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AUSTRALIAN FEDERAL POLICE

PARLIAMENTARY INQUIRY QUESTION TAKEN ON NOTICE:

Senate Environment and Communications References Committee

15 November 2019

Subject: Senate Environment and Communications References Committee – Press Freedom

Asked

Question Submitted by: Sarah Hanson-Young

Question:

Chair: In relation to David McBride—this relates to the ABC raid—who suggested that it would be appropriate to charge David McBride with theft in the first instance, rather than with disclosing confidential information? They're different, aren't they?

Mr Kershaw: Yes. It depends on the way it's been done. It can be done by the prosecutor—for example, the Commonwealth DPP—and/or the officers preferring those charges. So, in different circumstances, it can be jointly decided, or individually an officer can put that information forward and say, 'These are the charges that we're going ahead with.'

CHAIR: So it can be.

Mr Kershaw: Yes.

CHAIR: But what was it?

Mr Kershaw: With the normal process—for that particular process, I would have to go and check on that, so I may have to take it on notice—my understanding is that that would be something we would have consulted CDPP about.

CHAIR: Okay. Could you please take that on notice.

Answer:

The decision to charge, and what to charge is determined by the CDPP in consultation with the AFP based on the available evidence collected (see CDPP – Steps in Prosecution). Appropriate charges are chosen to adequately reflect the nature and extent of the criminal conduct (disclosed by the evidence) and provide the court with an appropriate basis for sentence.

David McBRIDE has been charged with one count of theft, contrary to section 131.1(1) of the *Criminal Code Act (Cth)*, one count of disclosure of information by a Commonwealth officer, contrary to Section 70(1) of the *Crimes Act 1914 (Cth)*, and three counts of unlawfully giving information as to defences, contrary to Section 73A(1) of the *Defence Act 1903 (Cth)*.

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Asked

Question Submitted by: Sarah Hanson-Young

Question:

CHAIR: On the days following the ABC raids, why wasn't that section 131.1, relating to receiving stolen goods, part of the communication that came from the commissioner and the deputy commissioner of the AFP in briefings to the media and in responses to questions? Why was that left out?

Mr Kershaw: Why was section 131.1 left out?

CHAIR: Yes. The public discussion was that the raids were pursuing offences under parts VI and VII of the Crimes Act. There was no mention of the element of theft and stolen goods.

Mr Kershaw: I'd have to take that on notice. I'm not aware. I wasn't there, unfortunately, at the time.

Answer:

The intent of the media briefing was to provide a broad overview of the offending at the time of the execution of the warrants. The media release focused on the substantive charges only and was not intended to provide a full description of potential charges, which ultimately were a decision for the Commonwealth Director of Prosecution.

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Asked

Question Submitted by: Sarah Hanson-Young

Question:

CHAIR: If you could, that would be helpful. Let me go back to this question: when did the AFP first discuss with the CDPP, or any other government agency, that they intended to raid the ABC?

Mr Kershaw: I'd have to take on notice the bit about letting the CDPP know. In the normal course of investigation, we normally would not need to tell the CDPP because we would not yet have reached the threshold where we were going to charge someone or look at referring a charge to the CDPP.

Answer:

The AFP did not contact another government agency prior to commencing the search warrants on 4 June 2019.

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Asked

Question Submitted by: Sarah Hanson-Young

Question:

CHAIR: Can you tell me when the AFP first discussed outside of the AFP and with any other government agency or department the prospect of a raid on the ABC?

Mr Kershaw: I will have to come back to you on those exact dates. I'll take that on notice.

Answer:

The AFP did not contact nor notify other government agencies prior to commencing the search warrants on 4 June 2019.

On 4 June 2019, Assistant Commissioner Debbie Platz advised the Minister for Home Affairs office that a search warrant had commenced and to expect media activity.

