

# AFP National Guideline on investigations where parliamentary privilege may be involved

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## 1. Disclosure and compliance

This document is classified **OFFICIAL** and is intended for internal AFP use.

Disclosing any content must comply with Commonwealth law and the [AFP National Guideline on information management](#).

This instrument forms part of the AFP Governance Instrument Framework as defined in the [AFP Commissioner's Order on governance \(CO1\)](#). The [AFP Commissioner's Order on professional standards \(CO2\)](#) and [AFP Commissioners Order on security \(CO9\)](#) set the framework for the conduct expected of AFP appointees through obligations and best practice to help maintain the safety and security of AFP information, operations, assets and people. Inappropriate departures from the provisions outlined within AFP governance instruments may constitute a breach and be dealt with under Part V of the [Australian Federal Police Act 1979](#) (Cth).

## 2. Guideline authority

This guideline is issued by Deputy Commissioner National Security using their power under section 37(1) of the [Australian Federal Police Act 1979](#) (Cth), as delegated by the Commissioner under section 69C of the Act.

Nothing in this Guideline can diminish, constrain or expand the scope of parliamentary privilege.

## 3. Introduction

This guideline outlines the obligations of AFP appointees involved in law enforcement investigations where parliamentary privilege may apply in order to control reputational and organisational risk to the AFP. It is designed to:

- ensure that AFP appointees conduct investigations in a way that respects parliamentary privilege
  - **in other words, to ensure action taken in the course of an investigation does not constitute an improper interference with**

## **the functions of the Parliament, a parliamentary committee or a parliamentarian in the course of their duties or performance as a member, or amount to a contempt of parliament**

- give an opportunity for claims of parliamentary privilege to be raised and resolved, and
- ensure that material subject to such claims is managed appropriately.

This guideline does not prevent a claim of privilege being raised or resolved in a different manner, but it reflects an understanding, negotiated with the Parliament, of how such claims will usually be raised and resolved.

### 3.1 Role of the AFP

The AFP recognises the importance of parliamentary privilege and not improperly interfering with the business of Parliament. The AFP may need to investigate offences involving parliamentarians and their staff from time to time. The AFP, through this guideline, will ensure that parliamentary privilege is observed.

This guideline is designed to be read alongside the [Memorandum of Understanding on the execution of search warrants and use of covert investigative powers where parliamentary privilege may apply between the Speaker of the House of Representatives, the President of the Senate and the Attorney-General \(PDF, 280KB\)](#).

## 4. Investigations oversight

The AFP Sensitive Investigation Oversight Board (SIOB), chaired by Deputy Commissioner National Security, oversees all investigations where parliamentary privilege may be involved.

The SIOB provides strategic direction and management of designated sensitive investigations and ensures alignment of AFP capabilities and capacities to conduct sensitive investigations. The purpose of escalating particularly sensitive investigations to the SIOB is to ensure AFP senior executive have direct awareness and oversight of the matter and, in some cases, make certain operational and strategic decisions. The SIOB endorses the investigation strategy and any proposed applications for warrants or authorisations specified in this guideline.

Through regular operational briefings and continued oversight, the SIOB ensures the relevant Clerk (or in their absence, or if otherwise appropriate, the Deputy Clerk) is notified ahead of the execution of any search warrants or use of covert investigative powers in investigations where parliamentary privilege may be involved. The purpose of AFP engagement with the Clerk is to advance/progress a criminal investigation in a manner which is consistent with parliamentary privilege.

The AFP's consultation with the Clerks is subject to the applicable secrecy provisions in the relevant legislation and the Protective Security Policy Framework.

## 4.1 Training

The AFP delivers online training on parliamentary privilege and the application of the MOU and this guideline to all AFP members. In any investigation potentially involving parliamentary privilege, the lead investigator must ensure all officers involved, including constables assisting, are trained in the requirements of this guideline and their obligations. This includes not disclosing any details relating to the investigation outside of the investigation team or the Independent Monitor Team (IMT), detailed in section 5.2. To inform a decision on an investigation where parliamentary privilege may be involved, investigators must consider this guideline, ensure the SIOB is appropriately briefed and follow any strategic directions from the SIOB relating to the investigation.

