Submission No 25

INQUIRY INTO THE CONDUCT AND PROGRESS OF THE OMBUDSMAN'S INQUIRY "OPERATION PROSPECT"

Name: Mr John Giorgiutti

Date received: 3/02/2015

The Hon. Robert Borsak MLC
Chair
Legislative Council Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect"
Parliament House
Macquarie Street
SYDNEY NSW 2000

2 February 2015

Dear Sir

SUBMISSIONS

At 5.45pm on 30 January 2015 Sam Griffith contacted me and an arrangement was made that I attend Parliament House on 3 February 2015 to be served with a document requiring my appearance before your Committee at 9am on Wednesday 4 February 2015. To assist the Committee I make the following submissions. I have no objection to the submissions and the attachments being made public.

Independent legal advice
Time precludes me from obtaining independent legal advice, and I according rely on the statement in the Committee's Terms of Reference that *"the House makes clear its understanding that* a *statutory secrecy provision in statute does not affect the power of the House or of its committees to conduct inquiries and to require answers to lawful questions unless the provision alters the law of parliamentary privilege by express words,* …". The statutes that bind me contain no such express words.

Caveat
The events about which I make submissions and about which I am to be questioned occurred up to 15 years ago. The Ombudsman has reviewed over 1,000,000 pages of information. I have no documents. I make these submissions based on my present recollections and assisted by information gleaned from documents posted on the Committee's web pages.

The Ombudsman has been conducting an inquiry with full powers for some two and a half years. There have been more than 70 hearing days. Persons have made public interest disclosures to the Ombudsman. Such persons are in effect "roll-overs".

The Committee, on the other hand, has very limited documents before it. The Committee only has four days of hearing with few witnesses. The Committee has no "roll-overs".

The Committee is engaged in an inquiry. The inquiry is not an adversarial proceeding, nor is the inquiry an inquisitorial proceeding.

Some of my submissions and evidence may appear to be, or be, in conflict with the evidence of Cath Burn, Deputy Commissioner. I stress to the Committee that if my evidence has that appearance then it is not a case of oath against oath, but merely a case of recollection against recollection.

Whilst I cannot guarantee a complete recollection, the submissions and my evidence should nevertheless be sufficiently accurate for the purpose of this inquiry, and only this inquiry, namely, the conduct and progress of the Ombudsman's Inquiry "Operation Prospect".

Background

I commenced employment with the New South Wales Crime Commission (the Commission) on 2 July 1990. By 1999, and thereafter until 2011, I was the Solicitor to the Commission and it's sole Director. Mark William Standen was an Assistant Director (Investigations). Standen was the Team Leader of the investigation team known as the Gymea Team. The investigations under the Mascot References were undertaken by the Mascot Team, which comprised Commission officers selected from the Gymea Team together with a contingent of police from Special Crime and Internal Affairs. Neil Owen was the solicitor for the Mascot Team. Standen reported to Phillip Bradley, the then Commissioner of the Commission.

John Dolan, Acting Superintendent was the Commander of the then Special Crime Unit (SCU) and was Standen's counterpart. Cath Burn, now Deputy Commissioner was the Team Leader of the police contingent and reported to Dolan.

SCU was a task force assisting the Commission to carry out the investigations under the Mascot References. Under section 27A of the now repealed *New South Wales Crime Commission Act 1985* SCU was under the control and direction of the then Commissioner of Police, subject to any guidelines furnished by the Management Committee of the Commission.

Standen and I reported to my Commissioner directly. Whilst I was senior to Standen the Commission operated under a flat management structure (for more information on the Commission's structure see *Report of the Special Commission of Inquiry into the New South Wales Crime Commission – David Patten, 30 November 2011).* Whilst I undoubtedly attended a number of weekly operational meetings of the Mascot Team my primary responsibilities lay elsewhere in the Commission and I only became involved in the Mascot Team investigations as required by my Commissioner.

I have no recollection, if I ever knew it, of the specific procedure implemented in the Mascot Team for the making of applications for warrants. Neil Owen was a very senior and experienced solicitor and more than capable of making such applications. Manuals and other material aided him.

