

This procedure contains three options for quarantining data which is the subject of a LPP claim and gives the occupier **4 days** after the execution of the warrant to advise the AFP which option they wish to use. During this time, the data is not to be examined. Investigators should leave a completed copy of this form with the occupier or their lawyer and a completed copy themselves.

## Legal professional privilege: AFP procedure for dealing with claims over material stored on electronic devices

### Items seized from or copied at warrant premises

Address of premises:	
Date of execution of search warrant:	
Occupier:	
Representative of the Occupier making LPP claim and their contact details:	

The AFP acknowledges that the Occupier of the premises (the Occupier) wishes, or may wish, to make a legal professional privilege (LPP) claim over material which is included in the data listed in Categories A and B. This document outlines the AFP's procedures for dealing with electronic data while preserving the Occupier's claims for LPP.

The Occupier acknowledges receipt of this document and agrees that the Occupier or their legal representative will respond to the AFP within **4 days**, that is by [insert date] to advise which option or options they propose to adopt for quarantining data.

<b>Legal principles</b>
<ul style="list-style-type: none"><li>• Under the <i>Crimes Act 1914</i>, if an executing officer or constable assisting suspects on reasonable grounds that any data accessed by operating the electronic equipment constitutes evidential material, he or she may copy <u>any or all</u> of the data or put the material in documentary form and seize the documents produced. If it is not practicable to do either of those things, the equipment may be seized (s 3L<sup>1</sup>).</li><li>• It is permissible to briefly review a document, without closely reading its contents, for the purpose of determining whether it might be covered by legal professional privilege without violating such privilege.<sup>2</sup></li><li>• The mere seizure or copying of material does not constitute a violation, waiver or loss of LPP that may otherwise apply in respect of material.<sup>3</sup></li></ul>

<sup>1</sup> See also *Kennedy v Baker* [2004] FCA 562 at [47]-[78]; *Different Solutions Pty Limited v Commissioner Australian Federal Police (No 2)* [2008] FCA 1686 at [74]-[163].

<sup>2</sup> See, eg, *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 211 ALR 380 at [13]-[15] & [20].

<sup>3</sup> See, eg, *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 211 ALR 380 at [13]-[15] & [20]; *Kennedy v Baker (No 2)* (2004) 138 FCR 414. Also see *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 at [30]-[45].

1. Category A - Data copied from electronic equipment at the warrant scene

A LPP claim has been made over the following data which has been copied by the AFP under s 3L of the *Crimes Act 1914* following examination of electronic equipment at the warrant premises. The electronic equipment from which the data was copied has been retained by the Occupier of the premises.

Property seizure record item number	Description of item and data on it over which LPP is claimed (eg. External HD – pst file J Smith. To the extent possible, please separate data over which there is no LPP claim from data over which there is an LPP claim)	Has copy of data been provided to occupier?	Description of LPP claim

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2. Category B - Data on electronic devices examined at the warrant scene and seized under the warrant

A LPP claim has been made over data on the following electronic equipment which has been seized under the warrant following examination by the AFP at the warrant premises:

Property seizure item number	Description of item and data on it over which LPP is claimed (eg. laptop belonging to J Smith – claim over emails and files on the hard drive relating to Federal Court litigation)	Has copy of data been provided to occupier?	Description of LPP claim:



### 3. Storage of equipment and data in Categories A and B

The electronic equipment and data storage devices referred to above will be stored by the AFP Drugs and Property Registry and will be made available to AFP Digital Forensics and AFP Investigators in accordance with this procedure.

### 4. Role of AFP Digital Forensics and AFP Investigators

*AFP Digital Forensics* is a team of computer forensics specialists who provide assistance to AFP investigation teams. AFP Digital Forensics are responsible for, among other things, copying data, uploading it to a suitable platform for searching, searching data and quarantining data over which there is a LPP claim. Data over which LPP is claimed will be not released to AFP Investigators by AFP Digital Forensics except in accordance with this procedure.

*AFP Investigators* are the members of the investigative team which executed the search warrant and who continue to be involved in the investigation.

### 5. Copying and preliminary handling of data

As noted above, the copying of data by AFP Digital Forensics does not constitute a violation, waiver or loss of LPP in relation to the material over which LPP is claimed. The data in Categories A and B (the data) will be copied by AFP Digital Forensics and uploaded to a suitable platform for forensically examining data. To reduce the quantity of the data to be examined, AFP Digital Forensics may remove standard non-content files (eg system files) from the data.

Where necessary to do so, AFP Digital Forensics may also reduce the quantity of data to be reviewed using search terms relevant to the investigation.

### 6. Copy of data

If no copy of the data in Categories A and B was provided to the Occupier at the time of the execution of the search warrant and the Occupier makes a request in writing by close of business four days after completion of the search, that is by [insert date], the AFP will provide a copy of the data in Categories A and B, (or, in appropriate circumstances, return the Category B equipment) to the Occupier of the premises. If a copy is to be provided, the AFP may require that the Occupier provide a storage device for the data. In accordance with s 3N(2)(b) of the *Crimes Act 1914*, the AFP will not provide a copy of the data if possession of the data could constitute an offence.

### 7. Quarantining LPP data

The options which may be used to quarantine data are as set out in Procedure 1, 2 and 3 below. These options are not mutually exclusive and do not preclude the Occupier from advising the AFP that they wish to use a combination of procedures to quarantine data which may be the subject of an LPP claim.

#### Procedure 1 – AFP reviews data and quarantines material which may be subject to LPP claim

7.1 Unless the Occupier or their representative notifies the AFP in writing by close of business four days after completion of the search, that is by [insert date], that they wish to adopt procedures 2 or 3, the AFP will adopt the following procedure to quarantine LPP data:

- (a) On the fifth day after the search, that is by [insert date], AFP Digital Forensics will release the data to AFP Investigators who will commence reviewing the data on the basis that the Occupier does not waive LPP over any of the material that may be subject to a claim of LPP (in whole or in part).
- (b) If AFP Investigators identify any material that appears, on its face, to be potentially subject to a claim of LPP by the Occupier (Potential LPP Material), the Potential LPP Material will be quarantined from the remainder of the data and not further examined by AFP Investigators pending next steps in the procedure.
- (c) The AFP will notify the Occupier in writing of all Potential LPP material identified during the examination process and provide an electronic spreadsheet of that material to the Occupier, and, if requested as per paragraph 6, provide a copy of the data.
- (d) Within 28 days of being notified about the Potential LPP Material, the Occupier will return the electronic spreadsheet updated with particulars of any LPP claims that they wish to make over the Potential LPP material or over any other data (the LPP List). The LPP List is to include the details identified in Annexure A to this agreement.
- (e) Potential LPP Material over which there is no claim will be released by AFP Digital Forensics to AFP Investigators for review on the basis that no LPP claim has been made by the Occupier over this material.
- (f) If no LPP list is received within 28 days (or any later time agreed in writing by the AFP), AFP Investigators will review all of the Potential LPP material on the basis that no LPP claim has been made by the Occupier in respect of that material.
- (g) Any material identified on the LPP List will be dealt with in accordance with paragraph 8.

Procedure 2 – Occupier provides LPP search terms to the AFP to search for and quarantine material which may be subject to a LPP claim

7.2 If the Occupier or their representative notifies the AFP in writing by close of business 4 days after completion of the search, that is by [insert date] that they want Procedure 2 to be followed:

- (a) AFP Investigators will not review the data prior to the expiry of **7 days** after receiving notification that the Occupier wants to follow Procedure 2. This does not preclude AFP Digital Forensics from processing the data so that it is in a suitable form to be searched.
- (b) Within these 7 days the Occupier will provide to the AFP a list of effective search terms (the LPP Search Terms) to identify Potential LPP Material.
- (c) The LPP Search Terms will include names and email addresses of solicitors or barristers involved in providing legal advice and key subject words.
- (d) The AFP may ask for additional LPP Search Terms if AFP Digital Forensics assesses that the search terms provided will not be effective in isolating data.
- (e) Upon receipt of the LPP Search Terms AFP Digital Forensics will search for and quarantine data which may be subject to a LPP claim (Potential LPP material).
- (f) The Occupier or their representative may request to be present and assist during the searching and quarantining process.
- (g) Once the Potential LPP Material is quarantined, the data that has not been quarantined will be released by AFP Digital Forensics to AFP Investigators for examination. AFP Investigators will adopt Procedure 1 in reviewing this material.
- (h) AFP will provide an electronic spreadsheet of all Potential LPP material identified during the quarantining process to the Occupier for the purpose of review, and, if requested, a copy of the data.
- (i) Within 28 days of being notified about the Potential LPP Material, the Occupier will return the electronic spreadsheet updated with particulars of any LPP claims that they wish to make over the Potential LPP Material or over other the other data (the LPP List). The LPP List is to include the details identified in Annexure A to this agreement.

- (j) Potential LPP Material over which there is no claim will be released by AFP Digital Forensics to AFP Investigators for review on the basis that no LPP claim has been made by the Occupier over this material.
- (k) If no LPP list is provided to the AFP within 28 days (or any later time agreed in writing by the AFP), AFP Investigators will review all of the Potential LPP material on the basis that no LPP claim has been made by the Occupier in respect of that material.
- (l) Any material identified on the LPP List will be dealt with in accordance with paragraph 8.

