IN THE SUPREME COURT OF THE	)	
	)	
AUSTRALIAN CAPITAL TERRITORY	)	No. SCC 264 of 2021
	)	
CRIMINAL JURISDICTION	)	

BETWEEN: **BRUCE EMERY LEHRMANN**
Applicant

AND**:** **THE DIRECTOR OF PUBLIC PROSECUTIONS**
Respondent

RESPONDENT'S WRITTEN SUBMISSIONS

Application

1. The application in proceedings filed 7 September 2022 seeks two orders:
   - The first order sought is for "*The Crown disclose to the Accused's legal representatives"*
     a) *A complete, unlocked and unredacted electronic copy of the Cellebrite extraction of the complainant's phone*;
     b) *The 'Investigative Review Document' referred to at page 18 of RFI 1*;
     c) All material relating to any investigations undertaken by the Australian Federal Police between 23 March 2020 and 31 March 2021 in relation to a security breach and the subsequent cleaning of the Ministerial Suite as a result of the after-hours attendance of the Accused and the complainant on 23 March 2020.

Filed for the respondent by:

Director of Public Prosecutions
1st Floor, Reserve Bank Building
20-22 London Circuit
CANBERRA CITY ACT 2601

Reference: 202113941
Telephone: [redacted]
Facsimile:

- The second order sought is outlined in the alternative to order one, being a temporary stay of the prosecution of the Accused until the material in Order 1 is disclosed.

Primary Comments on Orders Sought

Order 1b)

2. As outlined in the Affidavit of Mitchell Greig affirmed 12 September 2022, the document entitled "Investigative Review Document" is one of two documents provided by the Australian Federal Police to the Director of Public Prosecutions on 21 June 2021, seeking legal advice.

3. This document falls within the definition of "Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing" listed in schedule 1 of the Disclosure Declaration at RF1 and RF2 of the Affidavit of Rachel Elizabeth Fisher affirmed on 8 September 2022 and read in this application in proceedings on 8 September 2022

4. Accordingly, the document listed at order 1b) is subject to a claim of legal professional privilege by the Australian Federal Police.

Order 1c)

5. Although no formal leave to amend was sought, at the bar table on Thursday 8 September 2022, counsel advised that the dates in order 1c) should read "23 March 2019 and 31 March 2019", with the final date being "23 March 2019.

6. As outlined in the Affidavit of Mitchell Greig affirmed 12 September 2022, there is no material meeting the description:

> *"All material relating to any investigations undertaken by the Australian Federal Police between 23 March 2019 and 31 March 2019 in relation to a security breach*

and the subsequent cleaning of the Ministerial Suite as a result of the after-hours attendance of the Accused and the complainant on 23 March 2019."

Order 2

7. As outlined in theses submissions, in light of the courts power to order disclosure, there is an obvious remedy available to overcome any alleged unfair trial other than a stay of prosecution, and the grounds are not made good. In light of this, other than to outline the law in this area, we will make no further submission.

Submission

8. These submissions will address three points:

    1) The court's power to grant a temporary stay;

    2) The court's power to order disclosure of documents;

    3) Whether the court should order disclosure of documents:

        a. When documents meet the test of being documents;

        b. Competing privacy law impacting disclosure;

        c. When documents are protected under legal professional privilege.

Power to Grant a Temporary Stay

9. It is clear the court has power to grant a conditional stay in the appropriate circumstances, the question is when it should order such.

10. For example, in the case of R v Trong Bui [2011] ACTSC 102, Refshauge J ordered a conditional stay until the Crown served a prior criminal record for a witness in proceedings. It is noteworthy that the Crown already had a clear obligation to disclose the prior criminal record of a witness, both under section 4 ACT Prosecution Policy and supported by common law. It is unclear in this particular matter why the learned judge did not rely on the power to order disclosure directly, however the power clearly exists.

11. In R v Swingler [1996] 1 VR 257; (1995) 80 A Crim R 471 (CA) the court said in a joint judgment (at 264–265; 479):

> It is by now well accepted that a superior court can, in the exercise of its supervisory jurisdiction, stay a prosecution if it is satisfied that, in the circumstances, it would be oppressive to allow the prosecution to proceed.