WARRANT 266

Standen raised issues about names

In September 2000, Standen raised with me the fact that the Warrants sought under the now repealed *Listening Devices Act (1985)* (the LD Act) had on them a very large number of names. Standen told me that the police were adding a large number of names on the Warrants as Human Source "Sea" could "bump into" (my words) a lot of people and legal advice to the police was that the LD Act required the Warrant to contain the names of any persons Sea may record, whether the persons were suspects or not.

Standen told me that the police had told him that Gordon Lever solicitor at the New South Wales Police Force had obtained the Warrant(s) for a listening device in the home of
and on that Warrant(s) there appeared the name of Mrs.
There was no suggestion that Mrs. was 1n

any way involved in the (wrongly) suspected criminality of or that she even knew or suspected him of it. After the arrest and charging of , the Warrant(s) came to light and Mrs. complained about her name being on the Warrant.

The legal position was reviewed by the police and it was determined that all names of persons who could be recorded by a listening had to be added to the warrant whether suspects or not.

Having been through the "saga" the police were intractable about having the names on the Warrant(s) of persons Sea was going to "bump into".

I said to Standen that the matter could be distinguished. In the case, the listening device was static (in the home of and his wife) and was only ever going to speak to his wife.

Sea on the other hand was wearing a body wire. It was not always possible to plan operational activity such that one knew precisely whom Sea would capture on the body wire who was not a suspect. I went on to say to Standen that Sea had an ongoing police investigation in which the Commission was involved and that Sea came to the Commission building for meetings with Commission officers including my Commissioner. I went on to say that if the Mascot police believed as they said they did that they had to put on the Warrant(s) the names of all persons Sea could "bump into" then the Warrant(s) would all need to include the names of a number of Commission officers, starting with the permanent security officers whom Sea would meet when he first entered the Commission building. Standen confirmed that the Warrant(s) did not include the names of Commission officers. I told Standen very firmly what I would do if the police sought to include my name on the Warrant(s).

I also told Standen that when a prosecution was commenced and it was sought to rely on a Warrant(s) the police would need to tender the Warrant, which would disclose all of the names. Standen said that police had told him that the names of persons not subject to the prosecution would be redacted. I said that the police would not be able to do that and that they would need to produce the whole of the Warrant(s).

Issue about names raised with Commissioner

I relayed my conversation with Standen to my Commissioner. My Commissioner spoke with Standen. I was not present, nor was I told what transpired.

I have no recollection of the King send off.

Further Reference

My Commissioner then sought a further Reference from the Management Committee. It was not my role to be involved in the seeking of References. I now know (from the Ombudsman,s letter dated 28 January 2015 to the Committee) that in support of the new Reference my Commissioner relied on a Warrant Affidavit dated 5 October 2000. It must be presumed that my Commissioner was satisfied with the content of the Affidavit if he used it as a basis to ground a new Reference. I think after, not before, the grant of the Reference I was advised of its terms.

Warrant 266 becomes public

In 2002, a redacted copy of Warrant 266 was sought to be tendered in a prosecution but was rejected by the magistrate. The unredacted Warrant 266 was tendered and thereafter got into the public domain and became the subject of media attention.

Inspector of the Police Integrity Commission

Warrant 266 was referred to the then Inspector of the Police Integrity Commission for him to confirm that the warrant was justifiably sought, the seeking of the warrant complied with the relevant legislation and the material obtained by the warrant was used appropriately.

The Inspector completed his Report on 29 April 2002. To my knowledge, that Report has never been made public.

The Annual Report of the Inspector of the Police Integrity Commission for the year ended 30 June 2002 contains the conclusions reached by the Inspector.

Relevantly, the Inspector concluded that:

"This huge number of persons is explicable by the magnitude of this exceptional investigation and by the correction of a *common misunderstanding.* (My emphasis)

The misunderstanding to which I refer is that some may think that for any person to be named in a warrant there must be reasonable grounds to suspect that such person was involved in a prescribed offence or at least had some information about it. That thought is erroneous. The Crown Solicitor has given me advice confirming my view .... (My emphasis)

It is understandable that the applicant would seek to include in the warrant all names of those whom it was reasonably suspected M5 ('SEA") may engage in recorded conversations in order to corroborate his allegations, gain evidence about their corruption, gain information about their knowledge of the allegations/ corruption, and/or may reasonably be expected to be present when M5 was going to record conversations. (My emphasis)

As noted above I accept in this regard that:

> *"The contact which SEA was likely to have with other police, and former police was extensive, and there were likely to be conversations which were relevant to the investigation of the nominated offences with many such persons. Investigators tended to include all persons likely to speak in the presence of the device."* (My emphasis)

Complainants to Commission

A number of persons complained directly to my Commissioner about having been named on Warrant 266. The consistent Commission position was that there was no choice, the law required it, and that it should not be taken that a person named on a warrant was suspected of any criminal activity.