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Asked

Question Submitted by: Sarah Hanson-Young

Question:

CHAIR: Could you also answer for us when it was first decided that Mr Oakes and Mr Clark would be part of an investigation as to whether they had breached particular parts of the Crimes Act?

Mr Kershaw: Yes, I can come back to you on that.

CHAIR: Do you have any idea how early in the process that was?

Mr Kershaw: No. We'd have to search our records and probably speak to the case officers, so I'll have to take that one on notice.

Answer:

Messrs OAKES and CLARK were suspected of committing criminal offences on 18 July 2017.

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Asked

Question Submitted by: Sarah Hanson-Young

Question:

CHAIR: You talked before about the threshold questions of whether you take up a referral, particularly in relation to a disclosure. What information did the AFP have that the story that Annika Smethurst published was indeed a threat in any way to national security?

Mr Kershaw: I will have to take that on notice.

Answer:

The article published by Ms Smethurst identified the document disclosed had a security classification SECRET AUSTEO COVERING TOP SECRET COMINT AUSTEO. Top secret classification is applied and should use when the compromise of information confidentiality of the information would be expected to cause exceptional grave damage to the national interest, organisation or individuals. Caveats are used in addition to a security classification. The caveat is a warning that the information has special protections in addition to those indicated by the security classification. The code word AUSTEO is marked for Australian Eyes Only and only Australian citizens can access the information.

The AFP also applies the Case Categorisation Priority Model (CCPM) assessment. This recorded against this referral indicates the following assessments were made:

- Categorises - Unauthorised disclosure by Commonwealth Public Officials under the category of Corruption
- Impact on the Client was CRITICAL.
- Investigations Priority was ESSENTIAL
- Impact of the Investigation was HIGH
- Value of the investigation to the AFP was HIGH

Based on this information the AFP decided to commence an investigation.

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Asked

Question Submitted by: Sarah Hanson-Young

Question:

CHAIR: In relation to the Smethurst case did the AFP ever receive any communication from the Home Affairs minister or any other minister in the government in relation to that matter before the raids occurred?

Mr Kershaw: I'm not aware. I would have to take that on notice

CHAIR: Where did the referral in relation to that article come from?

Mr Kershaw: The referring agency—normally that's where the unlawful disclosure comes from. They're the originating agency.

CHAIR: It came from that department?

Mr Kershaw: Yes.

CHAIR: Do you have a copy of that referral?

Mr Kershaw: I don't with me. I'd have to take that on notice.

Answer:

No, the AFP did not receive any communication from the Home Affairs

Minister or any other Minister in government prior to executing the search warrant.

The referral was received from Department of Home Affairs.

A copy of the redacted referral is at Attachment A.

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Asked

Question Submitted by: Sarah Hanson-Young

Question:

CHAIR: Is that something that would be appropriate, for a minister to be contacting a deputy commissioner about such a serious thing as a raid as it's occurring?

Mr Kershaw: It just depends on the circumstances. Given we have national security issues, other issues—counter-terrorism and so on—it just depends on the nature of that investigation and certain things being taken into account.

CHAIR: Mr Gaughan didn't agree to give any information or a briefing did he?

Mr Kershaw: I'm not aware. I'd have to take that on notice. I wasn't there at the time and I'm not too sure what conversations were had.

Answer:

No, Deputy Commissioner Neil Gaughan did not provide any further updates to the Minister for Home Affairs' advisor when asked. This is standard practice.

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Asked

Question Submitted by: Sarah Hanson-Young

Question:

CHAIR: Could you take on notice as to whether there have been any complaints raised within the AFP in relation to ministers or their staff contacting AFP officers to get information on matters like this?

Mr Kershaw: Since being Commissioner, I've not had any complaints.

CHAIR: Where would a complaint be raised?

Mr Kershaw: There are a number of avenues. It could be the Public Interest Disclosure regime. It could be the ACLEI, the Ombudsman, through my office or through their supervisor internally. It could be a number of avenues.

