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19 December 2014

Our Ref: 29819/8

The Hon Robert Borsak, MLC  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

**RE: Inquiry into the conduct and progress of Ombudsman's inquiry  
"Operation Prospect"**

Dear Sir

I refer to your letter dated 9 December 2014 regarding the secrecy provisions in the *Police Integrity Commission Act 1996* ("the Act") and the effect of those provisions on NSW Police Force officers involved in the Committee's inquiry who require mental health support.

The Commission has practices in place, which have been developed in consultation with the Professional Standards Command of the NSWPF, for dealing with police officers involved in Commission investigations who require mental health support. Because the inquiry being conducted by your Committee concerns Commission investigations which took place more than a decade ago (Operations Florida and Mascot), there is some room for relaxation of those practices.

In the normal course, when the Commission serves a Notice to Produce Information or a Notice to Appear to Give Evidence, the Commission also provides the person served with a separate document containing information about the Notice, such as the type of individuals who can be informed about the Notice.

I enclose a copy of the Commission's standard statement of "Information For Recipients of a s 26 Notice." At p 3 the statement reproduces the provisions of s 54(2) of the Act, as follows;

***Your Notice will state whether information may or may not be disclosed about the Notice (sub-section 54(2)). If your Notice says that you may not disclose any information about it, this includes information about the existence or nature of the Notice or of the investigation to which it relates. It also means that you may not disclose any information to a person from which the person could reasonably be expected to infer the existence or the nature of the Notice or of the investigation to which it relates. With several exceptions, it is an offence to disclose information in contravention of an order that information not be disclosed.***

***Even if the Notice does contain a statement that information about the Notice is not to be disclosed, you may disclose information about the Notice in the following circumstances:***



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- (a) *the disclosure is made to an employee, agent or other person in order to obtain information to comply with the Notice and the employee, agent or other person is directed by you not to inform the person to whom the information relates about the matter, or*
- (b) *the disclosure is made to obtain legal advice or representation in relation to the Notice, or*
- (c) *the disclosure is made for the purposes of, or in the course of, legal proceedings, or*
- (d) *the disclosure is made in accordance with guidelines issued by the Commission or in accordance with the regulations (sub-section 54(3)).*
- (e) *the disclosure is made to a person in respect of whom prior approval has been obtained from the Commission.*

*Should you consider it necessary to discuss this Notice with a person not referred to in paragraphs (a) to (e) above, such as your supervisor, employer or medical adviser, you should contact the Commission officer nominated on the front page of this Notice.*

In the Commission's experience, it is not unusual for police officers served with a Notice to Produce or a Notice to Appear, to avail themselves of the last paragraph above, and contact the Commission's case officer to seek permission to discuss the investigation with their medical adviser. Such requests are referred by the case officer to the Commissioner. In my time as Commissioner, I have never declined such a request and I am informed that previous Commissioners took the same approach.

In my view, if an officer is served with a Notice to produce or appear which states that information about the Notice must not be disclosed, and an officer discloses information about the Notice (in circumstances other than those referred to above) that is likely to prejudice the investigation to which it relates, then the officer has committed an offence under s 54 of the Act.

The circumstances discussed above are not relevant to the inquiry being conducted by your Committee, as the Commission's investigative activity in Operation Florida and Operation Mascot ceased more than a decade ago. To assist your inquiry, I have determined that officers should not be precluded from discussing with mental health professionals evidence given or documents produced to the Commission for the purposes of Operation Florida or Operation Mascot, should those officers require welfare support.

To remove any doubt I have made an order varying any non-publication directions regarding such evidence or documents or the contents thereof to permit publication by an involved officer of that information to a mental health professional for the purpose of seeking welfare support.

I hope this information is of assistance. Should you require any further information please contact Michelle O'Brien, Commission Solicitor, on 9321 6700.

Yours faithfully

The Hon. Bruce James QC  
Commissioner  
Per M. M. O'Brien



## INFORMATION FOR RECIPIENTS OF A SECTION 26 NOTICE

This information brochure is intended for persons who have been issued with a Notice under section 26 of the *Police Integrity Commission Act 1996*.