#### Procedure 3 – Occupier reviews data and notifies AFP of material which is subject to a LPP claim

7.3 If the Occupier or their representative notifies the AFP in writing by close of business 4 days after completion of the search, that is by [insert date] that they want Procedure 3 to be followed:

- (a) If a copy of the data has not already been provided, the AFP will provide a copy of the data to the Occupier or their representative. If a copy is to be provided, the AFP may ask the Occupier to provide a storage device for the data. The AFP will also provide an electronic spreadsheet containing, among other things, file names and unique electronic identifiers (eg MD5 hash values).
- (b) AFP Investigators will not review the data for 28 days after the Occupier receives a copy of the electronic data. This does not preclude AFP Digital Forensics from processing the data so that it is in a suitable form to be searched.
- (c) Within 28 days after receiving a copy of the data, the Occupier must provide to the AFP an electronic spreadsheet identifying any material contained within the data in respect of which a claim of LPP is asserted, in whole or in part (the LPP List). The LPP List is to include the details identified in Annexure A.
- (d) AFP Investigators will review data other than that identified on the LPP List, on the basis that no claim of LPP has been made in respect of such material.
- (e) If no LPP List is provided to the AFP within 28 days (or any later time agreed by the AFP), AFP Investigators will review all of the data on the basis that no claim of LPP has been made by the Occupier in respect of any of that material.
- (f) Any material identified on the LPP List will be dealt with in accordance with paragraph 8.

### **8. Resolution of LPP claims**

8.1 AFP Investigators will not review the content of any material on the LPP List other than in accordance with paragraph 8.2 below.

8.2 In respect of any material identified on the LPP List:

- (a) The AFP will assess any claims for LPP in good faith and promptly identify any material in respect of which a claim is accepted or not contested. AFP Investigators will not review or rely on any such material and, as practicable, AFP Digital Forensics will maintain it as quarantined data, delete it or return it to the Occupier.
- (b) The AFP may request any additional information in respect of any material identified on the LPP List that is reasonably necessary for the AFP to determine whether a claim of LPP is justified.
- (c) The AFP may dispute any claim of LPP in respect of any material identified on the LPP List.

- (d) The AFP and the Occupier will both act in good faith and use their best endeavours to seek to resolve any disputed claims of LPP, including, by agreement, appointing an independent arbitrator to assess documents and determine whether they are privileged.
- (e) If, following reasonable attempts to resolve any disputed claims of LPP, the AFP notifies the Occupier in writing that it does not accept a claim of LPP in respect of any material identified on the LPP List, the Occupier may commence proceedings to establish the privilege claimed
- (f) If the Occupier commences such proceedings within 7 days of such notice being provided, the AFP will not review the relevant material before those proceedings are resolved (including dismissed or discontinued). If the Occupier does not commence such proceedings within 7 days of such notice being provided, the AFP will review the material on the basis that no claim of LPP is maintained in respect of the material.

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AFP

Received by Occupier

Date:

Date:

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## ANNEXURE A

The LPP List is to include at a minimum the following details for each item that is subject to a claim of LPP:

- a. filename
- b. file path
- c. date created
- d. date modified
- e. Author
- f. Recipient
- g. unique electronic identifier (eg. MD5 hash value, NUIX GUID)
  
- h. the nature of the item (e.g. email, legal advice, letter, file note)
- i. the identity of each person involved in the creation, preparation and/or amendment of the item
- j. whether LPP is asserted over the whole or part of the item
- k. the particular type of LPP claimed and the specific grounds on which LPP is claimed;
- l. the facts that are relied upon as giving rise to the claim of LPP; and
- m. the identity of any person who is the holder of the claimed LPP and whether that person has requested that the claim be made.
- n. if a person referred to in paragraph i above is or was an in-house counsel, then sufficient details must be provided about the capacity in which that person was acting in relation to the creation, preparation and/or amendment of the item and of that person's independence.

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AFP LEX 1587 FOLIO 9  
This procedure requires the lawyer at the premises to contact their clients about LPP claims and allows a further period of time for the clients to advise the AFP which of three options they wish to use for quarantining data which is the subject of a LPP claim. During this time, the data is not to be examined. Investigators should leave a completed copy of this form with the occupier and retain a completed copy themselves.

## Legal professional privilege: AFP procedure for dealing with claims over material stored on electronic devices

### Items seized from or copied at legal premises

<b>Address of premises:</b>	
<b>Date of execution of search warrant:</b>	
<b>Representative of the Occupier making LPP claim and their contact details:</b>	

The AFP acknowledges that that the Lawyer occupying the premises (the Occupier) wishes to:

- make a legal professional privilege (LPP) claim on behalf of the client or clients listed at Annexure B (the LPP claimant)
- over material which is included in the data listed in Categories A and B.

This document outlines the AFP's procedures for dealing with electronic data while preserving LPP claims. A copy of this document should be provided by the Lawyer to each LPP claimant.

<b>Legal principles</b>
<ul style="list-style-type: none"><li>• Under the <i>Crimes Act 1914</i>, if an executing officer or constable assisting suspects on reasonable grounds that any data accessed by operating the electronic equipment constitutes evidential material, he or she may copy any or all of the data or put the material in documentary form and seize the documents produced. If it is not practicable to do either of those things, the equipment may be seized (s 3L<sup>1</sup>).</li><li>• It is permissible to briefly review a document, without closely reading its contents, for the purpose of determining whether it falls within the terms of the warrant and might be covered by legal professional privilege without violating such privilege.<sup>2</sup></li><li>• The mere seizure or copying of material does not constitute a violation, waiver or loss of LPP that may otherwise apply in respect of material.<sup>3</sup></li></ul>

<sup>1</sup> See also *Kennedy v Baker* [2004] FCA 562 at [47]-[78]; *Different Solutions Pty Limited v Commissioner Australian Federal Police (No 2)* [2008] FCA 1686 at [74]-[163].

<sup>2</sup> See, eg, *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 211 ALR 380 at [13]-[15] & [20].

<sup>3</sup> See, eg, *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 211 ALR 380 at [13]-[15] & [20]; *Kennedy v Baker (No 2)* (2004) 138 FCR 414. Also see *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 at [30]-[45].

**1. Category A - Data copied from electronic equipment at the warrant scene**

A LPP claim has been made over the following data which has been copied by the AFP under s 3L of the *Crimes Act 1914* following examination of electronic equipment at the warrant premises. The electronic equipment from which the data was copied has been retained by the Occupier of the premises.

<b>Property seizure record item number</b>	<b>Description of item and data on it over which LPP is claimed</b> <small>(eg. External HD – pst file J Smith; USB – 4 electronic files relating to client Jones, titled... To the extent possible, please separate data over which there is no LPP claim from data over which there is an LPP claim)</small>	<b>Has copy of data been provided to occupier?</b>	<b>Description of LPP claim:</b>

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**2. Category B - Data on electronic devices examined at the warrant scene and seized under the warrant**

A LPP claim has been made over data on the following electronic equipment which has been seized under the warrant following examination by the AFP at the warrant premises:

<b>Property seizure item number</b>	<b>Description of item and data on it over which LPP is claimed</b> <small>(eg. laptop belonging to J Smith – claim over emails and files on the hard drive relating to Federal Court litigation)</small>	<b>Has copy of data been provided to occupier?</b>	<b>Description of LPP claim:</b>

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### 3. Contacting clients

The AFP will refrain from dealing with the data for 7 days, or longer period as agreed, that is until [date], to allow the Occupier to contact the LPP claimants listed at Annexure B. The Occupier should provide a copy of this procedure to the LPP claimants.

### 4. Storage of equipment and data in Categories A and B

The electronic equipment and data storage devices referred to above will be stored by the AFP Drugs and Property Registry and will be made available to AFP Digital Forensics and AFP Investigators in accordance with this procedure.

### 5. Role of AFP Digital Forensics and AFP Investigators

*AFP Digital Forensics* is a team of computer forensics specialists who provide assistance to AFP investigation teams. AFP Digital Forensics are responsible for, among other things, copying data, uploading it to a suitable platform for searching, searching data and quarantining data over which there is a LPP claim. Data over which LPP is claimed will be not released to AFP Investigators by AFP Digital Forensics except in accordance with this procedure.

*AFP Investigators* are the members of the investigative team which executed the search warrant and who continue to be involved in the investigation.

### 6. Copying and preliminary handling of data

As noted above, the copying of data by AFP Digital Forensics does not constitute a violation, waiver or loss of LPP in relation to the material over which LPP is claimed. The data in Categories A and B (the data) will be copied by AFP Digital Forensics and uploaded to a suitable platform for forensically examining data. To reduce the quantity of the data to be examined, AFP Digital Forensics may remove standard non-content files (eg system files) from the data.

Where necessary to do so, AFP Digital Forensics may also reduce the quantity of data to be reviewed using search terms relevant to the investigation.