12. As I will address next, the court has a power to order disclosure of evidence so it cannot be said that it would be oppressive to allow the prosecution to proceed, and accordingly the grounds for a conditional stay is not satisfied.

Court has power to order production generally

13. As stated in Carter v Hayes (1994) 61 SASR 451 (at 456):

> The court has power to order the production to the defence of material in the prosecution's possession or power if the interests of justice so require: Clarke (1930) 22 Cr App R 58; Mahadeo [1936] 2 All ER 813; Hatt (1958) 43 Cr App R 29; Xinaris (1955) Crim LR 437; Charlton [1972] VR 758.
>
> It will often be necessary, or at least desirable, in the interests of a fair trial that the defence have access to the statements of witnesses and other evidentiary material in the possession of the prosecution in advance of trial in order to prepare for cross-examination of prosecution witnesses and to prepare the defence generally. As these submissions will address, the question before the court is whether the documents sought are disclosable.

Judge's Power to Order Disclosure

14. In R v Brown [1998] AC 367; [1998] 1 Cr App R 66; [1997] 3 All ER 769 (HL) Lord Hope of Craighead said (at 380; 76; 778):

> If fairness demands disclosure, then a way of ensuring that disclosure will be made must be found.

15. In Carter v Hayes (1994) 61 SASR 451; 72 A Crim R 387 (FC) King CJ said (at 456; 392):

> Disclosure by those conducting a prosecution of material in the possession or power of the prosecution which would tend to assist the defence case, is an important ingredient of a fair trial (Clarkson v DPP [1990] VR 745 at 755), and is an aspect of the prosecution's duty to ensure that the "Crown case is presented with fairness to the accused": Richardson (1974) 131 CLR 116 at 119; Apostilides (1984) 154 CLR 563; 15 A Crim R 88

The Duty to Disclose is a Duty Owed to the Court, not to the Accused

16. In *Cannon v Tahche* (2002) 5 VR 317 (CA) the court said in a joint judgment (at 340 [57]):

> The prosecutor's "duty of disclosure" has been the subject of much debate in appellate courts over the years. But, as it seems to us, authority suggests that, whatever the nature and extent of the "duty", it is a duty owed to the court and not a duty, enforceable at law at the instance of the accused. This, we think, is made apparent when the so-called "duty" is described (correctly in our view) as a discretionary responsibility exercisable according to the circumstances as the prosecutor perceives them to be. The responsibility is, thus, dependent for its content upon what the prosecutor perceives, in the light of the facts known to him or her, that fairness in the trial process requires

17. See also *Hughes v Western Australia* (2015) 299 FLR 197; [2015] WASCA 164; PAH v Western Australia [2015] WASCA 159.

Duty of the Prosecutor (in the ACT supported by Section 4 Prosecution Policy)

18. In *R v Farquharson* (2009) 26 VR 410; [2009] VSCA 307, at [213], it was held:

> The Crown has a duty to disclose material which can be seen on a sensible appraisal by the prosecution:
>
> a) To be relevant or possibly relevant to an issue in the case;

b) To raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;

c) To hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to a) or b).

19. This rule was adopted from *R v Spiteri* (2004) 61 NSWLR 369; [2004] NSWCCA 321. See also *R v Reardon* (2004) 60 NSWLR 454; 146 A Crim R 475; [2004] NSWCCA 197 which cited the decision in R v Ward [1993] 1 WLR 619; [1993] 2 All ER 577; (1993) 96 Cr App R 1 where it was held that if the prosecution wished to claim public interest immunity, it is obliged to give notice to the defence of the asserted right so that it can be challenged if necessary by the defence.

20. That notice of a claim of legal professional privilege with respect to order 1b) has been given to defence twice, in the category "Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing" listed in schedule 1 of the Disclosure Declaration at RF1 and RF2 of the Affidavit of Rachel Elizabeth Fisher affirmed on 8 September 2022 and read in this application in proceedings on 8 September 2022.