All section references are to the *Police Integrity Commission Act 1996*.

### YOUR NOTICE — WHAT IT WILL SAY

Your Notice will specify the documents or other things that must be produced (sub-section 26(1)(b)).

Your Notice will specify the date and time by which the documents or other things must be produced, together with the place where the documents or other things must be produced (sub-section 26(1)(a)).

Your Notice will state whether the requirements of the Notice may be satisfied by some other person acting on your behalf. In this regard, it may also specify a person or class of persons who may act on your behalf to satisfy the requirements of the Notice (sub-section 26(2)).

Your Notice will state whether information may or may not be disclosed about the Notice (sub-section 54(2)). If your Notice says that you may not disclose any information about it, this includes information about the existence or nature of the Notice or of the investigation to which it relates. It also means that you may not disclose any information to a person from which the person could reasonably be expected to infer the existence or the nature of the Notice or of the investigation to which it relates. With several exceptions, it is an offence to disclose information in contravention of an order that information not be disclosed.

Even if the Notice does contain a statement that information about the Notice is not to be disclosed, you may disclose information about the Notice in the following circumstances:

- (a) the disclosure is made to an employee, agent or other person in order to obtain information to comply with the Notice and the employee, agent or other person is directed by you not to inform the person to whom the information relates about the matter, or
- (b) the disclosure is made to obtain legal advice or representation in relation to the Notice, or
- (c) the disclosure is made for the purposes of, or in the course of, legal proceedings, or
- (d) the disclosure is made in accordance with guidelines issued by the Commission or in accordance with the regulations (sub-section 54(3)).
- (e) the disclosure is made to a person in respect of whom prior approval has been obtained from the Commission.

Should you consider it necessary to discuss this Notice with a person not referred to in paragraphs (a) to (e) above, such as your supervisor, employer or medical adviser, you should contact the Commission officer nominated on the front page of this Notice.

### CLAIMS FOR PRIVILEGE

You may have the requirement contained in the Notice set aside if it appears to the Commission that you have a ground of privilege that would be recognised in a court of law



and it does not appear to the Commission that you consent to compliance with the requirement (section 27).

The Notice must be complied with despite the following:

- (a) any rule that in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
- (b) any privilege of a public authority or public official in that capacity that the authority or official could have claimed in a court of law, or
- (c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official.

In the event that you wish to raise a claim for privilege, the procedures set out below shall apply.

1. Prior to the return date shown on the Notice, you should produce the documents or other things sought by the Notice. Information the subject of the claim should be placed into a sealed envelope and the envelope marked with the words, "*Response to Notice No X of 20XX — Claim for Privilege*". The documents or other things the subject of the claim should be accompanied by:
  - (a) a list identifying the documents or other things the subject of the claim;
  - (b) a written application that the Notice, or part thereof, be set aside on the ground of a specified form of privilege, and
  - (c) a statutory declaration made by you in support of the claim for privilege, setting out particulars of the grounds of the claim.
2. Pursuant to sub-section 27(2) of the Act, the claim shall be determined by the Commissioner. In so far as the claim may be determined without examination of the documents or other things, the Commission undertakes to retain the documents or other things undisturbed in the sealed envelope.
3. If it appears to the Commissioner that you have a ground of privilege whereby, in proceedings in a court of law, you might resist a like requirement to produce and it does not appear to the Commission that you consent to compliance with the requirement to produce, the documents or other things will be returned without being further inspected by the Commission.
4. If, upon an examination of the information by the Commissioner, it does not appear to the Commissioner that you have a ground of privilege whereby, in proceedings in a court of law, you might resist a like requirement and you have not consented to compliance with the requirement to produce, then you will be invited to attend a hearing of the Commission at which time an opportunity will be given for you to be heard as to why the claim for privilege should not be dismissed. You may be legally represented during this process.

## TAKING OBJECTION

A requirement contained in the Notice need not be set aside on the basis of privilege against self-incrimination (sub-section 28(3)). The privilege against self-incrimination only applies to individual persons and not bodies corporate (sub-section 28(1)).