### 7. Copy of data

If no copy of the data in Categories A and B was provided to the Occupier at the time of the execution of the search warrant and the Occupier makes a request in writing by close of business four days after completion of the search, that is by [insert date], the AFP will provide a copy of the data in Categories A and B, (or, in appropriate circumstances, return the Category B equipment) to the Occupier of the premises. If a copy is to be provided, the AFP may require that the Occupier provide a storage device for the data. In accordance with s 3N(2)(b) of the *Crimes Act 1914*, the AFP will not provide a copy of the data if possession of the data could constitute an offence.

### 8. Quarantining LPP data

Procedure 1 – AFP reviews data and quarantines material which may be subject to LPP claim

8.1 Unless the LPP Claimant or their Legal Representative notifies the AFP in writing by close of business 14 days (or longer period as agreed) after completion of the search, that is by [insert date], that the LPP Claimant wishes to adopt procedures 2 or 3, the AFP will adopt the following procedure to quarantine LPP data:

- (a) On the fifteenth day after the search, that is by [insert date], AFP Digital Forensics will release the data to AFP Investigators who will commence reviewing the data on the basis that the LPP Claimant does not waive LPP over any of the material that may be subject to a claim of LPP (in whole or in part).
- (b) If AFP Investigators identify any material that appears, on its face, to be potentially subject to a claim of LPP by the LPP Claimant (Potential LPP Material), the Potential LPP Material will be quarantined from the remainder of the data and not further examined by AFP Investigators pending next steps in the procedure.
- (c) The AFP will notify the LPP Claimant in writing of all Potential LPP material identified during the examination process and provide a list of that material to the LPP Claimant, and, if requested, provide a copy of the material.
- (d) Within 28 days (or any later time agreed in writing by the AFP) of being notified about the Potential LPP Material, the LPP Claimant will provide a list with particulars of any LPP claims that they wish to make over the Potential LPP material or over other the other data (the LPP List). The LPP List is to include the details identified in Annexure A to this agreement.
- (e) Potential LPP Material over which there is no claim will be released by AFP Digital Forensics to AFP Investigators for review on the basis that no LPP claim has been made by the LPP Claimant over this material.
- (f) If no LPP list is received within 28 days (or any later time agreed in writing by the AFP), AFP Investigators will review all of the Potential LPP material on the basis that no LPP claim has been made by the LPP Claimant in respect of that material.
- (g) Any material identified on the LPP List will be dealt with in accordance with paragraph 9.

Procedure 2 – LPP Claimant provides LPP search terms to the AFP to search for and quarantine material which may be subject to a LPP claim

8.2 If the LPP Claimant or their Legal Representative notifies the AFP in writing by close of business 14 days after completion of the search, that is by [insert date] that the LPP Claimant wishes Procedure 2 to be followed:

- (a) AFP Investigators will not review the data prior to the expiry of 7 days after receiving notification that the LPP Claimant wants to follow Procedure 2. This does not preclude AFP Digital Forensics from processing the data so that it is in a suitable form to be searched.
- (b) Within these 7 days the LPP Claimant will provide to the AFP a list of effective search terms (the LPP Search Terms) to identify Potential LPP Material.
- (c) The LPP Search Terms will include names and email addresses of solicitors or barristers involved in providing legal advice and key subject words.
- (d) The AFP may ask for additional LPP Search Terms if AFP Digital Forensics assesses that the search terms provided will not be effective in isolating data.
- (e) Upon receipt of the LPP Search Terms AFP Digital Forensics will search for and quarantine data which may be subject to a LPP claim (Potential LPP material).
- (f) The LPP Claimant or their Legal Representative may request to be present and assist during the searching and quarantining process.
- (g) Once the Potential LPP Material is quarantined, the data that has not been quarantined will be released by AFP Digital Forensics to AFP Investigators for examination. AFP Investigators will adopt Procedure 1 in reviewing this material.
- (h) AFP will provide a list of all Potential LPP material identified during the quarantining process to the LPP Claimant for the purpose of review, and, if requested, provide a copy of the material.
- (i) Within 28 days (or any later time agreed in writing by the AFP) of being notified about the Potential LPP Material, the LPP Claimant will provide a list with particulars of any LPP claims that they wish to make over the Potential LPP Material or over other the other data (the LPP List). The LPP List is to include the details identified in Annexure A to this agreement.

- (j) Potential LPP Material over which there is no claim will be released by AFP Digital Forensics to AFP Investigators for review on the basis that no LPP claim has been made by the LPP Claimant over this material.
- (k) If no LPP list is provided to the AFP within 28 days (or any later time agreed in writing by the AFP), AFP Investigators will review all of the Potential LPP material on the basis that no LPP claim has been made by the LPP Claimant in respect of that material.
- (l) Any material identified on the LPP List will be dealt with in accordance with paragraph 9.

### Procedure 3 – LPP Claimant reviews data and notifies AFP of material which is subject to a LPP claim

8.3 If the LPP Claimant or their Legal Representative notifies the AFP in writing by close of business 14 days after completion of the search, that is by [insert date] that they want Procedure 3 to be followed:

- (a) If a copy of the data has not already been provided, the AFP will provide a copy of the data to the LPP Claimant or their Legal Representative. If a copy is to be provided, the AFP may ask the LPP Claimant to provide a storage device for the data.
- (b) AFP Investigators will not review the data for 28 days (or any later time agreed in writing by the AFP) after the LPP Claimant receives a copy of the electronic data. This does not preclude AFP Digital Forensics from processing the data so that it is in a suitable form to be searched.
- (c) Within 28 days (or any later time agreed in writing by the AFP) after receiving a copy of the data, the LPP Claimant must provide to the AFP an electronic spreadsheet identifying any material contained within the data in respect of which a claim of LPP is asserted, in whole or in part (the LPP List). The LPP List is to include the details identified in Annexure A.
- (d) AFP Investigators will review data other than that identified on the LPP List, on the basis that no claim of LPP has been made in respect of such material.
- (e) If no LPP List is provided to the AFP within 28 days (or any later time agreed in writing by the AFP), AFP Investigators will review all of the data on the basis that no claim of LPP has been made by the LPP Claimant in respect of any of that material.
- (f) Any material identified on the LPP List will be dealt with in accordance with paragraph 9 below.

## **9. Resolution of LPP claims**

9.1 AFP Investigators will not review the content of any material on the LPP List other than in accordance with paragraph 9.2 below.

9.2 In respect of any material identified on the LPP List:

- (a) The AFP will assess any claims for LPP in good faith and promptly identify any material in respect of which a claim is accepted or not contested. AFP Investigators will not review or rely on any such material and, as practicable, AFP Digital Forensics will maintain it as quarantined data, delete it or return it to the Occupier.
- (b) The AFP may request any additional information in respect of any material identified on the LPP List that is reasonably necessary for the AFP to determine whether a claim of LPP is justified.
- (c) The AFP may dispute any claim of LPP in respect of any material identified on the LPP List.

- (d) The AFP and the LPP Claimant will both act in good faith and use their best endeavours to seek to resolve any disputed claims of LPP.
- (e) If, following reasonable attempts to resolve any disputed claims of LPP, the AFP notifies the LPP Claimant in writing that it does not accept a claim of LPP in respect of any material identified on the LPP List, the LPP Claimant may commence proceedings to establish the privilege claimed. If the LPP Claimant commences such proceedings within 7 days of such notice being provided, the AFP will not review the relevant material before those proceedings are resolved (including dismissed or discontinued). If the LPP Claimant does not commence such proceedings within 7 days of such notice being provided, the AFP will review the material on the basis that no claim of LPP is maintained in respect of the material.

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AFP

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Received by Occupier

Date:

Date:

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## ANNEXURE A

The LPP List is to include, at a minimum, the following details for each item that is subject to a claim of LPP:

- a. filename
- b. file path
- c. date created
- d. date modified
- e. Author
- f. Recipient
- g. unique electronic identifier (eg. MD5 hash value, NUIX GUID)
  
- h. the nature of the item (e.g. email, legal advice, letter, file note)
- i. the identity of each person involved in the creation, preparation and/or amendment of the item
- j. whether LPP is asserted over the whole or part of the item
- k. the particular type of LPP claimed and the specific grounds on which LPP is claimed;
- l. the facts that are relied upon as giving rise to the claim of LPP; and
- m. the identity of any person who is the holder of the claimed LPP and whether that person has requested that the claim be made.
- n. if a person referred to in paragraph i above is or was an in-house counsel, then sufficient details must be provided about the capacity in which that person was acting in relation to the creation, preparation and/or amendment of the item and of that person's independence.

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<b>Name of client on whose behalf LPP claim is made (LPP Claimant)</b>	<b>Location or description of files relating to client</b>
<small>If LPP claimant is a company, a contact name should be supplied.</small>	

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 THE FREEDOM OF INFORMATION ACT 1982 (CTH)

This procedure outlines the process for dealing with electronic items moved under s 3K which contain data subject to a claim of LPP. Investigators should complete pages 1-3 of this form at the search premises and leave a copy with the occupier. A copy of pages 4-10 can also be provided for information. AFP LEX 1587 FOLIO 18

Pages 4-10 should be completed on the day of the examination if items are seized or data is copied. This procedure contains three options for quarantining data which is the subject of a LPP claim and gives the LPP claimant **4 days** after the seizure to advise the AFP which option they wish to choose. During this time, the data is not to be examined. Investigators should provide a completed copy of this form to the occupier and retain a completed copy themselves.