Answer:

In relation to matters like this, to our knowledge the AFP have not received any complaints nor have they been made aware of any complaints to other agencies.

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Asked

Question Submitted by: Anne Urquhart

Question:

Senator URQUHART: The AFP was told that, as far as the department knew—because this is a document that has come from the department—only one person had been in contact with Simon Benson over the relevant period. Is that correct?

Mr Kershaw: Well, what that says to me is that that's based on email logs.

Senator URQUHART: Yes?

Mr Kershaw: So it doesn't necessarily mean that there hasn't been any contact—I guess that's what my issue is.

Senator URQUHART: Okay, but no contact through email?

Mr Kershaw: Yes, correct.

Senator URQUHART: Okay, you're clarifying that. And that person worked in Minister Dutton's office? That's what it says there—the name is redacted, obviously.

Mr Kershaw: That's right, although, if I'm correct, this is not a police document, this is a home affairs document—is that correct?

Senator URQUHART: Yes, that's correct.

Mr Kershaw: Yes.

Senator URQUHART: But that's your understanding?

Mr Kershaw: That's their view, yes.

Senator URQUHART: And the AFP never contacted that individual to ask whether he or she had provided the classified information to Mr Benson?

Mr Kershaw: I'm not sure, I'd have to come back to you on notice.

Senator URQUHART: Please take that on notice. Did the individual named in the referral have access to ministerial briefings that included the leaked information?

Mr Kershaw: Again, I'll have to take that on notice.

Answer:

Only one person from the Department of Home Affairs had contact with Mr Benson. Given the nature of the person's role, contact with journalists is not unexpected. As part of the referral, Department of Home Affairs provided email addresses and mailbox user lists for people that had access to the disclosed information.

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The person who had direct contact with Mr Benson in the relevant period was not on the list of people who had access to the disclosed information.

As a result, the AFP determined it was unnecessary to contact this person.

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Asked

Question Submitted by: Anne Urquhart

Question:

Senator URQUHART: Okay. The AFP told the Joint Intelligence and Security Committee that there were no communications between the AFP and the minister, or the minister's office, in relation to the leak of the classified material. Is that right?

Mr Kershaw: Who said that?

Senator URQUHART: The AFP told the intelligence and security—

Mr Kershaw: We don't know—I'd have to go back to that and have a look at that to clarify that.

Senator URQUHART: Can you tell me why?

Mr Kershaw: Why they would have said that?

Senator URQUHART: Yes.

Mr Kershaw: No. I'll have to take that on notice.

Answer:

The answer was given to the PJCIS as it was the correct answer. The AFP confirms there were no communications between the AFP and the Minister or the Minister's office in relation to his matter.

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Asked

Question Submitted by: Anne Urquhart

Question:

Senator URQUHART: How many people are in the freedom of information team?

Mr Kershaw: I'd have to get back to you. I did just meet with them recently. There are more than eight, but I'd have to give you an exact figure, so if I could take that on notice—

Senator URQUHART: Okay. Can you tell me why the disclosure of an emoji would involve the unreasonable disclosure of personal information about a person? What personal information would that actually disclose—a penchant for emojis?

Mr Kershaw: I don't know. I'd have to come back to you on that.

Senator URQUHART: The Right To Know coalition of media organisations has expressed concern about the liberal use of redactions by agencies in response to freedom of information requests. Is this an example of the AFP being overzealous in applying redactions?

Mr Kershaw: Because I haven't seen any of this and haven't been involved in the process, I would have to come back to you. However, I would say, having met the team recently, that they work incredibly hard. We have probably an unprecedented number of FOIs, so they're a very busy team and they're very thorough. We are trying to work, for example, with journalists in particular on how we can provide information without having to go through that process. We have given an undertaking to provide more media releases with more detail than perhaps we have in the past. This will perhaps assist with the construction of those articles that are formed by those journalists. I have made a commitment on that front.