If the documents or other things sought by the Notice tend to incriminate you and you object to production of the documents or other things at the time they are produced to the Commission, then neither the fact of the requirement to produce nor the documents or other



things may be used in any proceedings against you (except proceedings for an offence against the Act).

Documents or other things produced in response to a Notice may be used for the purposes of the investigation concerned, despite any objection.

## **RETRIEVAL OF INFORMATION HELD BY OTHERS**

Where documents or other things needed to answer the Notice are not in the possession or control of you or your agent and the retrieval of such documents or other things from the person who has possession or control of the information is likely to involve some expense, you may give details of the relevant documents or other things to the Commission, which may then exercise its statutory powers to obtain the documents or other things concerned from the third party. If the Commission still requires you to comply with your Notice, you can request the Commission to provide a copy of the documents or other things from the third party to enable you to comply with the Notice.

## **OFFENCES**

### **Disclosure of Information**

It is an offence to disclose information about the Notice that is likely to prejudice the investigation to which it relates, except where provided for under the Act (see above). The maximum penalty for this offence is 50 penalty units (\$5,500) or imprisonment for 12 months, or both. To ensure that this provision is not breached, unless the proposed disclosure is to a person specified above (see under the heading, "Your Notice – What It Will Say"), you should not make *any* disclosures about having received the Notice or its contents without first seeking permission from the Commission. Enquiries should be directed to the Commission officer named on the Notice.

### **Failure to Comply with Notice**

It is an offence for a person, without reasonable excuse, to fail to comply with a Notice served on the person under section 26 of the Act. The maximum penalty for this offence is 20 penalty units (\$2,200) or imprisonment for 6 months, or both.

### **Furnishing False or Misleading Information**

It is an offence for a person, in purported compliance with a Notice served on the person or some other person under section 26 of the Act, to furnish information knowing it to be false or misleading in a material particular.

### **Offences Relating to Documents or Other Things**

A person will be guilty of an indictable offence if, knowing that any document or other thing is or may be required in connection with an investigation, wilfully destroys it or renders it incapable of identification or, in the case of a document, renders it illegible, indecipherable or unusable, with intent to prevent it from being used or in connection with the investigation. The maximum penalty is 100 penalty units (\$11,000 for individuals or \$22,000 for corporations) or imprisonment for 2 years, or both (sub-section 108(1)).

A person will be guilty of an indictable offence if the person, with intent to delay or obstruct the carrying out by the Commission of an investigation:



- (a) destroys or alters any document or other thing relating to the subject-matter of the investigation, or
- (b) sends or attempts to send, or conspires with any other person to send, out of New South Wales any such document or other thing, or any property of any description belonging to or in the disposition of or under the control of any person whose affairs are the subject-matter of the investigation.

The maximum penalty for this offence is 200 penalty units (\$22,000 for individuals or \$44,000 for corporations) or imprisonment for 5 years, or both (sub-section 108(2)).

A person will be guilty of an indictable offence if the person, with intent to delay or obstruct the carrying out by the Commission of any investigation, or with intent to mislead the Commission, fabricates any document or other thing which is later produced in evidence to the Commission. The maximum penalty for this offence is 200 penalty units (\$22,000 for individuals or \$44,000 for corporations) or imprisonment for 5 years, or both (sub-section 108(3)).

### **LEGAL OR FINANCIAL ASSISTANCE**

Legal or financial assistance regarding the Notice may be available through the Legal Representation Office, contact details for which are set out below:

Level 3  
60-70 Elizabeth St  
SYDNEY NSW 2000  
Telephone: (02) 8093 5520  
Facsimile: (02) 8238 9230  
[www.lawlink.nsw.gov.au/lro](http://www.lawlink.nsw.gov.au/lro)

### **ENQUIRIES**

Police officers can obtain general information regarding Police Integrity Commission procedures by telephoning the Professional Standards Command (PSC), Strategic Support Division on (02) 8234 5699. PSC can arrange for the provision of Police Force records, in appropriate cases, to assist in complying with a Notice.

General enquiries regarding your Notice should be directed to the Commission contact officer named on the Notice.