## Legal professional privilege: AFP procedure for examination of items moved under s 3K(2) of the *Crimes Act 1914*

### Legal Premises

<b>Address of premises:</b>	
<b>Date of execution of search warrant:</b>	
<b>Representative of the Occupier making LPP claim and their contact details:</b>	

1. A LPP claim is made by the Lawyer occupying the premises (the Occupier) on behalf of his/ her client (the LPP Claimant) over data on the following electronic equipment which will be moved from the warrant premises under s 3K(2) of the *Crimes Act 1914* for the purposes of examination or processing to determine whether it may be seized under the warrant. The equipment has not been seized and data on the equipment has not been inspected or copied. The details of the LPP Claimant and the data over which LPP is claimed on behalf of that client are listed in Annexure A to this document
2. This document outlines the AFP's procedures for examining the equipment while preserving the LPP Claimant's claims for LPP. The AFP notes that the mere seizure or copying of material does not constitute a violation, waiver or loss of LPP that may otherwise apply in respect of that material. A copy of this document should be provided to the LPP Claimant.

<b>Property movement record item number</b>	<b>Description of item and data on it over which LPP is claimed</b> (eg. laptop belonging to J Smith – claim over emails and files on the hard drive relating to Federal Court litigation)	<b>Description of LPP claim:</b>

Property movement record item number	Description of item and data on it over which LPP is claimed (eg. laptop belonging to J Smith – claim over emails and files on the hard drive relating to Federal Court litigation)	Description of LPP claim:

3. Under s 3K(3A) of the *Crimes Act 1914*, moved items must be examined by the AFP within **14 days** of being moved.

4. Under s 3K(3) if a thing is moved from the premises for the purpose of examination or processing the executing officer must, if practicable to do so:

- inform the Occupier or their representative of the address, place and time at which the examination or processing will be carried out, and
- allow the Occupier or their representative to be present during the examination or processing.

5. The electronic equipment will be examined or processed by the AFP to determine whether it may be seized under the warrant at:

Location	Date	Time

6. Under s 3LAA of the *Crimes Act 1914*, at the examination of the equipment moved under s 3K, the AFP may:

- operate the equipment to access data
- and if the executing officer or constable assisting suspects on reasonable grounds that any data accessed constitutes evidential material he or she may:
  - copy any or all of the data, or
  - put the data in documentary form and seize the documents so produced, or
  - if it is not practicable to do either of these things, or possession of the equipment is an offence, seize the equipment.

7. The Occupier may attend the examination. The AFP will observe the following process at the examination:
- to determine whether data should be copied or equipment seized, the AFP will select data for examination which from the name of the electronic file does not appear to be subject to a LPP claim.
  - if, during the course of the examination, the AFP opens a file that appears, from its contents, to be potentially subject to a claim of LPP, the AFP will not further inspect that file and will not consider the LPP Claimant’s privilege in that electronic file to be waived. If the Occupier is not present during the examination the AFP will notify the Occupier about the material following the examination.
  - the AFP will advise the Occupier as to whether data is copied or equipment is seized as a result of the examination.
  - if data is copied or equipment seized as a result of the examination, LPP claims will be dealt with in accordance with the ‘Legal Professional Privilege: AFP procedure for dealing with claims over material stored on electronic devices – Items seized or copied under s 3LAA of the Crimes Act 1914’ as attached to this document.

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AFP

Received by Occupier

Date:

Date:

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ANNEXURE A

Name of client on whose behalf LPP claim is made (LPP Claimant)	Location or description of files relating to client

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This procedure outlines the process for dealing with electronic items moved under s 3K which contain data subject to a claim of LPP. Investigators should complete pages 1-3 of this form at the search warrant premises and leave a copy with the occupier or their lawyer. A copy of pages 4-9 can also be provided for information.

Pages 4-9 should be completed on the day of the examination if items are seized or data is copied. This procedure contains three options for quarantining data which is the subject of a LPP claim and gives the occupier **4 days** after the seizure to advise the AFP which option they wish to choose. During this time, the data is not to be examined. Investigators should provide a completed copy of this form to the occupier or their lawyer and retain a completed copy themselves.

## Legal professional privilege: AFP procedure for examination of items moved under s 3K(2) of the *Crimes Act 1914*

<b>Address of premises:</b>	
<b>Date of execution of search warrant:</b>	
<b>Occupier:</b>	
<b>Representative of the Occupier making the LPP claim and contact details :</b>	

1. A LPP claim is made by or on behalf of the Occupier over data on the following electronic equipment which will be moved from the warrant premises under s 3K(2) of the *Crimes Act 1914* for the purposes of examination or processing to determine whether it may be seized under the warrant. The equipment has not been seized and data on the equipment has not been inspected or copied.
2. This document outlines the AFP's procedures for examining the equipment while preserving the Occupier's claims for LPP. The AFP notes that the mere seizure or copying of material does not constitute a violation, waiver or loss of LPP that may otherwise apply in respect of material.

<b>Property movement record item number</b>	<b>Description of item and data on it over which LPP is claimed</b> (eg. laptop belonging to J Smith – claim over emails and files on the hard drive relating to Federal Court litigation)	<b>Description of LPP claim:</b>

Property movement record item number	Description of item and data on it over which LPP is claimed (eg. laptop belonging to J Smith – claim over emails and files on the hard drive relating to Federal Court litigation)	Description of LPP claim:

3. Under s 3K(3A) of the *Crimes Act 1914*, moved items must be examined by the AFP within **14 days** of being moved.

4. Under s 3K(3) if a thing is moved from the premises for the purpose of examination or processing the executing officer must, if practicable to do so:

- inform the Occupier or their representative of the address, place and time at which the examination or processing will be carried out, and
- allow the Occupier or their representative to be present during the examination or processing.

5. The electronic equipment will be examined or processed by the AFP to determine whether it may be seized under the warrant at:

Location	Date	Time

6. Under s 3LAA of the *Crimes Act 1914*, at the examination of the equipment moved under s 3K, the AFP may:

- operate the equipment to access data
- and if the executing officer or constable assisting suspects on reasonable grounds that any data accessed constitutes evidential material he or she may:
  - copy any or all of the data, or
  - put the data in documentary form and seize the documents so produced, or
  - if it is not practicable to do either of these things, or possession of the equipment is an offence, seize the equipment.

7. The Occupier or their representative may attend the examination. The AFP will observe the following process at the examination:

- to determine whether data should be copied or equipment seized, the AFP will select data for examination which from the name of the electronic file does not appear to be subject to a LPP claim.
- if, during the course of the examination, the AFP opens a file that appears, from its contents, to be potentially subject to a claim of LPP by the Occupier, the AFP will not further inspect that file and will not consider the Occupier’s LPP in that electronic file to be waived. If the Occupier or their Representative is not present the AFP will notify the Occupier about the material following the examination.
- the AFP will advise the Occupier as to whether data is copied or equipment is seized as a result of the examination.
- if data is copied or equipment seized as a result of the examination, LPP claims will be dealt with in accordance with the ‘Legal Professional Privilege: AFP procedure for dealing with claims over material stored on electronic devices – Items seized or copied under s 3LAA of the Crimes Act 1914’ as attached to this document.

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AFP

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Received by Occupier

Date:

Date:

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THE FREEDOM OF INFORMATION ACT 1982 (CTM)



## Legal professional privilege: AFP procedure for dealing with claims over material stored on electronic devices

### Items seized or copied under s 3LAA of the *Crimes Act 1914*.

Address of premises:	
Date of execution of search warrant:	
Date of s 3K examination of items:	
Occupier:	
Representative of the Occupier making LPP claim and their contact details:	

The AFP acknowledges that the Occupier wishes, or may wish, to make a legal professional privilege (LPP) claim over material which is included in the data listed in Categories C and D. This document outlines the AFP's procedures for dealing with electronic data while preserving the Occupier's claims for LPP.

The Occupier acknowledges receipt of this document and agrees that the Occupier or their legal representative will respond to the AFP within 4 days, that is by to advise which option or options it proposes to adopt for quarantining data.

<p><b>Legal principles</b></p> <ul style="list-style-type: none"> <li>• Under the <i>Crimes Act 1914</i>, if an executing officer or constable assisting suspects on reasonable grounds that any data accessed by operating the electronic equipment constitutes evidential material, he or she may copy <u>any or all</u> of the data or put the material in documentary form and seize the documents produced. If it is not practicable to do either of those things, the equipment may be seized (s 3LAA.<sup>1</sup>).</li> <li>• It is permissible to briefly review a document, without closely reading its contents, for the purpose of determining whether it might be covered by legal professional privilege without violating such privilege.<sup>2</sup></li> <li>• The mere seizure or copying of material does not constitute a violation, waiver or loss of LPP that may otherwise apply in respect of material.<sup>3</sup></li> </ul>
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<sup>1</sup> See also *Kennedy v Baker* [2004] FCA 562 at [47]-[78]; *Different Solutions Pty Limited v Commissioner Australian Federal Police (No 2)* [2008] FCA 1686 at [74]-[163].