Senator URQUHART: Could you please look into whether the information that's been redacted in those messages was appropriate and come back to the committee on that?

Mr Kershaw: Yes, I will.

Answer:

The AFP Freedom of Information Team is resourced with 5.6 FTE positions. There are currently eight employees working in the team.

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The disclosure of personal information (as defined in the *Privacy Act 1988*) is governed by section 47F of the *Freedom of Information Act 1982* (FOI Act). Text based communications can be considered personal information.

Text messages, as a class, do not attract special or different treatment due to their form. Although the exchange was not private in the personal sense, it was considered private in the sense the parties were communicating with no other audience than each other. Given the expectation of privacy (i.e. confidentiality) in the text message exchange, the platform being used, and the functional context of the communications, the decision maker was satisfied disclosure of the communications could be considered an unreasonable disclosure of personal information within the meaning of the FOI Act.

However, the release of personal information is also subject to public interest considerations, as outlined at section 11B of the FOI Act.

On that basis, the decision maker determined it was appropriate to release the material of public interest. That is, the material relating to the official functions of the AFP, being the execution of a search warrant. Certain other information contained in the communications (including an emoji) was of limited demonstrable relevance to the affairs of government, taking into account what was of a personal and unofficial nature.

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Asked

Question Submitted by: Anne Urquhart

Question:

Senator URQUHART: So the AFP notified Mr Dutton's office in advance of a search warrant being executed to search the home of a suspected leaker in the au pair email investigation. Is that correct?

Mr Kershaw: I would have to come back to you. I'm not aware of that.

Answer:

The AFP notified the Minister's Office in advance of the search warrant being executed on the suspected leakers' place of work.

On 10 October 2018, AFP, Assistant Commissioner Debbie Platz, attempted to call the Minister for Home Affairs' adviser and Chief of Staff. When these phone calls were not answered a text message was sent to the Minister's Chief of Staff at 11:14am on 10 October 2018:

"Craig. Hi. Our team are executing some search warrants today that may cause some media attention. These relate to the leak of emails relating to the au pair matter. Pls call if you would like further information. Regards Debbie."

For operational reasons, the AFP decided to conduct the warrant activity the following day (11 October 2018). On 10 October 2018 at 11:52am, AFP Deputy Commissioner Operations, Neil Gaughan, advised the Minister's Chief of Staff of this update via text message on 10 October 2018 at 11:52am, saying:

"That warrant activity will now be first thing tomorrow morning – Neil"

A response was received:

"Thanks mate – this arvo also fine"

During a telephone conversation at 5.51pm on 10 October 2018, Assistant Commissioner Debbie Platz informed the advisor of impending search warrant activity.

On 11 October 2018, there was email correspondence between AFP employees and the Minister for Home Affairs Office in relation to drafting of a question time brief

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(QTBs) on the referral from the Department of Home Affairs and the subsequent AFP investigation.

Between the 11 October 2018 and 13 February 2019 there were number of updates to QTBs and other ministerial correspondence.

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Asked

Question Submitted by: Anne Urquhart

Question:

Senator URQUHART: The AFP told the Intelligence and Security Committee that, in its view, the fact that the subject matter of the emails was a controversial decision made by Mr Dutton to grant tourist visas to au pairs did not give rise to a conflict of interest. Is that correct?

Mr Kershaw: I'd have to look at that document. I'm not across that particular matter, but I will be and I'll come back to you.

Senator URQUHART: You'll take that on notice?

Mr Kershaw: I'll take that on notice.

Senator URQUHART: Thank you.

Answer:

In the AFP's initial submission to the Inquiry it wrote (at q.58b):

The AFP did not consider advising the Minister's Office the execution of search warrants had commenced, gave rise to a conflict of interest. The notification of the execution of the search warrants was appropriate due to the level of public attention the search warrants were expected to receive. The notification did not involve seeking a decision from the Minister, the Minister's approval, or any other engagement with the Minister in relation to the AFP's (then) current or proposed operational activities.