21. In *Mallard v The Queen* (2005) 224 CLR 125; 157 A Crim R 121; 222 ALR 236; [2005] HCA 68, at [17], the plurality of the High Court (Gummow, Hayne, Callinan and Heydon JJ) stated "… that the prosecution must at common law also disclose all relevant evidence to an accused and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty".

Director of Public Prosecutions Policy

22. The test for disclosure outlined in Farquharson is reflected in the ACT Prosecution Policy. The legislative basis for the issuing of a Prosecution Policy is found in section 12 Director of Public Prosecutions Act 1990, and the most recent version of the ACT Prosecution Policy was issued on 1 April 2021.

4. DISCLOSURE

4.1 The prosecution is under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecution which can be seen on a sensible appraisal by the prosecution:

• to be relevant or possibly relevant to an issue in the case;

• to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or

• to hold out o real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two matters.

4.2 The prosecution is also under a duty to disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example:

• relevant previous conviction or finding of guilt;

• a statement made by a witness which is inconsistent with any prior statement of the witness;

• a relevant adverse finding in other criminal proceedings or in non-criminal proceedings;

•evidence before a court, tribunal or Rayo/ Commission which reflects adversely on the witness;

• any physical or mental condition which may affect reliability;

• any concession which has been granted to the witness in order to secure their testimony for the prosecution.

4.3 The prosecution must fulfil its duty of disclosure as soon as reasonably practicable. The
prosecution's duty of disclosure continues throughout the prosecution process and any subsequent appeal.

4.4 In fulfilling its disclosure obligations the prosecution must have regard to the protection of the privacy of victims and other witnesses. The prosecution will not disclose the address or telephone number of any person unless that

information is relevant to a fact in issue and disclosure is not likely to present a risk to the safety of any person.

4.5 The prosecution's duty of disclosure does not extend to disclosing material:

• relevant only to the credibility of defence (os distinct from prosecution) witnesses;

• relevant only to the credibility of the accused;

• relevant only because it might deter an accused from giving false evidence or raising an

issue of fact which might be shown to be false; or

• for the purpose of preventing an accused from creating a forensic disadvantage for

themself, if at the time the prosecution became aware of the material it was not seen as

relevant to an issue in the cose or otherwise disclosable.

4.6 The prosecution may refuse to disclose material on the grounds of public interest immunity or legal professional privilege.

4. 7 Where material has been withheld from disclosure on public interest grounds, the defence should be informed of the claim of immunity and the basis for the claim in general terms unless to do so would reveal that which it *would not be in the public interest to reveal. In some cases* it *will be sufficient to delay rather than withhold disclosure. For example, if disclosure might prejudice ongoing investigations, disclosure could be delayed until after the investigations are completed.*

4.8 Legal professional privilege will ordinarily be claimed against the production of any document in the nature of an internal OPP advice or opinion. Legal professional privilege will not be claimed in respect of any

record of a statement by a witness that is inconsistent with their previous statement or adds to it significantly, including any statement made in conference and any victim impact statement, provided the disclosure of such records serves a legitimate forensic purpose.

4.9 The duty on the prosecution to disclose material to the accused imposes a concomitant obligation on the police and other investigative agencies to notify the prosecution of the existence and location of all such material. If required, in addition to providing the brief of evidence, the police or other investigative agency shall certify that the prosecution has been notified of the existence of all such material.

4.10 Where known, in accordance with Director's disclosure guideline which has been in effect since 3 August 2020 (see Annexure 1), the prosecution is under a duty to disclose the existence of:
(a) Relevant protected material that is subject of a claim of privilege or immunity;
(b) Relevant material that is subject of a statutory publication restriction;

(c) Relevant unprotected material that is not subject to a claim of privilege or immunity or a statutory publication restriction.

Competing Provisions

23. There are a number of competing provisions protecting relevant material that does not fall within the DPP's disclosure obligations.

Information Privacy Act 2014 (ACT)

24. Section 8 defines personal information about an individual who is reasonably identifiable, whether the information or opinion is true or not, and whether the information is recorded in a material form or not.

25. This would include a range of data redacted from Cellebrite report (particularly as it relates to people other than the owner of the phone) as outlined in the affidavit of Sarah Pitney affirmed 12 September 2022.

