

The Hon Robert Borsak MLC
Chair
Select Committee on the Conduct and Progress of
the Ombudsman's Inquiry "Operation Prospect"
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Attention: Ms Beverly Duffy, Clerk to the Committee

Dear Mr Borsak,

Inquiry into the conduct and progress of the Ombudsman's inquiry 'Operation Prospect': post-hearing responses

I refer to the letter of 5 February 2015 from Ms Beverly Duffy, Clerk to the Committee, and provide post-hearing responses as follows.

Response to potential publication of *in camera* transcript

I object to any publication of the transcript of my evidence given *in camera* on Tuesday 3 February 2015. My objection relates to the entire transcript of my evidence given *in camera* on that date.

My evidence reflected my understanding that forthright answers given *in camera* to the direct questioning of the Select Committee would at all times remain confidential because of the particularly adverse impact on the safety, health and welfare of certain Operation Prospect witnesses were that evidence to be published. My objection is accordingly made for the reasons set out in my claim of public interest immunity to the Select Committee on 28 January 2015; that is, to preserve the significant public interest in maintaining the integrity of Operation Prospect and to protect the safety, health and welfare of certain persons who have given evidence to Operation Prospect by keeping the identity of those persons confidential.

Answers to questions on notice

I note the questions on notice highlighted in the transcript provided under Ms Duffy's letter and give the following answers:

Highlighted transcript at p. 12:

I provide herewith my two letters to the Hon Barry O'Farrell MP, the then Premier of NSW, dated 11 October 2012, and my letters to the then Premier dated 16 April 2013, 30 April 2013

and 20 June 2013, comprising my correspondence with the then Premier in relation to the funding and legislative arrangements necessary to conduct Operation Prospect.

Highlighted transcript at p. 19:

I provide herewith my letter dated 11 July 2014 to the Hon Mike Baird MP, the Premier of NSW, relating to my request for an amendment of the *Ombudsman Act 1974* to extend the protections provided by s 35 of the Ombudsman Act to former Ombudsman, former Deputy Ombudsman and former Ombudsman officers. The amendment is enacted in the *Ombudsman and Public Interest Disclosures Legislation Amendment Act 2014*.

Highlighted transcript at p. 21:

I inform the Select Committee that the two officers who indicated concerns in their letters of resignation gave notices of resignation on 18 November 2013 and 13 March 2014 respectively.

Answer to question on notice by the Hon Trevor Khan MLC

I note the question on notice by the Hon Trevor Khan MLC at p. 18 of the transcript (not highlighted in the transcript provided under Ms Duffy's letter) and give the following answer:

My letter dated 10 October 2012 to Mr Andrew Scipione, the Commissioner of the NSW Police Force, was tabled in the Inquiry into Budget Estimates 2012–2013 by the General Purpose Standing Committee No. 4, in the Committee's hearing into the portfolio of Police on 11 October 2012.

Answers to supplementary questions

The Select Committee's supplementary questions do not fall within the ambit of my obligations under the *Parliamentary Evidence Act 1901*, but to assist the Select Committee I voluntarily offer the following answers to the supplementary questions:

Questions 1-3:

I have not advised the persons nominated in supplementary questions 1-3 of these matters. I would anticipate doing so only at the conclusion of my investigation, in the context of providing those persons with detailed information about the legitimacy of their inclusion in the warrants and any relevant findings that may be made.

My evidence before the Select Committee in relation to the subject matter of supplementary questions 1-3 was given in response to the direct questions of the Select Committee. My evidence was intended to augment the Select Committee's understanding of the scope and complexity of this aspect of Operation Prospect.

Question 4:

I have already dealt with this matter in detail in my evidence, in particular in my opening statement to the Committee. For the reasons I advanced, it is a fundamental misconception to characterise anything that a person named in a warrant may say, in response to allegations made about them in the warrant application, as having any relevance to my inquiry. Those applying for warrants do not normally have the opportunity to check the accuracy of

information on which an application is to be based with the persons to whom that information relates. Assessing whether those who sought a warrant or warrants were justified in doing so on the information available to them must, as a matter of law and of logic, focus upon the information that was available to them. The use of information that was not so available in assessing the propriety of applying for a warrant would be unsupportable, involving hindsight reasoning of the clearest kind.

Question 5:

The question contains a concealed premise indicative of prejudgement on the part of its drafter.

