

Jennifer [REDACTED]

From: Drumgold, Shane [REDACTED]@act.gov.au>
Sent: Tuesday, 20 December 2022 3:44 PM
To: ACTFOI
Subject: [External] RE: Notice of investigation of a complaint about the handling of an FOI access application (2) - 2022-113209 [SEC=OFFICIAL]
Attachments: Ombudsman 1 of 3.zip

OFFICIAL

OFFICIAL: Sensitive

Dear Ms [REDACTED]

Thank you for the below enquiry, I have attached the relevant zipped files, and will make addition comments to put the FOI request in context as below.

Context of FOI request

On 3 December 2022, The Australian ran a story headed "Police doubted Brittany Higgins but case was 'political' (attached). The article contains a reference to a police diary entry that is only in the possession of the AFP and DPP.

The article clearly references excerpts of a letter that I wrote to the Chief Police Officer on 1 November 2022 including the names of the relevant police officers. The article also references five private SMS messages from witnesses in the trial, that were never put into evidence at trial. It is unclear how this letter came to be in the possession of The Australian.

On the morning of Saturday 3 December 2022, I received a media enquiry from the Guardian in relation to the article in The Australian and I responded:

"I am greatly concerned that potentially legally protected material may have again been unlawfully distributed. Given myself and others have already raised concerns about matters that are currently under investigation, it would not be appropriate to comment further whilst investigations are underway."

On 5 December 2022, the DPP Information Officer Katie Cantwell received an FOI request from the Guardian for "any documented complaint made by the DPP about the conduct of police during the matter of R v Lehrmann, which was sent to ACT Policing in the months of October or November 2022."

The role of information officer was formally held by Dr Melanie [REDACTED] who recently suddenly left the organisation for another government department. The role has been filled by the Executive Officer Katie Cantwell since Dr [REDACTED]'s departure, and training has been allocated in the training schedule.

On 7 December I received a copy of two FOI requests from the Information Officer Katie Cantwell, one from the Leader of the Opposition for the ACT Legislative Assembly and the other one was from the Guardian seeking different document. The requests came to me because they both related to materials that I had sent, and only I was in possession of. In relation to the Guardian FOI, the Information Officer commented "Surely any document sent regarding this would be subject to legal/professional privilege?" which given it did not involve legal advice was incorrect.

On 7 December 2022 I forwarded a copy of a letter dated 1 November 2022 that fell within the ambit of the Guardian FOI request, and the materials subject to the leader of the opposition FOI request.

On 7 December 2022, I received an email from the Information Officer in relation to the Guardian FOI asking “*Can I confirm that this is the letter you are happy for me to release under FOI to the guardian?*” which I understood to only relate to the comment relating legal/professional privilege rather than other issues such as the redaction of parties or third party consultation, and I responded “*I am happy for it to go out.*”

I anticipated that following this, there would still be consideration given to issues such as relevant redactions and if required third party consultation and accept that my brief communication most likely misled the Information Officer, however in my view it was an issue that was quickly remedied without any harm being caused.

I understand that the letter was briefly disclosed in its unredacted form, and on 8 December I received a phone call from the Chief Police Officer advising that he had received a media enquiry suggestive that there were names of certain police disclosed in a letter released to the Guardian under FOI.

I organised for some urgent training and assistance with both FOI requests, which occurred on the morning of Friday 9 December 2022, between the DPP Information Officer Katie Cantwell and the Justice and Community Safety information officer Lauren [REDACTED], during which training was provided applying to the two current FOI requests, and redactions were made to both FOIs with the matters listed to be published on the public interest disclosure log on Monday 12 December.

I understand that the unredacted letter sent to the Guardian was quickly deleted, and replaced with the redacted version, and no names were published by any media outlet. Further, I understand that only the redacted version was published on the public interest disclosure log.

It would have on one hand possibly been desirable to both redact the documents and directly advise the Australian Federal Police as a courtesy. In light of the article in The Australian on 3 December 2022 outlining the substance of the letter and all parties involved in the letter that was subsequently released pursuant to the FOI request, and the rapid withdrawal and redaction of the document prior to the publication of any names within the letter, I am of the view that no harm was occasioned to any party. Further, there have now been two training session between the DPP Information Officer and JACS Information Officer, both of who are now well skilled in the management of FOIs.

Due to their size, please find attached 3 x zip files in different emails.



Shane Drumgold SC

Director

Office of the Director of Public Prosecutions (ACT)

GPO Box 595, Canberra ACT 2601 (DX 5725)

T: [REDACTED] (Direct line)

T: [REDACTED] (Executive Officer Katie Cantwell)

M:

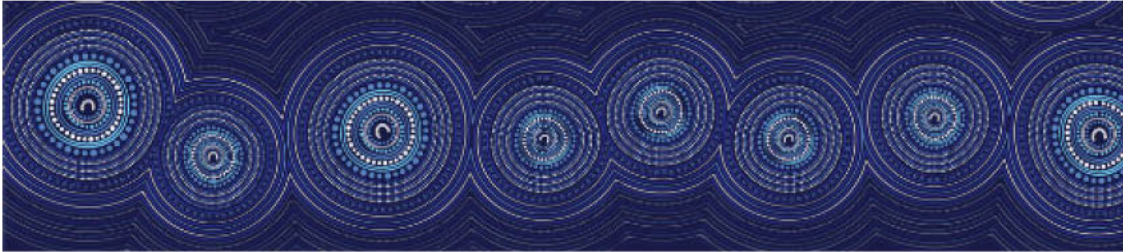
E: [REDACTED]@act.gov.au

E: [REDACTED]@act.gov.au (EO)

W:www.dpp.act.gov.au

For a full range of victims rights, please go to www.dpp.act.gov.au and follow the Witnesses and Victims link.