<sup>2</sup> See, eg, *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 211 ALR 380 at [13]-[15] & [20].

<sup>3</sup> See, eg, *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 211 ALR 380 at [13]-[15] & [20]; *Kennedy v Baker (No 2)* (2004) 138 FCR 414. Also see *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 at [30]-[45].



## 2. Storage of equipment and data in Categories C and D

The electronic equipment and data storage devices referred to above will be stored by the AFP Drugs and Property Registry and will be made available to AFP Digital Forensics and AFP Investigators in accordance with this procedure.

## 3. Role of AFP Digital Forensics and AFP Investigators

*AFP Digital Forensics* is a team of computer forensics specialists who provide assistance to AFP investigation teams. AFP Digital Forensics are responsible for, among other things, copying data, uploading it to a suitable platform for searching, searching data and quarantining data over which there is a LPP claim. Data over which LPP is claimed will be not released to AFP Investigators by Digital Forensics except in accordance with this procedure.

*AFP Investigators* are the members of the investigative team which executed the search warrant and who continue to be involved in the investigation.

## 4. Copying and preliminary handling of data

As noted above, the copying of data by AFP Digital Forensics does not constitute a violation, waiver or loss of LPP in relation to the material over which LPP is claimed. The data in Categories C and D (the data) will be copied by AFP Digital Forensics and uploaded to a suitable platform for forensically examining data. To reduce the quantity of the data to be examined, AFP Digital Forensics may remove standard non-content files (eg system files) from the data.

## 5. Where necessary to do so, AFP Digital Forensics may also reduce the quantity of data to be reviewed using search terms relevant to the investigation. **Copy of data**

If not already provided, if a request is made in writing by close of business four days after the completion of the examination, that is by [insert date], the AFP will provide a copy of the data in Categories C and D, (or, in appropriate circumstances, return the Category D equipment) to the Occupier of the premises (the Occupier). If a copy is to be provided, the AFP may require that the Occupier provide a storage device for the data. In accordance with s 3N(2)(b) of the *Crimes Act 1914*, the AFP will not provide a copy of the data if possession of the data could constitute an offence

## 6. Quarantining LPP data

### Procedure 1 – AFP reviews data and quarantines material which may be subject to LPP claim

6.1 Unless the Occupier or their representative notifies the AFP in writing by 11 am four days after completion of the search, that is by [insert date], that they wish to adopt procedures 2 or 3, the AFP will adopt the following procedure to quarantine LPP data:

- (a) On the fifth day after the search, that is by [insert date], AFP Digital Forensics will release the data to AFP Investigators who will commence reviewing the data on the basis that the Occupier does not waive LPP over any of the material that may be subject to a claim of LPP (in whole or in part).
- (b) If AFP Investigators identify any material that appears, on its face, to be potentially subject to a claim of LPP by the Occupier (Potential LPP Material), the Potential LPP Material will be quarantined from the remainder of the data and not further examined by AFP Investigators pending next steps in the procedure.
- (c) The AFP will notify the Occupier in writing of all Potential LPP material identified during the examination process and provide an electronic spreadsheet of that material to the Occupier, and, if requested as per paragraph 5, provide a copy of the data.

- (d) Within 28 days of being notified about the Potential LPP Material, the Occupier will return the electronic spreadsheet updated with particulars of any LPP claims that they wish to make over the Potential LPP material or over any other data (the LPP List). The LPP List is to include the details identified in Annexure A to this agreement.
- (e) Potential LPP Material over which there is no claim will be released by AFP Digital Forensics to AFP Investigators for review on the basis that no LPP claim has been made by the Occupier over this material.
- (f) If no LPP list is received within 28 days (or any later time agreed in writing by the AFP), AFP Investigators will review all of the Potential LPP material on the basis that no LPP claim has been made by the Occupier in respect of that material.
- (g) Any material identified on the LPP List will be dealt with in accordance with paragraph 8.

Procedure 2 – Occupier provides LPP search terms to the AFP to search for and quarantine material which may be subject to a LPP claim

6.2 If the Occupier or their representative notifies the AFP in writing by close of business 4 days after completion of the search, that is by [insert date] that they want Procedure 2 to be followed:

- (a) AFP Investigators will not review the data prior to the expiry of **7 days** after receiving notification that the Occupier wants to follow Procedure 2. This does not preclude AFP Digital Forensics from processing the data so that it is in a suitable form to be searched.
- (b) Within these 7 days the Occupier will provide to the AFP a list of effective search terms (the LPP Search Terms) to identify Potential LPP Material.
- (c) The LPP Search Terms will include names and email addresses of solicitors or barristers involved in providing legal advice and key subject words.
- (d) The AFP may ask for additional LPP Search Terms if AFP Digital Forensics assesses that the search terms provided will not be effective in isolating data.
- (e) Upon receipt of the LPP Search Terms AFP Digital Forensics will search for and quarantine data which may be subject to a LPP claim (Potential LPP material).
- (f) The Occupier or their representative may request to be present and assist during the searching and quarantining process.
- (g) Once the Potential LPP Material is quarantined, the data that has not been quarantined will be released by AFP Digital Forensics to AFP Investigators for examination. AFP Investigators will adopt Procedure 1 in reviewing this material.
- (h) AFP will provide an electronic spreadsheet of all Potential LPP material identified during the quarantining process to the Occupier for the purpose of review, and, if requested, a copy of the data.
- (i) Within 28 days of being notified about the Potential LPP Material, the Occupier will return the electronic spreadsheet updated with particulars of any LPP claims that they wish to make over the Potential LPP Material or over other the other data (the LPP List). The LPP List is to include the details identified in Annexure A to this agreement.
- (j) Potential LPP Material over which there is no claim will be released by AFP Digital Forensics to AFP Investigators for review on the basis that no LPP claim has been made by the Occupier over this material.
- (k) If no LPP list is provided to the AFP within 28 days (or any later time agreed in writing by the AFP), AFP Investigators will review all of the Potential LPP material on the basis that no LPP claim has been made by the Occupier in respect of that material.
- (l) Any material identified on the LPP List will be dealt with in accordance with paragraph 8.

Procedure 3 – Occupier reviews data and notifies AFP of material which is subject to a LPP claim

6.3 If the Occupier or their representative notifies the AFP in writing by close of business 4 days after completion of the search, that is by [insert date] that they want Procedure 3 to be followed:

- (a) If a copy of the data has not already been provided, the AFP will provide a copy of the data to the Occupier or their representative. If a copy is to be provided, the AFP may ask the Occupier to provide a storage device for the data. The AFP will also provide an electronic spreadsheet containing, among other things, file names and MD5 hash values.
- (b) AFP Investigators will not review the data for 28 days after the Occupier receives a copy of the electronic data. This does not preclude AFP Digital Forensics from processing the data so that it is in a suitable form to be searched.
- (c) Within 28 days after receiving a copy of the data, the Occupier must provide to the AFP an electronic spreadsheet identifying any material contained within the data in respect of which a claim of LPP is asserted, in whole or in part (the LPP List). The LPP List is to include the details identified in Annexure A.
- (d) AFP Investigators will review data other than that identified on the LPP List, on the basis that no claim of LPP has been made in respect of such material.
- (e) If no LPP List is provided to the AFP within 28 days (or any later time agreed by the AFP), AFP Investigators will review all of the data on the basis that no claim of LPP has been made by the Occupier in respect of any of that material.
- (f) Any material identified on the LPP List will be dealt with in accordance with paragraph 8.2 below.

## 7. Resolution of LPP claims

7.1 AFP Investigators will not review the content of any material on the LPP List other than in accordance with paragraph 7.2 below.

7.2 In respect of any material identified on the LPP List:

- (a) The AFP will assess any claims for LPP in good faith and promptly identify any material in respect of which a claim is accepted or not contested. AFP Investigators will not review or rely on any such material and, as practicable, AFP Digital Forensics will maintain it as quarantined data, delete it or return it to the Occupier.
- (b) The AFP may request any additional information in respect of any material identified on the LPP List that is reasonably necessary for the AFP to determine whether a claim of LPP is justified.
- (c) The AFP may dispute any claim of LPP in respect of any material identified on the LPP List.
- (d) The AFP and the Occupier will both act in good faith and use their best endeavours to seek to resolve any disputed claims of LPP, including, by agreement, appointing an independent arbitrator to assess documents and determine whether they are privileged.
- (e) If, following reasonable attempts to resolve any disputed claims of LPP, the AFP notifies the Occupier in writing that it does not accept a claim of LPP in respect of any material identified on the LPP List, the Occupier may commence proceedings to establish the privilege claimed.

(f) If the Occupier commences such proceedings within 7 days of such notice being provided, the AFP will not review the relevant material before those proceedings are resolved (including dismissed or discontinued). If the Occupier does not commence such proceedings within 7 days of such notice being provided, the AFP will review the material on the basis that no claim of LPP is maintained in respect of the material.