## 5. Covert investigative powers

This section outlines procedures that must be followed where the AFP proposes to seek and use a warrant or authorisation under either the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act) or *Surveillance Devices Act 2004* (Cth) (SD Act) (a covert investigative power), in relation to an investigation where the AFP identifies that parliamentary privilege may apply.

### 5.1 Application for covert investigative power

The SIOB endorses the investigative strategies for investigations where parliamentary privilege may apply, including a decision to apply for a covert investigative power. Where operational urgency prevents this from occurring, verbal approval from Deputy Commissioner National Security must be sought.

Following the SIOB's endorsement and prior to the application for the covert investigative power, the AFP notifies the relevant Clerk of the AFP's intent to apply for a covert investigative power which has the potential to identify material that may be subject to parliamentary privilege. The notification is to include the nature of the allegation and the offence/s being investigated, but exclude any identifying details. **To ensure the integrity of the investigation, all AFP communications with the Clerk are on a confidential basis, until otherwise agreed.**

The AFP and Clerk discuss and agree on appropriate ways to mitigate any risks the investigation would improperly interfere with parliamentary functions. The AFP will continue consultation with the Clerk throughout the investigation, at appropriate times, including prior to any future use of covert investigative powers.

The SIOB should continue to be briefed on the status of the investigation, including on any engagement with, or notifications to the Clerk.

An application on affidavit for a covert investigative power which has the potential to identify material subject to parliamentary privilege should disclose this fact, and set out the AFP's proposal for dealing with the material.

During the investigation, the application for, or existence of any material captured under the warrant is treated as confidential within the AFP and disclosure is limited to those with a need to know for the purpose of fulfilling their functions (for example, the relevant issuing authority, the SIOB and the Office of the Commonwealth Ombudsman).

## 5.2 Establishment of Independent Monitor Team

Once an application for a covert investigative power is approved, an Independent Monitor Team (IMT) is established to quarantine, review and assess material collected under covert investigative powers. A suitable officer (Commander or above) is appointed by the SIOB to lead the IMT. This officer (IMT Lead) is responsible for consulting and briefing the relevant Clerk.

An IMT may comprise AFP appointees such as sworn investigators, lawyers (including external counsel), technical monitors or other suitable appointees who are not part of the AFP team conducting the investigation. Members of the IMT must be appropriately briefed to enable them to review and assess material. In its assessment, the IMT considers material collected to determine when to seek advice from the Clerk on the best way to manage the risk of improperly interfering with parliamentary functions (detailed further below at Section 5.4). The timings for engagement may differ from investigation to investigation depending on the volume or nature of material collected; however, the AFP should proactively consider undertaking this engagement at the earliest appropriate opportunity. The IMT Lead must brief on the status of the investigation, and provide recommendations to the SIOB, but must not discuss or brief on the content of material that may be privileged. This may occur both prior to or following any engagement with the Clerk.

## 5.3 Procedures to quarantine, review and classify material

Material obtained under the covert investigative power is provided to the IMT to quarantine, review and classify according to the following categories:

- Relevant to the investigation and potentially protected by parliamentary privilege.
- Relevant to the investigation and likely not protected by parliamentary privilege.
- Not relevant to the investigation and potentially protected by parliamentary privilege.
- Not relevant to the investigation and likely not protected by parliamentary privilege.

As soon as practicable during the initial collection of material (and before provision of material to the investigation team), the IMT will meet with the Clerk to discuss the categorisation process, including the approach to categorising material, particularly Category B. The IMT will consider the advice of the Clerk to inform the approach to

categorisation. Ongoing discussion and advice from the Clerk will occur in line with section 5.4.

When material categorised as Category A is identified, it is quarantined from the investigative team. The IMT briefs the SIOB, advising of the quantity and type of information, but does not discuss the content of the material. The SIOB should approve the Clerk being notified of Category A material.

Material categorised as relevant to the investigation and likely not protected by parliamentary privilege (Category B), is released to the investigative team with notification to the SIOB.

Category C and D material is quarantined and marked for destruction in accordance with any legislative requirements.

## 5.4 Consultation with Clerks

**The AFP, through an appropriate officer, will proactively engage and consult the relevant Clerk at appropriate times in relation to the AFP's use of covert investigative powers in investigations where parliamentary privilege may be involved.** The IMT Lead Officer must notify the Clerk of the Category A material and seek their advice on whether any further use of the material can be made.