Emblems Task Force

After the Emblems Task Force was set up in 2003 my Commissioner gave to me the responsibility of dealing with the Task Force and its request for access to Commission holdings.

I only then became aware of the memo dated 13 April 2002 of Cath Burn, now Deputy Commissioner. That memo states at page 2:

"It was the procedure to include on the warrant names of people who were likely to be spoken to by the informer whether they were targets, suspects or persons of interest. This did not extend to every person the informer would come in contact with, just those where it was likely the conversation would be recorded ***(e.g. At a function).*** *In this way, it was ensured the Judge would be aware of the scope of the operation and the number of people M5 would be likely to engage in recorded conversations".* (My emphasis).

I also became aware of the attachment to the memo. The attachment indicates that a large number of persons named on the Warrant were not mentioned in the Affidavit for the Warrant but were nevertheless suspected of involvement in criminal activity. Taken together (the memo and the attachment) it seemed that only two were not suspects. I raised this with my Commissioner and he was unresponsive. He appeared surprised.

I also raised with my Commissioner that the Commission's copy of the Affidavit for Warrant 266 could not be found. (I note that by letter dated 22 April 2002, Burn, inter alia indicated to the Inspector of the Police Integrity Commission that the Commission's copy of the Affidavit could not be found and he was provided with an electronic copy). The Commission's copy has never been found. I had available what appeared to be an electronic version but it could not be relied upon to be an accurate copy because persons often wrote over existing documents and at the time there was also a glitch with the "save" function of the Commission's in house written document management system. I sought instructions to obtain a copy by approaching Judge Bell but my Commissioner never gave me those instructions.

At a meeting with members of Task Force Emblems chaired by Dave Madden, then Assistant Commissioner and attended by Ian Temby QC I advised that the Commission did not have a copy of the Affidavit and that the Task Force should seek it from Justice Bell. There was also discussion around Task Force Emblems being made a Commission Task Force. It was left for Temby QC to provide an advice, jointly to the Commission and the Police Force. That occurred but my Commissioner rejected that advice.

My Commissioner had obtained a Resolution from the Management Committee of the Commission to permit the Task Force to lawfully access Commission documents.

From the outset, my Commissioner felt that the Commission was being unfairly targeted. The then Commissioner of the Police Integrity Commission shared that view. The Commissioner of the Police Integrity Commission disseminated to the Commission on an on-going basis documents being generated by the Emblems Task Force. The content of those documents were extremely disturbing to my Commissioner because it appeared to my Commissioner that the Task Force had lost objectivity, if it ever had any.

At some point I was instructed by my Commissioner to prepare a report for the Management Committee of the Commission about the Commission's dealings with the Emblems Task Force. By then my Commissioner had serious concerns about the bona fides of the Task Force. That document details the full extent to which the Commission went to accommodate Task Force Emblems (lawfully).

My Report was tabled at a meeting of the Management Committee of the Commission and I was subsequently advised that I need no longer communicate with the Task Force.

Inspector Levine

In June 2012 when Inspector Levine wanted Commission documents I was given the responsibility of collating the documents.

I told Peter Singleton, the then Commissioner of the Commission that the "matter" would never go away. I suggested to Singleton that the Commission should disseminate to whomever was named on the Warrants a copy of the Warrant together with a copy of the Affidavit (redacted as to persons other than the particular person. That suggestion was rejected on the basis that the persons would get together and then would have a copy of the whole of the Affidavit.

By 2012 the vast majority of the Commission's files had been in storage for very many years. By searching the Commissions document management system and electronic documents I

identified files for retrieval. I retrieved about 100 files of about 20,000. It did not take long for me to have concerns. My simple task of collation turned into an inquiry under the Act. The then Special Investigation and Litigation Team (SILT) undertook the inquiry. I reported directly to Singleton.