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AFP

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Received by Occupier

Date:

Date:

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## ANNEXURE A

The LPP List is to include at a minimum the following details for each item that is subject to a claim of LPP:

- a. filename
- b. file path
- c. date created
- d. date modified
- e. Author
- f. Recipient
- g. unique electronic identifier (eg. MD5 hash value, NUIX GUID)
  
- h. the nature of the item (e.g. email, legal advice, letter, file note)
- i. the identity of each person involved in the creation, preparation and/or amendment of the item
- j. whether LPP is asserted over the whole or part of the item
- k. the particular type of LPP claimed and the specific grounds on which LPP is claimed;
- l. the facts that are relied upon as giving rise to the claim of LPP; and
- m. the identity of any person who is the holder of the claimed LPP and whether that person has requested that the claim be made.
- n. if a person referred to in paragraph i above is or was an in-house counsel, then sufficient details must be provided about the capacity in which that person was acting in relation to the creation, preparation and/or amendment of the item and of that person's independence.

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THE FREEDOM OF INFORMATION ACT 1982 (CTH)

**Legal professional privilege: AFP procedure for dealing with claims over material stored on electronic devices  
Items seized or copied under s 3LAA of the *Crimes Act 1914***

**Legal Premises**

<b>Address of premises:</b>	
<b>Date of execution of search warrant:</b>	
<b>Date of s 3K examination of items:</b>	
<b>Representative of the Occupier making LPP claim and their contact details:</b>	

The AFP acknowledges that the LPP Claimant wishes, or may wish, to make a legal professional privilege (LPP) claim over material which is included in the data listed in Categories C and D. This document outlines the AFP's procedures for dealing with electronic data while preserving the LPP Claimant's claims for LPP. A copy of this document should be provided to the LPP claimant.

<b>Legal principles</b>
<ul style="list-style-type: none"> <li>• Under the <i>Crimes Act 1914</i>, if an executing officer or constable assisting suspects on reasonable grounds that any data accessed by operating the electronic equipment constitutes evidential material, he or she may copy <u>any or all</u> of the data or put the material in documentary form and seize the documents produced. If it is not practicable to do either of those things, the equipment may be seized (3LAA<sup>1</sup>).</li> <li>• It is permissible to briefly review a document, without closely reading its contents, for the purpose of determining whether it might be covered by legal professional privilege without violating such privilege.<sup>2</sup></li> <li>• The mere seizure or copying of material does not constitute a violation, waiver or loss of LPP that may otherwise apply in respect of material.<sup>3</sup></li> </ul>

<sup>1</sup> See also *Kennedy v Baker* [2004] FCA 562 at [47]-[78]; *Different Solutions Pty Limited v Commissioner Australian Federal Police (No 2)* [2008] FCA 1686 at [74]-[163].

<sup>2</sup> See, eg, *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 211 ALR 380 at [13]-[15] & [20].

<sup>3</sup> See, eg, *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 211 ALR 380 at [13]-[15] & [20]; *Kennedy v Baker (No 2)* (2004) 138 FCR 414. Also see *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 at [30]-[45].





## 2. Contacting clients

The AFP will refrain from dealing with the data for 7 days [or later date as agreed], that is until [date], to allow the Occupier to contact the LPP claimants listed at Annexure B. The Occupier should provide a copy of this procedure to the LPP claimants.

## 3. Storage of equipment and data in Categories C and D

The electronic equipment and data storage devices referred to above will be stored by the AFP Drugs and Property Registry and will be made available to AFP Digital Forensics and AFP Investigators in accordance with this procedure.

## 4. Role of AFP Digital Forensics and AFP Investigators

*AFP Digital Forensics* is a team of computer forensics specialists who provide assistance to AFP investigation teams. AFP Digital Forensics are responsible for, among other things, copying data, uploading it to a suitable platform for searching, searching data and quarantining data over which there is a LPP claim. Data over which LPP is claimed will be not released to AFP Investigators by Digital Forensics except in accordance with this procedure

*AFP Investigators* are the members of the investigative team which executed the search warrant and who continue to be involved in the investigation.

## 5. Copying and preliminary handling of data

As noted above, the copying of data by AFP Digital Forensics does not constitute a violation, waiver or loss of LPP in relation to the material over which LPP is claimed. The data in Categories C and D (the data) will be copied by AFP Digital Forensics and uploaded to a suitable platform for forensically examining data. To reduce the quantity of the data to be examined, AFP Digital Forensics may remove standard non-content files (eg system files) from the data.

Where necessary to do so, AFP Digital Forensics may also reduce the quantity of data to be reviewed using search terms relevant to the investigation.

## 6. Copy of data

If not already provided, if a request is made in writing by close of business four days after the completion of the examination, that is by [insert date], the AFP will provide a copy of the data in Categories C and D, (or, in appropriate circumstances, return the Category D equipment) to the Occupier of the premises (the Occupier). If a copy is to be provided, the AFP may require that the Occupier provide a storage device for the data. In accordance with s 3N(2)(b) of the *Crimes Act 1914*, the AFP will not provide a copy of the data if possession of the data could constitute an offence.

## 7. Quarantining LPP data

### Procedure 1 – AFP reviews data and quarantines material which may be subject to LPP claim

7.1 Unless the LPP Claimant or their Legal Representative notifies the AFP in writing by close of business 14 days after completion of the search, that is by [insert date], that the LPP Claimant wishes to adopt procedures 2 or 3, the AFP will adopt the following procedure to quarantine LPP data:

- (a) On the fifteenth day after the search, that is by [insert date], AFP Digital Forensics will release the data to AFP Investigators who will commence reviewing the data on the basis that the LPP Claimant does not waive LPP over any of the material that may be subject to a claim of LPP (in whole or in part).
- (b) If AFP Investigators identify any material that appears, on its face, to be potentially subject to a claim of LPP by the LPP Claimant (Potential LPP Material), the Potential LPP Material will be quarantined from the remainder of the data and not further examined by AFP Investigators pending next steps in the procedure.
- (c) The AFP will notify the LPP Claimant in writing of all Potential LPP material identified during the examination process and provide a list of that material to the LPP Claimant, and, if requested, provide a copy of the material.
- (d) Within 28 days of being notified about the Potential LPP Material, the LPP Claimant will provide a list with particulars of any LPP claims that they wish to make over the Potential LPP material or over other the other data (the LPP List). The LPP List is to include the details identified in Annexure A to this agreement.
- (e) Potential LPP Material over which there is no claim will be released by AFP Digital Forensics to AFP Investigators for review on the basis that no LPP claim has been made by the LPP Claimant over this material.
- (f) If no LPP list is received within 28 days (or any later time agreed in writing by the AFP), AFP Investigators will review all of the Potential LPP material on the basis that no LPP claim has been made by the LPP Claimant in respect of that material.
- (g) Any material identified on the LPP List will be dealt with in accordance with paragraph 8

Procedure 2 – LPP Claimant provides LPP search terms to the AFP to search for and quarantine material which may be subject to a LPP claim

7.2 If the LPP Claimant or their Legal Representative notifies the AFP in writing by close of business 14 days after completion of the search, that is by [insert date] that the LPP Claimant wishes Procedure 2 to be followed:

- (a) AFP Investigators will not review the data prior to the expiry of **7 days** after receiving notification that the LPP Claimant wants to follow Procedure 2. This does not preclude AFP Digital Forensics from processing the data so that it is in a suitable form to be searched.
- (b) Within these 7 days the LPP Claimant will provide to the AFP a list of effective search terms (the LPP Search Terms) to identify Potential LPP Material.
- (c) The LPP Search Terms will include names and email addresses of solicitors or barristers involved in providing legal advice and key subject words.
- (d) The AFP may ask for additional LPP Search Terms if AFP Digital Forensics assesses that the search terms provided will not be effective in isolating data.
- (e) Upon receipt of the LPP Search Terms AFP Digital Forensics will search for and quarantine data which may be subject to a LPP claim (Potential LPP material).
- (f) The LPP Claimant or their Legal Representative may request to be present and assist during the searching and quarantining process.
- (g) Once the Potential LPP Material is quarantined, the data that has not been quarantined will be released by AFP Digital Forensics to AFP Investigators for examination. AFP Investigators will adopt Procedure 1 in reviewing this material.
- (h) AFP will provide a list of all Potential LPP material identified during the quarantining process to the LPP Claimant for the purpose of review, and, if requested, provide a copy of the material.
- (i) Within 28 days of being notified about the Potential LPP Material, the LPP Claimant will provide a list with particulars of any LPP claims that they wish to make over the Potential LPP Material or over other the other data (the LPP List). The LPP List is to include the details identified in Annexure A to this agreement.
- (j) Potential LPP Material over which there is no claim will be released by AFP Digital Forensics to AFP Investigators for review on the basis that no LPP claim has been made by the LPP Claimant over this material.

- (k) If no LPP list is provided to the AFP within 28 days (or any later time agreed in writing by the AFP), AFP Investigators will review all of the Potential LPP material on the basis that no LPP claim has been made by the LPP Claimant in respect of that material.
- (l) Any material identified on the LPP List will be dealt with in accordance with paragraph 8.