The "more timely point in the investigation" for these matters to be disclosed would be in my report, when all of the evidence can be considered in context together with my findings. Despite my repeated expressions of concern about the difficulties and risks to the public interest, and to those involved, in requiring me to speak publicly about Operation Prospect at this point, including in the detailed document that I supplied to the Committee in advance, I was required under compulsion of summons to attend before the Committee in public session to answer questions. In circumstances where several witnesses were called before I was to give evidence, the effect of which would be to undermine public confidence in the effectiveness and probity of the inquiry that I am undertaking, I approached my evidence upon the basis that it was in the public interest for me to supply to the Committee as much information as I could, consistently with the protection of the public interest. The welfare of persons who were involved in my inquiry is a matter that I took into account in forming those judgements, as I expect would be apparent to the Committee at least from the evidence that I gave in confidential session.

Questions 6-16:

These matters fall squarely within the scope of my claim to public interest immunity.

Corrections to transcript

I have marked-up the transcript of my evidence, public and *in camera*, with corrections. Please find the marked-up transcript attached.

Yours sincerely

Bruce Barbour
Ombudsman

10/2/15

The Hon Barry O'Farrell MP
Premier of NSW
Department of Premier and Cabinet
Level 40 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

By fax: (02) 9228 3935

FAXED
11/16/12

Dear Premier

I am writing to confirm the arrangements that are to be put in place to facilitate my inquiry into the allegations that have been made about the conduct of officers of the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission in relation to Operations Mascot, Florida and Emblems, and associated matters.

As you would be aware, the allegations concern a wide range of conduct that has occurred over a significant period of time. Many of these matters raise contemporary but related concerns about access to and release of highly confidential material relating to the 'Emblems' matter. In this light, it is clear that the investigation of such a wide range of related matters will be protracted and resource intensive. In particular, the investigation will involve the collection, storage and analysis of a significant volume of documentary evidence.

The investigation will also involve taking evidence, either by way of interview or in hearings, from a potentially large number of witnesses. The evidence obtained during the course of the investigation will require significant physical and electronic storage, although we would attempt to save costs by using our existing premises in so far as possible. Additionally, the gathering and analysis of that evidence will require the full-time engagement of experienced staff and our acquisition of specialised computer programs.

On any view, I am not in a position to resource an investigation of this potential breadth and protracted nature within my current budget and utilising my existing staffing level. Although my office is developing final costings for the investigation, the funding that will be required is, at this stage, difficult to predict but is likely to be at least \$2 million. However, I understand that, given current budgetary constraints, the Commissioner of the NSW Police Force has indicated his willingness to provide funding for the investigation inquiry from the NSW Police Force budget, to a limit of \$1 million. In this circumstance I would request you to consider whether you would support a funding request to NSW Treasury.

I would ask that, if the funding is obtained in full or in part from the NSW Police Force we obtain an increase to the capital authorisation limit for my office so that we can procure IT and other equipment, the exact amount to be advised following finalisation of our

requirements and decisions about the budget to be allocated. Any funding provided by the NSW Treasury will automatically adjust my capital authorisation limit.

I would be grateful for your earliest confirmation as to the funding arrangements that are to be put in place to facilitate my conduct of the investigation.

Yours sincerely

Bruce Barbour
Ombudsman

11/10/12

- cc
1. Mr Chris Eccles
Director General
 2. Mr Andrew Scipione APM
Commissioner of Police



Ombudsman

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The Hon Barry O'Farrell MP
Premier of NSW
Department of Premier and Cabinet
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1 Farrer Place
SYDNEY NSW 2000

Dear Premier

I am writing to draw your attention to the need for urgent amendment of the *Ombudsman Act 1974* and the *Police Integrity Commission Act 1996* ("PIC Act") to assist my inquiry into the allegations that have been made about the conduct of officers of the NSW Police Force, the NSW Crime Commission ("NSWCC") and the Police Integrity Commission ("PIC") in relation to Operations Mascot and Florida, and associated matters.

Whilst my office has authority to investigate police conduct under Part 8A of the *Police Act 1990*, complaints that involve the conduct of the PIC Commissioner and PIC officers will only fall within my jurisdiction when referred by the PIC Inspector under s 90 of the PIC Act. However, even in this circumstance, whilst s 60(1) of the PIC Act provides that the PIC may furnish information and documents and give evidence to my office, s 60(2) of the PIC Act provides that the PIC cannot be compelled to do so. In this way, s 60(2) of the PIC Act operates to set to one side the coercive investigative powers provided to my office under s 18 of the *Ombudsman Act* and s 11 of the *Royal Commissions Act 1923* in any investigation by my office of the conduct of officers of the PIC.