Please consider the environment before printing this e-mail



We acknowledge the Traditional Custodians of the ACT, the Ngunnawal people
We acknowledge and respect their continuing culture and the contribution they make
to the life of this city and this region

Artwork by Ngarrindjeri artist Jordan Lovegrove

From: ACTFOI <ACTFOI@ombudsman.gov.au>
Sent: Thursday, 15 December 2022 11:51 AM
To: Drumgold, Shane [REDACTED] <[\[REDACTED\]@act.gov.au](mailto:[REDACTED]@act.gov.au)>
Subject: Notice of investigation of a complaint about the handling of an FOI access application (2) - 2022-113209 [SEC=OFFICIAL]

Caution: This email originated from outside of the ACT Government. Do not click links or open attachments unless you recognise the sender and know the content is safe. [Learn why this is important](#)

OFFICIAL

Our ref: 2022-113209

Your ref: 200929085

Dear Mr Drumgold SC

On 14 December 2022, the ACT Ombudsman (**Office**) received a complaint from Mr Peter [REDACTED], Executive General Manager of ACT Policing, about the ACT Office of the Director of Public Prosecutions' (**the DPP**) handling of a Freedom of Information access application. We are investigating this complaint under s 9 of the *Ombudsman Act 1989* (ACT) (**Ombudsman Act**).

In addition to our complaint-handling powers under the Ombudsman Act, the Ombudsman is required to investigate complaints made to the Ombudsman about an agency's actions or failure to act under s 69 of the *Freedom of Information Act 2016* (ACT) (**FOI Act**).

Complaint details

Mr [REDACTED] has told our Office that:

- the DPP recently released a letter signed by you and sent to Mr [REDACTED], to *The Guardian* in response to an access application under the FOI Act
- the letter contained several allegations made in respect to the investigation that led to the prosecution known as *R v Lehrmann – SCC 264 of 2021*

- ACT Policing was not consulted by the DPP in relation to the access application
- he feels that the DPP were required to consult with ACT Policing in accordance with s 38 of the FOI Act and the *Freedom of Information Guidelines Volume 3: Dealing with access applications*
- he is of the view that the letter released to *The Guardian* included contrary to the public interest information
- he attempted to contact the DPP without success:
 - On 8 December 2022, he wrote to the DPP FOI Officer via email to raise his concerns and requested ACT Policing be consulted before the DPP published details of the access application, including the letter, on its disclosure log, and
 - after receiving no response, he called the DPP FOI telephone number to follow up on the morning of Friday 9 December 2022 and left a message with a DPP staff member, with no responses received.

Information you need to provide to us

As you would be aware, we are investigating a similar complaint (our ref: 2022-715237) in relation to the handling of the same FOI access application. We note that we have already sought the following information from you in relation to that matter:

1. the details of the relevant access application including the reference number, date of receipt and date of decision
2. the full FOI processing file, including:
 - a. the original access application and any correspondence with the applicant
 - b. copies of internal correspondence regarding the access application
 - c. copies of correspondence, including file notes of relevant telephone or in person conversations, between the DPP and anyone consulted, and
 - d. a marked up and unredacted copy of the information at issue

To assist our Office with this new complaint, please provide the following additional information:

3. copies of correspondence received from Mr [REDACTED] in relation to the FOI access application, including emails and file notes of relevant telephone conversations with Mr [REDACTED]
4. Any internal advice that relates to, is born from or references, correspondence and phone calls of 8 and 9 December 2022 from and to Mr [REDACTED] directly or indirectly about this matter (*R v Lehrmann – SCC 264 of 2021* and the FOI access application)
5. any other information which may assist our Office's understanding of the complaint.

Please provide this information by **5pm 16 January 2023**.

Please do not hesitate to contact me if you have any questions or would like to discuss this matter further.

Yours sincerely

Jennifer [REDACTED] (she/her)
Assistant Director, ACT FOI
ACT OMBUDSMAN

02 5119 5518 | actfoi@ombudsman.gov.au | ombudsman.act.gov.au



The Office of the Commonwealth Ombudsman acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present.

COMMONWEALTH OMBUDSMAN - IMPORTANT CONFIDENTIALITY NOTICE

This e-mail message or an attachment to it is confidential, and it is intended to be accessed only by the person or entity to which it is addressed.

No use, copying or disclosure (including by further transmission) of this message, an attachment or the content of either is permitted and any use, copying or disclosure may be subject to legal sanctions. This message may contain information which is:

- * about an identifiable individual;
- * subject to client legal privilege or other privilege; or
- * subject to a statutory or other requirement of confidentiality.

If you have received this message in error, please call 1300 362 072 to inform the sender so that future errors can be avoided.

This email, and any attachments, may be confidential and also privileged. If you are not the intended recipient, please notify the sender and delete all copies of this transmission along with any attachments immediately. You should not copy or use it for any purpose, nor disclose its contents to any other person.

Caution: This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.