**Consultation with and advice from the Clerk does not amount to a formal claim or assessment of privilege. However, this consultation allows the captured material to be continually assessed and for the AFP to undertake other investigative actions without improperly interfering with parliamentary functions.**

For example, the Clerk may advise, in reviewing Category A material provided by the IMT, that some material may more likely be Category B and can be released to the investigations team. As part of this consultation process, (as detailed further at Section 5.3) the AFP will also discuss with the Clerk the collection of Category B material, and advise that any Category C material collected will be, or has been, quarantined and identified for destruction in accordance with any legislative requirements.

During consultation, the Clerk advises the AFP of any risks the investigation may improperly interfere with parliamentary functions. The AFP and the Clerk then discuss and agree on the appropriate way to mitigate any risks the investigation would improperly interfere with parliamentary functions. This may include:

- continued SIOB oversight of the investigation
- continuing the investigation without accessing material classified as Category A or
- seeking a formal consideration by the privileges committee as to whether material classified as Category A is privileged or may be used in the investigation.

The AFP may make the decision to discontinue aspects of the investigation which are likely to amount to an improper interference with parliamentary functions.

Where the AFP decides not to access the Category A material (and maintain the covert status of the investigation), the investigation will continue, with appropriate briefing to the SIOB.

If the AFP seeks to use further covert powers as specified in this guideline during the course of the investigation, the AFP notifies the Clerk. The Clerk and the AFP discuss and agree on measures necessary to manage the risk of improperly interfering with parliamentary functions, in accordance with this guideline.

Where the AFP decides to seek a formal consideration of whether the material is privileged or can be used in the investigation, the AFP will advise the Clerk to notify the affected parliamentarian/s to allow them to decide whether to make a claim of privilege. The material remains in quarantine while the relevant privileges committee meets to consider a finding in relation to the privilege. Where a parliamentarian wishes to raise a matter of privilege, the process outlined at section 6.5 of this guideline may be implemented. The AFP may consider and agree to an alternative procedure, in consultation with the Clerk and relevant committee where circumstances require.

It is a matter for the affected parliamentarian/s to raise a matter of privilege, and if the relevant House refers the question to the relevant Privileges Committee, for that Committee to make a finding and recommend to the relevant House what action, if any, should be taken.

The AFP should ensure any investigative actions adhere to the recommendations of the relevant Privileges Committees and any legislative requirements.

**5.5 Procedures where the AFP identifies material collected under a covert investigative power that may be protected by parliamentary privilege (where there was no previous indication the investigation may be within the scope of this guideline).**

If it becomes apparent material collected under a covert investigative power may be protected by parliamentary privilege, the investigator must cease review, and follow the procedures under this guideline (from 5.1 – 5.4, including notification to the SIOB and the Clerk, and establishment of an IMT) as soon as possible.

## 6. Executing search warrants

This section outlines procedures that must be followed where AFP proposes to execute a search warrant in relation to a person elected to a federal, state or territory parliament (a member) or their staff, or premises occupied or used by these individuals, including:

- office in the parliament, legislative assembly, house of assembly or legislative council
- electorate office
- residence of a member or their staff
- any other premises used by a member or their staff for private or official purposes on which there is reason to suspect that privileged material may be located
- any other premises not used or occupied by a member or their staff where the AFP suspects or is informed that documents on the premises may be subject to parliamentary privilege
- any other location where an individual claims that material is covered by parliamentary privilege.

## 6.1 Procedure prior to obtaining a search warrant

An AFP appointee who proposes to apply for a search warrant in respect of a person or premises listed above must seek approval through the SIOB before applying for the warrant unless there are circumstances of such seriousness or urgency and/or there is reasonable suspicion that evidence could be destroyed (for example, a crime scene). In these circumstances, verbal approval from Deputy Commissioner National Security (and subsequent approval of the SIOB) is appropriate.

AFP Legal will provide assistance to draft and/or review the affidavit and warrant, as well as providing legal advice in relation to the execution of the warrant.

AFP appointees should follow the [Better Practice Guide on Crimes Act 1914 search warrants \(DOCX, 235KB\)](#).