Procedure 3 – LPP Claimant reviews data and notifies AFP of material which is subject to a LPP claim

7.3 If the LPP Claimant or their Legal Representative notifies the AFP in writing by close of business 14 days after completion of the search , that is by [insert date] that they want Procedure 3 to be followed:

- (a) If a copy of the data has not already been provided, the AFP will provide a copy of the data to the LPP Claimant or their Legal Representative. If a copy is to be provided, the AFP may ask the LPP Claimant to provide a storage device for the data.
- (b) AFP Investigators will not review the data for 28 days after the LPP Claimant receives a copy of the electronic data. This does not preclude AFP Digital Forensics from processing the data so that it is in a suitable form to be searched.
- (c) Within 28 days after receiving a copy of the data, the LPP Claimant must provide to the AFP an electronic spreadsheet identifying any material contained within the data in respect of which a claim of LPP is asserted, in whole or in part (the LPP List). The LPP List is to include the details identified in Annexure A.
- (d) AFP Investigators will review data other than that identified on the LPP List, on the basis that no claim of LPP has been made in respect of such material.
- (e) If no LPP List is provided to the AFP within 28 days (or any later time agreed by the AFP), AFP Investigators will review all of the data on the basis that no claim of LPP has been made by the LPP Claimant in respect of any of that material.
- (f) Any material identified on the LPP List will be dealt with in accordance with paragraph 8 below.

## 8. Resolution of LPP claims

8.1 AFP Investigators will not review the content of any material on the LPP List other than in accordance with paragraph 8.2 below.

8.2 In respect of any material identified on the LPP List:

- (a) The AFP will assess any claims for LPP in good faith and promptly identify any material in respect of which a claim is accepted or not contested. AFP Investigators will not review or rely on any such material and, as practicable, AFP Digital Forensics will maintain it as quarantined data, delete it or return it to the Occupier.
- (b) The AFP may request any additional information in respect of any material identified on the LPP List that is reasonably necessary for the AFP to determine whether a claim of LPP is justified.
- (c) The AFP may dispute any claim of LPP in respect of any material identified on the LPP List.
- (d) The AFP and the LPP Claimant will both act in good faith and use their best endeavours to seek to resolve any disputed claims of LPP.

(e) If, following reasonable attempts to resolve any disputed claims of LPP, the AFP notifies the LPP Claimant in writing that it does not accept a claim of LPP in respect of any material identified on the LPP List, the LPP Claimant may commence proceedings to establish the privilege claimed. If the LPP Claimant commences such proceedings within 7 days of such notice being provided, the AFP will not review the relevant material before those proceedings are resolved (including dismissed or discontinued). If the LPP Claimant does not commence such proceedings within 7 days of such notice being provided, the AFP will review the material on the basis that no claim of LPP is maintained in respect of the material.

.....

AFP

Date:

.....

Received by Occupier

Date:

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## ANNEXURE A

The LPP List is to include, at a minimum, the following details for each item that is subject to a claim of LPP:

- a. filename
- b. file path
- c. date created
- d. date modified
- e. Author
- f. Recipient
- g. unique electronic identifier (eg. MD5 hash value, NUIX GUID)
  
- h. the nature of the item (e.g. email, legal advice, letter, file note)
- i. the identity of each person involved in the creation, preparation and/or amendment of the item
- j. whether LPP is asserted over the whole or part of the item
- k. the particular type of LPP claimed and the specific grounds on which LPP is claimed;
- l. the facts that are relied upon as giving rise to the claim of LPP; and
- m. the identity of any person who is the holder of the claimed LPP and whether that person has requested that the claim be made.
- n. if a person referred to in paragraph i above is or was an in-house counsel, then sufficient details must be provided about the capacity in which that person was acting in relation to the creation, preparation and/or amendment of the item and of that person's independence.

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**CLAIMS FOR LEGAL PROFESSIONAL PRIVILEGE:  
PREMISES OTHER THAN THOSE OF A LAWYER, LAW SOCIETY OR LIKE  
INSTITUTION.**

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These guidelines should be followed by the executing officer or a constable assisting in any case where a search warrant is being executed on premises other than those of a Lawyer, Law Society or Like Institution and there is a claim for Legal Professional Privilege (or Client Legal Privilege) in respect of documents that are on the premises.

1. The officer may look at each document briefly, and without reading the contents, to determine the general nature of the document and to assess whether the document appears to be relevant to the matters under investigation and whether it appears likely that the document contains privileged material (in JMA Accounting Pty Ltd v CofT [2004] 211 ALR 380 the Full Federal Court ruled that it is not a breach of LPP for an investigator to look at a privileged document for these purposes).
2. If the officer decides that the document is not relevant to the matters under investigation they should return it to the occupier and proceed with the remainder of the search.
3. Similarly if the officer is satisfied, on the basis of a brief examination, that the document is clearly covered by Legal Professional Privilege they should return it to the occupier and proceed with the remainder of the search.
4. If the officer decides that the document appears to be relevant to the matters under investigation and forms the view, on the basis of a brief examination, that the document is clearly not covered by Legal Professional Privilege they are entitled to seize the document under the authority of the search warrant.
5. If the officer decides that the document appears to be relevant to the matters under investigation, but cannot form a view on whether or not the document is covered by Legal Professional Privilege, the officer can ask the occupier if they are prepared to agree to follow the procedure set out in this document so that the claim for privilege can be resolved.
6. The relevant procedure is as follows:

The executing officer or a constable assisting will prepare a list of all relevant documents in cooperation with the occupier. The list should show the general nature of each document, the ground on which privilege is claimed, and the name of the person claiming privilege;

The documents will be placed in an envelope or other container which will be sealed;

The list and the container will be signed by the executing officer or constable assisting and the occupier;

The sealed container and a copy of the list will be delivered to a third party agreed between the executing officer or constable assisting and the occupier;

The third party shall hold the container and the copy of the list pending resolution of the claim for privilege;

Subject to any agreement to the contrary, the person claiming privilege will have four working days after delivery to the third party in which to commence proceedings to establish the privilege claimed. If proceedings are commenced within that time the sealed container and the copy of the list will be delivered to the registrar of the court in which the proceedings have been brought. The documents will then be held by the registrar pending the order of the court;

If proceedings are not commenced within four working days, or such other period as may be agreed, the third party will deliver the documents, or such of them as the executing officer still wishes to examine, to the executing officer and the executing officer will then deal with the documents as if they had been seized under the search warrant at the time of search;

Nothing in the previous dot points prevents the executing officer from discussing a claim for privilege with the person raising the claim. If agreement can be reached on which documents are covered by legal professional privilege, and which are not, the third party will be asked to act in accordance with that agreement.

- 7.** If the occupier agrees to comply with that procedure, and to be bound by it, the officer should proceed to implement the procedure.
- 8.** If the occupier does not agree to comply with that procedure, the executing officer or constable assisting may proceed to execute the search warrant doing the best they can to ensure that they do not read or seize privileged material. There can be no guarantee that they will not inadvertently read or seize privileged material.

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## GENERAL GUIDELINES BETWEEN THE AUSTRALIAN FEDERAL POLICE AND THE LAW COUNCIL OF AUSTRALIA AS TO THE EXECUTION OF SEARCH WARRANTS ON LAWYERS' PREMISES, LAW SOCIETIES AND LIKE INSTITUTIONS IN CIRCUMSTANCES WHERE A CLAIM OF LEGAL PROFESSIONAL PRIVILEGE IS MADE

### Preliminary

1. For the purpose of these guidelines, 'Law Society' means a Law Society, a Bar Association, a Law Institute and any similar professional body of lawyers, and includes a body or tribunal established for the purpose of receiving or investigating complaints involving issues of professional standards or relating to the delivery of professional legal services against barristers and solicitors or for the purpose of disciplining barristers or solicitors.

### Background

2. Difficulties are sometimes experienced on the occasions that it becomes necessary for an AFP officer to obtain and execute a search warrant directed at the office of a solicitor, the chambers of a barrister, or the premises of a Law Society.

3. In *Baker v. Campbell* (1983) 153 CLR 52 the question posed in the case stated was:-

"In the event that legal professional privilege attaches to and is maintained in respect of ... documents held by (a lawyer) can those documents be properly made the subject of a search warrant issued under s. 10<sup>1</sup> of the Crimes Act"

The question was answered 'No'.

### Legislation

4. The Crimes Act 1914 provides that

- (a) an issuing officer may issue a warrant to search premises if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises [section 3E(1)];
- (b) an issuing officer may issue a warrant authorising an ordinary search or a frisk search of a person if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that the person has in his or her possession, or will within the next 72 hours have in his or her possession, any evidential material [section 3E(2)]; and
- (c) Part 1AA of the Crimes Act does not affect the law relating to legal professional privilege (section 3ZX).

### Overview

5. It is seen as desirable that an agreed procedure should be laid down which, if followed, will negate or reduce the risks of documents which may be subject of legal professional privilege being seized pursuant to section 3E search warrants.

6. Accordingly, and subject to the provisions of the Crimes Act 1914 (Cth), these general guidelines have been agreed between the Commissioner of the Australian Federal Police on the one hand and the Law Council of Australia on the other.

7. While focussing on search warrants issued pursuant to the Crimes Act, the guidelines are to be interpreted as applying to search warrants issued under other Commonwealth legislation on lawyers' premises or Law Societies where a claim of legal professional privilege is made.