Whilst I understand that item 19 of Schedule 1 to the *Ombudsman Act* has been amended by proclamation to permit me to investigate the conduct of members of the NSW Crime Commission that is referred by the Inspectors of either the NSW Crime Commission or the PIC, I must strongly caveat that any delay to the reform of s 60(2) of the PIC Act will adversely affect my inquiry. Because I anticipate that an initial requirement of the investigation will be the examination of information from and the conduct of officers of the PIC, any obstacle to my authority to conduct that examination can only have an undesirable effect on the timeliness, efficiency and, ultimately, the integrity of my inquiry.

For this reason I would urge your consideration of the soonest amendment to s 60(2) of the PIC Act to add (or to add comparably) at the end of the section: "*unless the evidence or document relates to a matter referred to the Ombudsman by the Inspector of the NSW Crime Commission under the Crime Commission Act 2012 or by the Inspector of the Police Integrity Commission under the Police Integrity Commission Act 1996*".



I have also identified, and draw to your attention, the absence of any express provisions in the Ombudsman Act that prohibit the disclosure by a person of information that is likely to prejudice an investigation and that restrict the publication of evidence given in a hearing. Similar provisions exist in the *Independent Commission Against Corruption Act 1988* (ss 114 and 112 respectively) and in the *PIC Act* (ss 54 and 52 respectively) and provide a significant forensic benefit to an investigation by maintaining strict confidentiality of investigation related information. At present, s 17 of the Ombudsman Act provides that investigations are conducted in the absence of the public and, where a witness is summoned to attend and give evidence in a hearing, my office has relied on the decision of the Federal Court in *NSCC v Bankers Trust* (1989) 24 FCR 217, that the power to give a direction preventing or restricting the publication of that evidence is an integral element of the powers that are exercised in this context. However, given the nature of the present inquiry, it would in my view be clearly preferable for the Ombudsman Act to be amended to include powers that are comparable to the express statutory powers exercised by the ICAC and the PIC in this regard. Accordingly, I request your urgent consideration of amendments to the Ombudsman Act to provide these powers.

Additionally, you would be aware that s 23 of the Ombudsman Act permits me to engage the services of any person for the purpose of getting expert assistance in the exercise of my statutory functions. I currently propose to engage the services of counsel to assist me in the conduct of this inquiry and, to put beyond doubt my power to do so, I would request your consideration of an amendment to the Ombudsman Act to include an express authority to enable me to appoint counsel assisting. I would ask that any such authority be comparable to the powers that are exercised in this regard by the ICAC and the PIC; that is, the powers to appoint counsel assisting that are provided to the ICAC and to the PIC by s 106 of the ICAC Act and s 12 of the PIC Act respectively. Again, I would request your urgent consideration of an amendment to the Ombudsman Act to provide this power.

I would be grateful for your earliest advice about the matters that I have set out above.

Yours sincerely

Bruce Barbour
Ombudsman

11/10/12

- cc 1. Mr Chris Eccles
Director General
- 2. Mr Paul Miller
General Counsel
Department of Premier and Cabinet

The Hon Barry O'Farrell MP
Premier of NSW
Department of Premier and Cabinet
Level 40 Governor Macquarie Tower

1 Farrer Place
SYDNEY NSW 2000

Dear Premier

I am writing to draw your attention to the need for an urgent amendment of the *Ombudsman Act 1974* to assist my inquiry into the allegations that have been made about the conduct of officers of the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission in relation to Operations Mascot and Florida, and associated matters ('Operation Prospect').

As you are aware, my office has authority to investigate police conduct under Part 8A of the *Police Act 1990* and, through recent amendments to the *Ombudsman Act 1974*, matters that have been referred by the Inspector of the Police Integrity Commission ('PIC') about conduct of the PIC Commissioner and PIC officers, and members and executive officers of the NSW Crime Commission. However, Operation Prospect has identified an approaching impediment to obtaining information from persons who are bound by statutory secrecy provisions under s 66 of the *Police Integrity Commission Act 1996* and s 80 of the *Crime Commission Act 2012* (previously s 29 of the *NSW Crime Commission Act 1985*) and who are no longer public officials. These secrecy provisions provide criminal sanctions for any breach.

The impediment arises from s 21(3)(c) of the *Ombudsman Act*, which provides that a requirement made by the Ombudsman in an investigation under the *Ombudsman Act* or an inquiry under s 19 of the *Ombudsman Act* is not required to be set aside because of 'any duty of secrecy or other restriction on disclosure applying to a public authority'. This has the consequence that the coercive investigative powers provided to my office must be set aside because of a duty of secrecy that applies to a person who is a former public authority.

Operation Prospect has identified a significant number of persons who could provide information to assist the investigation and are former public officials bound by the duties of secrecy that I have outlined above. These persons cannot be compelled to provide information to which a duty of secrecy attaches and would expose themselves to a criminal sanction were they to voluntarily provide that information.

