



Education and Employment Legislation Committee

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Tabled by: Senator Brandis

Date: 27/10/17 (11 05am)

ATTORNEY-GENERAL

CANBERRA

27 October 2017

Senator Linda Reynolds CSC
Chair
Senate Education and Employment Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to the claim of public interest immunity made earlier today in the Senate Education and Employment Legislation Committee (the *Committee*) over matters the subject of an Australian Federal Police investigation into the unauthorised disclosure of information concerning the execution of search warrants obtained by the Registered Organisations Commission.

The purpose of this letter is to articulate the basis of the claim, pursuant to paragraph 10(3) of the Senate's order of 13 May 2009 (the *Order*). For the avoidance of doubt, I make the claim over all matters the subject of the investigation.

As you stated to the Committee this morning, prejudice to law enforcement investigations is a ground of public interest immunity recognised by the Senate. That position is confirmed by statements in Odgers' 14th edition. At page 663, 'prejudice to law enforcement investigation' is referred to under 'potentially acceptable grounds':

For this ground to be invoked it should be established that there are investigations in progress by a law enforcement agency, such as the police, and the provision of the information sought could interfere with those investigations.

It is important to note Odgers' use of the word 'could' - it need not be established that provision of the requested information would *actually* interfere with the relevant investigation, merely that it would have the tendency to do so.

I also refer to paragraph 4.6.1 of the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, which relevantly provides:

There are several generally accepted grounds on which a minister or, in appropriate circumstances, a statutory office holder, may rely when claiming PII. For example, PII claims may be made in relation to information and documents the disclosure of which would, or might reasonably be expected to:

...

d. prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance.

As I advised the Committee this morning, Detective Superintendent Andrew Smith of the Australian Federal Police has written to Minister Cash's office in the following terms:

As this matter [the unauthorised disclosure] is under investigation, it would not be appropriate to discuss the matter further.

The statement by Detective Superintendent Smith establishes that there is an Australian Federal Police investigation in progress. It further establishes that provision of information in relation to the matters the subject of the investigation would have the potential to affect the conduct of that investigation. It should be inferred that a senior officer of the AFP such as Detective Superintendent Smith would not make such statement lightly, or without good cause. Detective Superintendent Smith is in a better position to judge likely prejudice to an investigation than members of the committee.

Were the Committee to continue to inquire and seek evidence regarding matters the subject of the investigation, such disclosure may:

- inhibit the provision of information by potential witnesses;
- influence lines of inquiry by police or the evidence of witnesses (in that witnesses may tailor their evidence in response to matters discussed by the committee); or
- disclose avenues of inquiry, including potential suspects.

More generally, the courts have recognised that that public canvassing of matters the subject of an ongoing investigation 'might inhibit[ing] the willingness of persons to volunteer information relevant to the investigation', and that investigating authorities should be allowed to obtain 'the fullest possible information without the persons volunteering such information being inhibited by any possible repercussions which might flow from the disclosure of the information' (see *Dupont v Chief Commissioner of Police* [2015] FamCAFC 64 and *Maloney v New South Wales National Coursing Association Limited* (1978) 3 ACLR 385). The above principles have also been recognised by the Court of Appeal of the Supreme Court of Victoria in *Ryan v Victoria* [2015] VSCA 353.

The Order requires a statement to indicate whether harm would result from a disclosure of evidence in camera. Given the provisions of standing order 26(2), that question does not arise.

Yours faithfully



(George Brandis)