<sup>1</sup> Section 10 has now been replaced by section 3E Crimes Act 1914

8. The Law Council through its constituent bodies, the Bar Associations and the Law Societies in all of the Australian States and internal Territories, represents the great majority of Australia's practising lawyers.

9. The discussions which led to the initial guidelines relating to lawyers' premises were convened by the Commonwealth Director of Public Prosecutions (DPP) and representatives of the Office of the DPP have been involved in the subsequent discussions.

### **Professional Privilege.**

10. The matter of legal professional privilege (ie concerning communications passing between a lawyer and his/her client/s, and, in some circumstances, a third party, for the purpose of the lawyer providing legal advice to the client/s) is subject to various statutory provisions [eg the Evidence Act 1995 (Cth)<sup>2</sup>, the Evidence Act 1995 (NSW)] and the common law.

11. As indicated in the footnote, the common law rules apply before the commencement of court proceedings. From a Commonwealth perspective, the common law rules will apply prior to the start of proceedings, but also during proceedings if those proceedings are conducted in a State court which is not subject to legislation similar to the Commonwealth and NSW Evidence Acts.

### **Effect of Guidelines**

12. The effect of these guidelines, in summary, is that, where the lawyer or Law Society is prepared to co-operate with the police search team, no member of that team will inspect any document identified as potentially within the warrant until the lawyer or Law Society has been given the opportunity to claim legal professional privilege in respect of any of the documents so identified.

13. Where a claim is made in such circumstances, no member of the police search team will inspect any document the subject of the claim until either (a) the claim is abandoned or (b) the claim is dismissed by a court.

14. It is agreed that application for a search warrant shall only be made after consultation with the Office of the DPP.

15. These guidelines proceed on the assumption that any particular warrant to which they relate has been duly issued and is good on its face. It is recognised that a lawyer or Law Society upon whose premises the search warrant is to be executed may want to take legal advice as to those matters.

### **Procedures in detail**

16. Upon attendance at the premises of the lawyer or Law Society, the executing officer should explain the purposes of the search and invite the lawyer or representative of the Law Society to co-operate in the conduct of the search. If the lawyer, a partner or employee, or the Law Society or an employee, is suspected of involvement in the commission of the alleged offence the executing officer should say so.

<sup>2</sup> The privilege provided by s.118, and the privileges provided by ss.119 and 120 [of the Commonwealth Evidence Act] only apply in relation to proceedings in a federal court or ACT court (s.4(1)). The common law rules of legal professional privilege [Grant v. Downs (1976) 135 CLR 674] continue to apply in relation to, among other things, the exercise of investigative powers under Commonwealth or ACT law. Thus the range of communications protected by the privilege at the stage of an investigation (by the common law sole purpose test) may be narrower than that protected in subsequent, related, proceedings (by the dominant purpose test in the Act). [**Commonwealth Evidence Law** - commentary by G Bellamy and P Meibusch, Civil Law Division, Attorney-General's Department 1995 (para 118.14)]

17. Identification of the executing officer and all other members of the search team should be provided to the lawyer or representative of the Law Society. The search team should be kept to the lowest number of persons reasonably necessary in all the circumstances.

18. If no lawyer, or representative of the Law Society, is in attendance at the premises the subject of the search warrant then, if practicable, the premises or relevant part of the premises should be sealed and execution of the warrant deferred for a period which the executing officer in his/her discretion considers reasonable in all the circumstances to enable any lawyer or responsible person connected with the premises to attend or, if that is not practicable, to enable arrangements for another person to attend the premises.

19. The executing officer or Constable/s assisting must be mindful of and comply with the relevant statutory and/or common law obligations attaching to the execution of the search warrant/s in question, and to the provisions of Part 1AA of the Crimes Act 1914 in particular in respect to search warrants issued pursuant to that Act.

20. A reasonable time should be allowed to the lawyer to enable him/her to consult with his/her client/s or to the Law Society to enable it to consult with the legal representatives of the person/s to whose affairs the documents relate, and/or for the lawyer or Law Society to obtain legal advice.

21. For this reason, it is desirable that warrants be executed only during normal working hours. However, when warrants are executed outside normal working hours, allowances should be made for delays should the lawyer wish to contact his/her client or the Law Society to contact legal representatives, or for either the lawyer or Law Society to take legal advice.

22. Having informed his/her client/s of the position or the Law Society having informed the legal representative/s of the person/s to whose -affairs the documents relate of the position, and/or either having obtained legal advice, the lawyer or Law Society should, consistent with his/her client's/clients' instructions or the instructions of the legal representatives of the person/s to whose affairs the documents relate, cooperate with the police officers by assisting them in locating all documents which may be within the warrant.

23. If the executing officer requires access to the office records systems the lawyer or Law Society should assist if necessary by explaining the records system to the police officer.

24. Where the lawyer or Law Society agrees to assist the search team the procedures set out below should be followed:-

- (a) in respect of all documents identified by the lawyer or Law Society and/or further identified by the executing officer as potentially within the warrant, the executing officer should, before proceeding to further execute the warrant (by inspection or otherwise) and to seize the documents, give the lawyer or Law Society the opportunity to claim legal professional privilege in respect of any of those documents;
- (b) if the lawyer or Law Society asserts a claim of legal professional privilege in relation to any of those documents then the lawyer or Law Society should be prepared to indicate to the executing officer the grounds upon which the claim is made and in whose name the claim is made; and
- (c) in respect of those documents which the lawyer or Law Society claim are subject to legal professional privilege, the search team shall proceed in accordance with the guidelines as follows. In respect of the remaining documents, the search team may then proceed to complete the execution of warrant.

25. All documents which the lawyer or Law Society claims are subject to legal professional privilege shall under the supervision of the executing officer be placed by the lawyer and/or his/her staff, or the Law Society and/or its representatives, in a container which shall then be sealed.

26. In the event that the lawyer or Law Society desires to take photocopies of any of those documents the lawyer or Law Society shall be permitted to do so under the supervision of the executing officer and at the expense of the lawyer or Law Society before they are placed in the container.

27. A list of the documents shall be prepared by the search team, in co-operation with the lawyer or Law Society, on which is shown general information as to the nature of the documents.

28. That list and the container/s in which the documents have been placed shall then be endorsed to the effect that pursuant to an agreement reached between the lawyer or Law Society and the search team, and having regard to the claims of legal professional privilege made by the lawyer on behalf of his/her client/s or the Law society on behalf of the person/s to whose affairs the documents relate, the warrant has not been executed in respect of the documents set out in the list but that those documents have been sealed in the container, which documents are to be given forthwith into the custody of the magistrate or justice who issued the warrant or other independent party (referred to below as the 'third party') agreed upon by the lawyer or Law Society and the executing officer pending resolution of the disputed claims.

29. The list and the container/s in which the documents have been sealed shall then be signed by the executing officer and the lawyer or a representative of the Law Society.

30. The executing officer and the lawyer or representative of the Law Society shall together deliver the container forthwith, along with a copy of the list of the documents, into the possession of the third party, who shall hold the same pending resolution of the disputed claims.

31. If within 3 clear working days (or such longer period as is reasonable which may be agreed by the parties) of the delivery of the documents into the possession of the third party, the lawyer or Law Society has informed the executing officer or his/her agent and the third party or his/her agent that instructions to institute proceedings forthwith to establish the privilege claimed have been received from the client/s on whose behalf the lawyer asserted the privilege, or from the person or person/s on whose behalf the claim has been made by the Law Society, then no further steps shall be taken in relation to the execution of the warrant until either:

- (a) a further period of 1 clear working day (or such further period as may reasonably be agreed) elapses without such proceedings having been instituted; or
- (b) proceedings to establish the privilege have failed; or
- (c) an agreement is reached between the parties as to the disclosure of some or all of the documents subject to the claim of legal professional privilege.

32. Where proceedings to establish the privilege claimed have been instituted, arrangements shall forthwith be made to deliver the documents held by the third party into the possession of the Registrar of the Court in which the said proceedings have been commenced. The document shall be held by the Registrar pending the order of the Court.

33. Where proceedings to establish the privilege claimed are not instituted within 3 clear working days (or such further period as may have been agreed) of the delivery of the documents into the possession of the third party or where an agreement is reached between the parties as to the disclosure of some or all of the documents then the parties shall attend upon the third party and shall advise him/her as to the happening of those matters and shall request him/her, by consent, to release into the possession of the executing officer all the documents being held by the third party or, where the parties have agreed that only some of the documents held by him/her should be released, those documents.

34. In those cases where the lawyer or Law Society refuses to give co-operation, the executing officer should advise that the search will proceed in any event and that, because the search team is not familiar with the office systems of the lawyer or Law Society, this may entail a search of all files and documents in the lawyer's or Law Society's office in order to give full effect to the authority conferred by the warrant.

35. The lawyer or Law Society should also be advised that a document will not be seized if, on inspection, the executing officer considers that the document is either not within the warrant or privileged from seizure. The search team should then proceed forthwith to execute the warrant.

36. These guidelines, which replace those last agreed between the Australian Federal Police and the Law Council of Australia in June 1990, commence with effect from 3 March 1997.

**M Palmer**  
**Commissioner**  
**Australian Federal Police**

**P Levy**  
**Secretary-General**  
**Law Council of Australia**

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