The adverse effect on the conduct of Operation Prospect in this circumstance is clear and for this reason I would urge your consideration of the soonest amendment to s 21(3)(c) of the Ombudsman Act to give that provision a broader operation that includes persons who are not public authorities. In my view this operation could be achieved by substituting "*any duty of secrecy or other restriction on disclosure applying to a public authority*" with "*any duty of secrecy or other restriction on disclosure applying to the person*".

I would be grateful for your earliest advice about the matter set out above.

Yours sincerely

Bruce Barbour
Ombudsman

16/4/13

- cc
1. Mr Chris Eccles
Director General
Department of Premier and Cabinet
 2. Mr Paul Miller
General Counsel
Department of Premier and Cabinet

The Hon Barry O'Farrell MP
Premier of NSW
Department of Premier and Cabinet
Level 40 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Premier

I refer to my letter of 16 April 2013 and wish to draw your attention to a further need for an urgent amendment of the *Ombudsman Act 1974* to assist my inquiry into the allegations that have been made about the conduct of officers of the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission in relation to Operations Mascot and Florida, and associated matters ('Operation Prospect'). I apologise that this matter could not have been included in my letter of 16 April 2013 but it has only lately come to our notice.

As you are aware, the Ombudsman Act was recently amended by the *Ombudsman Amendment Act 2012* to provide, amongst other things, an authority to the Ombudsman under s 19C(1) of the Act to make a direction prohibiting a person from disclosing any information that is likely to prejudice the investigation to which it relates. I note that this authority is confined to a person who is required 'by a summons issued under s 19(2) [of the *Ombudsman Act*] to give evidence or produce a document' and has no application to a public official who may be required to provide a statement of information or produce a document or other thing under s 18(1) of the Ombudsman Act.

As you would be aware, the Attorney General, in his second reading of the *Ombudsman Amendment Bill 2012* stated, in regard to clauses 19A, 19B and 19C of the Bill, that "the provisions mirror those that apply under the *Independent Commission Against Corruption Act* and the *Police Integrity Commission Act*". In this regard, however, I note that s 114(1) of the *Independent Commission Against Corruption Act 1988* provides as follows:

114 Disclosures prejudicing investigations

(1) A person who is required:

- (a) by a notice under section 21 or 22 to produce a statement of information or to attend and produce a document or other thing, or
- (b) by a summons under section 35 to give evidence or to produce a document or other thing,

shall not disclose any information about the notice or summons that is likely to prejudice the investigation to which it relates.

Section 54(1) of the *Police Integrity Commission Act 1996* has an equivalent width of application and I am not aware of any reason for the more limited application of s 19C(1) of the Ombudsman Act.

Operation Prospect has identified a number of persons who could provide information to assist the investigation and who are current public officials. Although these persons can be required to provide a statement of information under s 18(1) of the Ombudsman Act, I have no authority to direct a public official who is the subject of a requirement made under s 18 not to disclose any information that is likely to prejudice the investigation to which the requirement relates. In the context of Operation Prospect, this will be a significant operational impediment.

The adverse effect on the conduct of Operation Prospect in this circumstance is clear and for this reason I would urge your consideration of the soonest amendment to s 19C(1) of the Ombudsman Act to include in that provision a person who is required by a notice under section 18 of the Ombudsman Act to give a statement of information, or to produce any document or other thing, or to give a copy of any document.

I would be grateful for your earliest advice about the matter set out above.

Yours sincerely

Bruce Barbour
Ombudsman

30/4/13

cc Mr Paul Miller
General Counsel
Department of Premier and Cabinet

Our ref: ADM/569P03

The Hon Barry O'Farrell MP
Premier of NSW
Department of Premier and Cabinet
Level 40 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Premier

I am writing to bring to your attention the need for an amendment to s 35 of the *Ombudsman Act 1974* to enable Ombudsman officers to give evidence in certain legal proceedings, including any prosecutions that may arise out of my inquiry into allegations that have been made about the conduct of officers of the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission in relation to Operations Mascot and Florida, and associated matters ('Operation Prospect'). You would be aware that the important public purpose of 35(1) of the Ombudsman Act is to cause the Ombudsman and an Ombudsman officer who is not a member of the Police Force, to be neither competent nor compellable to give evidence or produce any document in any legal proceedings in respect of any information obtained in the exercise of the Ombudsman's functions. While s 35(2) of the Act provides a number of exceptions to this statutory incapacity, none of these exceptions would enable my officers to give evidence in any Operation Prospect related prosecutions.