I had ascertained that on 12 March 1999 a Warrant had been granted which contained 119 names. This was well before Sea would have been "bumping into" people. A spreadsheet was prepared of all warrants applied for and a comparison was carried out of the different names that had been included on the warrants. I concluded that the only way to establish why there were changes to the names on the warrants was to examine all the email traffic within the Mascot Team and to examine the Meta data relating to documents to ascertain authorship and who else viewed documents. My inquiry was never completed. I was directed by Singleton to stop. Ultimately the SILT Team was shut down.

When the Commission was served by the Ombudsman with a Notice requiring production of documents **I** should have been given responsibility to produce the sought after material. Singleton would not allow me to be involved. I said to Singleton that I should at least speak with the Ombudsman and indicate the methodology used in my inquiry and what I had uncovered to date in my inquiry. By then a memo of some 150 pages was already in draft and many attachments had been prepared. That request was also refused.

The Ombudsman

It is possible to establish why the names appeared on each of the warrants for body wires worn by Sea from 1999 to 2001. It is a matter of tracing through all of the documents (and meta data) and

relevant email traffic. The Ombudsman should have completed this task by now.

For the purpose of ascertaining the progress by the Ombudsman I suggest that the Committee simply ask the Ombudsman when did he finally receive all of the documents and material form the Commission and whether he has established why the names appeared on each warrant. I suggest that he could respond without needing to make a claim for Public Interest Immunity.

As to whether there was any criminality, that is another issue. Waiting another five months is certainly going to be shorter than starting again with some new inquiry.

KALDAS

Burn gave the following evidence to your Committee (at page 62):

DH: Mr Kaldas was not one of the original 19 named persons in the original reference, was he?

CB: I do not recall.

DH: You do not recall that he was, or you do not recall one way or the other?

CB: I do not recall one way or the other if he was one of the 19.

DH: Would you like to take that on notice?

CB: I can take that notice. I do not have a *document that would assist me in answering that, however.*

DH: Was his name in the pot at the beginning of Mascot or did it come in at a *later point?*

CB: It was at the beginning.

In June 2012 when I was collating documents for Levine I retrieved the original debrief of Sea. It was five days of typed questions and answers (the Debrief). Burn and , a police officer whose rank I can't recall, conducted the Debrief.

The Debrief formed the basis of the Schedule of Debrief (SOD). I now know from the Ombudsman letter that there were originally 86 SODs. Over time this increased to 231 SODs. Whilst I was undertaking my inquiry I had not been able to locate the original SOD with 86 names although I knew it must have existed.

In the Debrief, Sea did not provide information of corrupt activity on the part of Nick Kaldas, now Deputy Commissioner. In fact Sea was specifically asked whether he knew of any corrupt activity on the part of Kaldas. Sea responded in the negative. Kaldas was the only name specifically put to Sea. No other officer's names were put to Sea.

The Reference material that grounded the Mascot Reference contained only 19 persons being persons who were associates of Sea and who were named by him as involved in, or having knowledge of, corruption. The 19 names made up the 86 SODs. Those 19 names did not include Kaldas.

When I looked at the SOD I had in June 2012 with the 231 SODs it listed three SODs for Kaldas. Two of the SODs for Kaldas had the letter "A" after the number. The SOD number was a low number. These Kaldas SODs had been added later but not given the next sequential number.

In July 2012, I retrieved from the District Court the Court files that related to the arrests that gave rise to two SODs for Kaldas. There was no evidence that the files had been previously retrieved. At least one (if not both) of the complaints had been raised and disposed of in the court proceedings.

In about May 2012[1] Kaldas became the subject of SOD 231. Kaldas thereafter came under intense electronic surveillance by the Commission and the Police Integrity Commission. That SOD was not run in the public hearings that commenced in October 2001. I was responsible for reviewing the SOD. I expected to commence that review in 2002 but I did undertake some investigate work in 2001. The SOD was however taken over by the Police Integrity Commission and I had nothing further to do with it. Nothing came of it.

1 In correspondence to the Committee (dated 9 February 2015) Mr Giorgiutti clarified the statement by inserting: The year was, in fact 2001.

The Ombudsman

It is possible to establish when the Kaldas complaints became SODs and who added them to the SOD. It is a matter of tracing through all of the documents (and meta data) and relevant email traffic. The Ombudsman should have completed tis task.