26. Section 9(c) of the Information Privacy Act includes amongst "public sector agency" a statutory office holder, and the staff assisting the statutory office holder, which includes the Director of Public Prosecution and staff who appear on my behalf.

27. Schedule 1 to this Act contains the Territory privacy principles (TPP) with TPP 6 stating:

> 6.1 If a public sector agency holds personal information about an individual that was collected for a particular purpose (the primary purpose), the agency must not use or disclose the information for another purpose (the secondary purpose) unless
>
> a) the individual has consented to the use or disclosure of the information; or
>
> b) TPP 6.2 or TPP 6.3 apply.

28. TPP 6.2 is relevant and deals with circumstances where the individual would reasonably expect the public sector agency to disclose the information for a secondary purpose, or the disclosure is required by **order of an Australian law, or Court.**

29. TPP 6.3 deals with biometric information and templates and is not relevant to the current case.

Telecommunications (interception and Access) Act 1979 (Cth)

30. Where information has been obtained through the use of surveillance devices or telecommunication interception, disclosure will also be regulated by the *Telecommunications (Interception and Access) Act 1979* ('TIA Act'), the *Surveillance Devices Act 2004* (Cth) ('SD Act') and the *Crime (Surveillance Devices) Act 2010* (ACT) ('ACT SD Act').

31. Section 67(1)(a) of the Telecommunications Act provides that lawfully intercepted information (defined as information obtained by intercepting communications passing

over a telecommunication system rather than the means of collection) may only be disclosed where a permitted purpose exists. Section 5 outlines permitted purposes, that does not include material obtained during an investigation but not relevant and disclosable in a subsequent prosecution.

Section 118 Evidence Act 2011

32. Section 118 Evidence Act provides that evidence must not be presented, if on objection by a client, the court finds that presenting the evidence would result in disclosure of a confidential communication made between a client (in this case the Australian Federal Police) and a lawyer (in this case the Director of Public Prosecutions).

33. It is well established law that the Office of the Director of Public Prosecutions is defined as a lawyer, and a witness in a matter is defined as a client (*See R v Petroulias (No 22) (2007) 213 FLR 293; 176 A Crim R 309),* and legal advice as between the Office of the Director of Public Prosecutions and an employee of the DPP is in a client legal privileged relationship (see Director of Public Prosecutions (NSW) v Stanizzo [2019] NSWCA 12 at [25]).

34. It is also well established law that a lawyer / client relationship exists over legal advice provided by the Office of the Director of Public Prosecutions to a Government Department (See *Director of Public Prosecutions (Cth) v Kinghorn (2020) 102 NSWLR 72; 281 A Crim R 546; [2020] NSWCCA 48 at [62]-[64])* in which case the claim of privilege can be made by the Government Department (see *TransGrid v Members of Lloyds Syndicate 3210 [2011] NSWSC 301, per Ball J at [11]).*

35. In the present case, the document "Investigative Review Document" was provided by the Australian Federal Police, to the Office of the Director of Public Prosecutions for the sole purpose of seeking legal advice, and a claim of privilege has been made in schedule 1 of the Disclosure Declaration at RF1 and RF2 of the Affidavit of Rachel Elizabeth Fisher affirmed on 8 September 2022 and read in this application in proceedings on 8 September 2022, as a document falling within the definition of

"Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing".

Relevant Considerations:

36. For the purposes of this application, the relevant test is whether on a sensible appraisal by the prosecution, the evidence is relevant or possibly relevant to an issue in the case, the credibility or reliability of a prosecution witness, or it will raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use.

37. Material not meeting this test, is otherwise protected from disclosure, except by order of a court. Such an order should only be made if required pursuant to the DPP's disclosure obligations under section 4 Prosecution Policy, and the tests contained within, and the document is not otherwise protected.

38. In the present case, the material redacted from the Cellebrite report does not meet the test for disclosure. Further, the material listed in order 1b), is neither established as being relevantly disclosable, and further is protected pursuant to section 118 Evidence Act 2011.

Shane Drumgold SC
Director of Public Prosecutions (ACT)
13 September 2022