I should highlight that the present issue of our statutory incapacity to give evidence is not connected to any immediate operational matters in Operation Prospect; the inquiry has not yet reached a stage where I would be in a position to recommend the prosecution of any person for an offence or, for that matter, to forecast the nature or number of any such recommendations. Additionally, this issue extends beyond Operation Prospect to include the incapacity of my officers to give evidence in proceedings under Part 3 of the *Public Interest Disclosures Act 1994*.

In regard to the latter, a growing general awareness of our oversight role under the Public Interest Disclosures Act appears to have led to an increase in whistleblower allegations of reprisal action being made to my office in our capacity as an investigating agency under that Act. Where such allegations require immediate investigative action, they can be referred for urgent investigation to the NSW Police Force or to the ICAC. However, it cannot be predicted that the referral of allegations to these agencies will always be an available or preferable avenue, particularly where the allegations are connected to a disclosure of serious mismanagement or administrative misconduct that would fall within the jurisdiction of my

office. Given that none of the exceptions in s 35(2) of the Ombudsman Act enable my officers to give evidence in reprisal action related proceedings, our incapacity to give evidence in proceedings under ss 20 and 20B of the Public Interest Disclosures Act is an operational limitation on our part that I view with increasing concern.

In light of the matters that I have outlined, I would request your consideration of the amendment of s 35 of the Ombudsman Act so that s 35(1) of the Act does not apply to legal proceedings under ss 20 and 20B of the Public Interest Disclosures Act or, with present regard but not limited to Operation Prospect, to prosecutions in relation to a matter referred to my office by the Inspector of the New South Wales Crime Commission under the *Crime Commission Act 2012* or by the Inspector of the Police Integrity Commission under the *Police Integrity Commission Act 1996*. I should, however, indicate that the last may only partially address the issue of our statutory incapacity in regard to Operation Prospect, as this investigation also concerns conduct that is unrelated to any referred matter.

I would be grateful for your earliest advice about the above.

Yours sincerely

Bruce Barbour
Ombudsman

20/6/13

- cc: 1. Mr Chris Eccles
Director General
Department of Premier and Cabinet
2. Mr Paul Miller
General Counsel
Department of Premier and Cabinet

11 July 2014

Contact: Timothy Lowe
Telephone: (02) 9286 1089

The Hon. Mike Baird, MP
Premier of NSW
Level 40 Governor Macquarie Tower
1 Farrer Place
SYDNEY 2000

Dear Premier

Request for urgent amendment of section 35 of the Ombudsman Act 1974

I am writing to draw your attention to the need for an urgent amendment of s 35 of the *Ombudsman Act 1974* to ensure that Ombudsman-related information cannot be disclosed in legal proceedings by former Ombudsman and Ombudsman officers, other than in the circumstances that are set out in s 35(2) of the Ombudsman Act.

In this regard I have recently identified a potentially adverse issue for my office arising from the confined application of s 35(1) of the Ombudsman Act to persons who are an Ombudsman or an officer of the Ombudsman. Section 35(1) the Act provides that an Ombudsman and an officer of the Ombudsman are generally neither competent nor compellable to give evidence or produce documents in any legal proceedings in respect of information obtained by the Ombudsman or officer of the Ombudsman in the course of the Ombudsman's or officer's office.

You would in particular be aware that my office is currently conducting an investigation into allegations that have been made about the conduct of officers of the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission in Operations Mascot and Florida, and associated matters ('Operation Prospect'). Given the highly confidential and sensitive information under examination in Operation Prospect, together with other confidential and sensitive information that is regularly handled by my office, it would in my view be clearly preferable for s 35 of the Ombudsman Act to be urgently amended to include in its scope a person who was an Ombudsman, a Deputy Ombudsman, an Australian legal practitioner assisting the Ombudsman or an officer of the Ombudsman. In this way, s 35 of the Ombudsman Act will have an ambit that is equivalent to the secrecy provisions of s 111(1) of the *Independent Commission Against Corruption Act 1988*, s 56(1) of the *Police Integrity Commission Act 1996* and s 80(1) of the *Crime Commission Act 2012*.

An amendment of this nature would ensure that all Ombudsman-related information, including information connected to Operation Prospect, could not be disclosed in any legal proceedings by former Ombudsman and Deputy Ombudsman, counsel assisting and Ombudsman officers, other than in the proceedings that are specified in s 35(2) of the Ombudsman Act.

I would urge your consideration of the soonest possible amendment of s 35 of the Ombudsman Act in light of the concerns that I have outlined above.

Yours sincerely

Bruce Barbour
Ombudsman

cc Mr Simon Smith
Acting Secretary
Department of Premier and Cabinet

Mr Paul Miller
General Counsel
Department of Premier and Cabinet