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Asked

Question Submitted by: Sam McMahon

Question:

Senator McMAHON: Did the AFP attempt to negotiate a mutually beneficial process to ensure limited disruption and angst for the ABC staff with regard to the execution of the warrant?

Mr Kershaw: I believe so—yes.

Senator McMAHON: Along the same lines, was there any dialogue with Annika Smethurst prior to the execution of the warrant on her?

Mr Kershaw: I'd have to take that on notice.

Answer:

Regarding the ABC, yes, the AFP attempted to negotiate a mutually beneficial process to ensure limited disruption and angst for the ABC staff.

These negotiations occurred between 24 January and 6 February 2019.

On 6 February 2019 ABC advised that they were having difficulty in accepting that they should assist the AFP and declined.

Regarding Ms SMETHURST, no, the AFP did not contact her regarding the warrant prior to its execution.

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Asked

Question Submitted by: David Fawcett

Question:

Senator FAWCETT: I would like to go to the issue of public interest disclosures within the AFP. Since the act came into force in 2014, how many actions have been made within the AFP? You can take that on notice if you don't know.

Mr Kershaw: I'm going to have to take that on notice. It looks like I don't have that data in front of me, unfortunately.

Answer:

For the purposes of this question, Australian Federal Police (AFP) Professional Standards (PRS) has provided information on disclosures as actions.

Since the commencement of the PID Act 2013 (15 January 2014), the AFP has received a total of 23 disclosures.

This information has been extracted from the AFP's contribution to the PID Act 2013 Annual Report Surveys 2014-15 to 2018-19.

See **Table 1** for data by financial year.

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Question:

Senator FAWCETT: You'll probably also have to take the next question on notice, then. Can you disclose, without the details, the nature of the category—whether it was fraud or misconduct or something else? What were the categories? Also, what was the outcome of those PIDs within the AFP, as in: Are they open; are they closed; was the complainant or the person who made the disclosure satisfied at the end of the process? That would be useful.

Mr Kershaw: Yes.

Answer:

The nature of the disclosable conduct as reported in the AFP's contribution to the PID Act 2013 Annual Report Surveys 2014-15 to 2018-19 were:

- A contravention of a law of the Commonwealth, State or Territory
- Perversion of the course of justice
- Maladministration
- Abuse of public trust
- Wastage of Commonwealth resources (including money and property)
- Conduct that results in, or that increases, the risk of danger to the health or safety of one or more persons
- Conduct that may result in disciplinary action
- Fabrication, falsification, plagiarism or deception in relation to scientific research
- Conduct engaged in for the purpose of corruption

See **Table 1** for data by financial year.

As at 25 November 2019, PRS has 0 ongoing PID investigations. All matters reported on have been completed.

If an individual is unsatisfied with the outcome of the investigation they have an opportunity to request a review via the Commonwealth Ombudsman.

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Table 1: Disclosure received by financial year

| | 2014-15 | 2015-16 | 2016-17 | 2017-18 | 2018-19 |
|--|---|--|---|--|--|
| Disclosures received | 4 | 10 | 2 | 5 | 2 |
| Nature of the disclosable conduct | <ul style="list-style-type: none"> • Contravention of an Australian law • Maladministration • Misconduct in relation to scientific research • Conduct resulting in, or that increases the risk of, danger to health or safety • Conduct that may result in disciplinary action | <ul style="list-style-type: none"> • A contravention of a law of the Commonwealth, State or Territory • Conduct in a foreign country that contravenes a law • Perversion of the course of justice • Conduct engaged in for the purpose of corruption • Maladministration • Wastage of Commonwealth resources (including money and property) • Conduct that results in, or that increases, the risk of danger to the health or safety of one or more persons • Conduct that may result in disciplinary action | <ul style="list-style-type: none"> • A contravention of a law of the Commonwealth, State or Territory • Conduct in a foreign country that contravenes a law • Maladministration • Wastage of Commonwealth resources (including money and property) • Conduct that results in, or that increases, the risk of danger to the health or safety of one or more persons • Conduct that may result in disciplinary action | <ul style="list-style-type: none"> • A contravention of a law of the Commonwealth, State or Territory • Perversion of the course of justice • Maladministration • Abuse of public trust • Wastage of Commonwealth resources (including money and property) • Conduct that results in, or that increases, the risk of danger to the health or safety of one or more persons • Conduct that may result in disciplinary action | <ul style="list-style-type: none"> • A contravention of a law of the Commonwealth, State or Territory • Fabrication, falsification, plagiarism or deception in relation to scientific research • Wastage of Commonwealth resources (including money and property) • Conduct that may result in disciplinary action |

