Where information obtained under a search warrant is not relevant to that warrant (e.g. contained in a computer which was seized) the AFP is very limited as to what it can do with that information. Material seized under a search warrant issued under section 255 of PoCA must be dealt with in accordance with Division 3 of Part 3-5 of PoCA. Sections 228(2) and 266A of the PoCA govern the disclosure of information obtained under a search warrant and set out the authorities to whom disclosures may be made, and the purposes for which disclosure may be made. Unless the material is put before a court, it will not enter the public domain.

The search warrant provisions in the PoCA are sections 243, Use of equipment to examine or process things; 244, Moving things to another place for examination; and 245, Use of electronic equipment at premises. It should be noted that under PoCA warrants, items such as computers can only be moved to AFP premises for 72 hours.

These provisions allow the officer to seize the entire hard drive of a computer, even if there is some material which does not fall within the scope of the search. The officer must however have reasonable grounds to believe that there is evidentiary material contained within the hard drive.

Electronic equipment and/or data is seized in accordance with the specified conditions of a search warrant. All electronic equipment and data seized is treated as an exhibit and managed accordingly for the specific purpose of the investigation.

Under PoCA, things seized under a search warrant must be returned in accordance with sections 256 and 259. This includes the return of things where the reason for the thing's seizure no longer exists or the thing is not going to be used in evidence

7. How does the AFP determine the search terms to be used when accessing hard drives or other electronic records while carrying out warrants? Does the AFP share these terms with the owners of the information that is being searched? What oversight is there of the use of search terms to ensure they are appropriately limited to the terms of the warrant?

The search terms are derived from the conditions of the warrant and the information as laid out in the affidavit, as reviewed by the judicial officer when considering signing the warrant. Searches of electronic devices and data occur in accordance with the conditions of the search warrant, in order to identify evidentiary material as authorised by the warrant. The conditions are listed on the search warrant, a copy of which is provided to the occupier upon entry to the premises. The PoCA entitles the occupier (or a representative) to be present and observe the search, including of electronic devices.

8. Have any of the AFP officers involved in the raid in a planning or operational capacity been disciplined? Have any of these officers taken medical or stress leave?

No.