For the purpose of ascertaining the progress by the Ombudsman I suggest that the Committee simply ask the Ombudsman whether Sea made complaints about Kaldas in his Debrief, whether Kaldas was part of the 19 names, when the Kaldas complaints became SODs and who added them to the SOD. I suggest that he could respond without needing to make a claim for Public Interest Immunity.

As to whether there was any criminality, that is another issue. Again, waiting another five months is certainly going to be shorter than starting again with some new inquiry.

FALSE INFORMATION IN AFFIDAVITS

Former Judges

On 21 May 2012 Bruce James, Commissioner of the Police Integrity Commission gave the following evidence to the Committee on the Office of the Ombudsman and The Police Integrity Commission in relation to applications for warrants:

CHAIR: In relation to an affidavit, which is confidential, what transparency and accountability is there for the veracity of affidavits that have been sworn before Supreme Court Judges?

BJ: I used to be a Supreme Court Judge. If one is an authorized Judge, and I think all judges in the Common Law Division are, you are presented with the affidavits – and I am *confident that my practice is no different from the practice adopted by other Judges, ay least at that time – it was simply on the papers, without ever seeing the deponents, on the face of the evidence you made a decision whether to grant the warrant.*

CHAIR: Is there any testing of an affidavit that can ever be undertaken?

BJ: I think a *Judge could require a deponent of the affidavit to attend before the Judge. The Judge would be unlikely to have any information outside the affidavit with which to confront the*

deponent so that getting the deponent in and speaking to the deponent might not achieve very much.

CHAIR: So the basis of all authorizations for listening devices is through this process. I am *interested in the integrity of this process. If false information was put before* a *Supreme Court judge, I* am *assuming that it would be difficult for* a *Judge not to accept* a *sworn affidavit?*

BJ: Yes.

CHAIR: Then that affidavit becomes secret so it is never seen to be tested or if a *crime was committed by someone swearing* a *false affidavit, is there any possibility of ever detecting that crime or making* a *person accountable for it?*

BJ: I think it is unlikely to be detected.

On 22 February 2013 David Levine, Inspector of the Police Integrity Commission gave the following evidence to the Committee on the Office of the Ombudsman, The Police Integrity Commission and the Crime Commission in relation to applications for warrants:

"I, like any other judge, developed an idiosyncratic methodology for reading this material, which at times would come in inundating waves one after the other. I do not want to diminish the process, but I said, "I am *going to look to see if there is someone named in this warrant who is named as 'M, Mouse' or 'D. Duck'" –**I** did that".*

Levine gave evidence to your Committee that he never refused an application.

Clive Small

In his submissions, Clive Small states that in an affidavit sworn on 14 September 2000 for a listening device warrant the deponent swears that on 10 December 1999 Sea unexpectedly met with John Bourke, retired Inspector who is alleged to have given to Sea information adverse to Sea. In April 2013, Neil Mercer contacted Bourke who denied having met Sea at the Corso, Manly. Bourke denied having been at Manly since 1978 and denied the information. Sea was not wearing a body wire at the time.

Clearly, if the conversation between Sea and Bourke did not occur then the information was fabricated by some one to include in the Affidavit. Sea of course would not see the Affidavit and would not know if it contained falsehoods attributed to him.

The Ombudsman

For the purpose of ascertaining the progress by the Ombudsman I suggest that the Committee simply ask the Ombudsman whether he has contacted Sea and obtained from Sea his version and whether that version accords with Bourke's version.

If Sea gave a version consistent with Bourke, it is possible to establish how the information came to be in the Affidavit and who propagated the information. It is a matter of tracing through all of the documents (and meta data) and relevant email traffic. The

Ombudsman should have completed that task. Again, waiting another five months is certainly going to be shorter than starting again with some new inquiry.

Other false affidavits

The submissions by Clive Small include allegations of false swearing in other investigations by Special Crime and Internal Affairs. The Committee is no doubt aware that I have raised similar allegations about the Commission. A copy of my Public Interest Disclosure is attached together with the response to it.

I suggest that the Committee should more generally consider making a recommendation that there be a judicial review of all Affidavits for all warrants applied for to date by all New South Wales Agencies and that a judicial officer be charged with the responsibility of establishing a best practice model for the making of applications for warrants so that, inter alia, false swearing can be eliminated.