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Asked

Question Submitted by: David Fawcett

Question:

Senator FAWCETT: If an officer of the AFP who has classified information perhaps pertaining to intelligence that you have from another agency or cooperating police force wants to make a public interest disclosure, the normal process is to go internally first where possible. What I'm seeking to understand is where they seek to use a process internal to the AFP and you or your officers have made the determination that there is no substance to the disclosure. Is the fact that it has been made disclosed by you as an agency in any of your reporting to government or to oversight bodies or committees of the parliament?

Mr Kershaw: It may be captured under our professional standards area. That particular area does publish the number of internal complaints. We have different categories, which are overseen by ACLEI and the ombudsman as well. So, yes, we would have some reporting around certain matters which would be what we would call an internal complaint or internal disclosure.

Senator FAWCETT: You've used the word 'maybe' there. Could you come back to the committee with a definite answer. Do your internal processes require that someone external to the AFP be aware that a PID was initiated and investigated and what has subsequently occurred so that there is that transparency which then provides the public confidence that the PID process is actually working?

Mr Kershaw: Yes, I'll come back to you.

Answer:

AFP PRS has oversight of the *Public Interest Disclosure Act 2013* (PID Act) for the AFP. PRS Superintendents/Coordinators are the delegated AFP PID Authorised Officers who assess disclosures. Each year the Commonwealth Ombudsman (Ombudsman) writes to all Commonwealth agencies seeking input and assistance in the preparation of the *Public Interest Disclosure Act 2013 Annual Report* (Section 76 of the PID Act) which forms part of the Ombudsman's annual reporting obligation to Parliament. AFP determinations to not accept a disclosure under the PID Act are reported to the Ombudsman via this mandatory reporting obligation.

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Question Submitted by: David Fawcett

Question:

Senator FAWCETT: Thank you. Lastly—and I'm happy for you to take this on notice, or you might want to confirm it now—I assume you have a training system so both new employees of the AFP and, on a recurring basis, existing employees are refreshed around the whole PID system, their obligations and also their opportunities to make a public interest disclosure?

Mr Kershaw: Yes, but I would like to confirm that with my training area and make sure. What I can say is that we definitely know how to make complaints with relation to internal matters. Just ask the head of our professional standards area. But I will come back to you on that.

Senator FAWCETT: Thank you.

Answer:

The AFP has training available to all appointees in relation to PID through the AFP's online training system 'iAspire'.

AFP PRS staff recently conducted face-to-face training with an external law firm in relation to PID.

AFP PRS also present to new AFP appointees during staff induction programs and discuss various avenues to raise a complaint including PID.

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Australian Government
Department of Defence

COMMISSIONER'S
OFFICE

30 APR 2018

CMS: 2018-3958

Secretary

Telephone: [Redacted]
Facsimile: [Redacted]

SEC(S)/OUT/2018/64

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

NMCO
For attention please
SL
DCO 30/4

*For urgent resolution
and advice pls.
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

Greg Moriarty
Greg Moriarty
30 April 2018