## 6.2 Procedure prior to executing a search warrant

The AFP should, unless Deputy Commissioner National Security or the SIOB determines that to do so would affect the integrity of the investigation, contact the member or a senior member of staff prior to executing the warrant with a view to agreeing on a time for execution of the search warrant so as to minimise any interference with the performance of the member's duties.

Additionally, a senior AFP appointee (Commander or above) should:

- contact the relevant presiding officer before executing the search warrant and notify that officer of the proposed search, or
- if a presiding officer is not available, contact the Clerk or Deputy Clerk or, where a committee's documents may be involved, the chair (or if unavailable, the secretary) of that committee.

## 6.3 Procedure for executing the search warrant

Where possible, the executing officer should comply with the following procedures unless compliance would affect the integrity of the investigation:

- A search warrant should not be commenced on a sitting day unless otherwise agreed.
- A search warrant should be executed at a time when the member or a senior member of their staff will be available to be present.
- The member or their staff should be given reasonable time to consult the relevant presiding officer and/or a lawyer before the warrant is executed.

If the member or their staff is present when the search is conducted, the executing officer should ensure that they have a reasonable opportunity to claim parliamentary privilege in respect of any documents or other material.

There is a public interest in maintaining the free flow of information between constituents and their parliamentary representatives. Accordingly, even if there is no claim for privilege, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search. The executing officer should consider inviting the member or staff to identify where documents or other material that fall within the scope of the search warrant are located. When viewing electronic evidence, the executing officer should also consider strategies, for example key word searches, to find documents that meet conditions of the warrant rather than seizing entire drives or computers in the first instance. If relevant documents are identified, they should be transferred to another external storage device and secured along with other material.

## 6.4 Procedure if privilege is claimed or identified

The executing officer should follow this procedure if they identify any material collected under the warrant might be subject to a claim of parliamentary privilege. It also applies if a claim of parliamentary privilege is made.

If a claim is made, the executing officer should ask the individual to identify the basis for the claim. The executing officer should make a diary note of this request and then follow the quarantine procedure outlined below.

The executing officer should advise the person making the claim of the following procedure to ensure that the relevant documents or other material are protected until the claim has been resolved.

## 6.5. Quarantine procedure

- The relevant material should be placed in secure audit bags in accordance with the [AFP National Guideline on property and exhibits](#).
- A list of the exhibits is prepared by the executing officer, with the member or their staff to provide particulars where required.



- The member or their staff must be given an opportunity to take or be provided with copies of any documents or other material before they are secured. The copying should be done in the presence of the executing officer.
- The secured exhibits should be delivered into the safekeeping of the Clerk or a person suitably identified by the presiding officers.
  - In circumstances where electronic devices are seized or moved and require further examination to retrieve information (for example from a computer hard drive), access to the devices can be facilitated by consultation between the AFP with the presiding officers (or Clerk) and the relevant member, where appropriate.
  - The timeframes for return to the owner will vary based on the investigation and will occur in consultation with the presiding officers and the relevant member.
  - Information able to be retrieved should be transferred to a separate external storage device and secured consistent with quarantine procedures.
- The member has ten business days (or other period agreed by the AFP and the member) from the delivery of the exhibits to the third party to notify the executing officer either the claim for parliamentary privilege has been abandoned or confirm they intend to formally request the appropriate House consider whether the material seized is covered by parliamentary privilege. Such notification will be in writing.
- When a member notifies the executing officer they will seek a ruling on a claim of parliamentary privilege, the exhibits should remain in the possession of the Clerk or a person suitably identified by the presiding officers until the disposition of the material is determined in accordance with the ruling.
- If the member has not contacted the AFP within ten business days (or other period agreed by the AFP and the member), the AFP is entitled to assume the claim for parliamentary privilege has been abandoned. The AFP should take reasonable steps to confirm the claim is not being pursued, including attempting to seek that confirmation from the member. Following this, the Clerk or their nominee should deliver the material to the executing officer to proceed as required.

The executing officer may consider and agree to an alternative procedure, in consultation with the member or the presiding officer where circumstances require.

## 6.6 Obligations at the conclusion of a search

The executing officer must provide a receipt recording exhibits seized under the search warrant. If the member or their staff do not hold copies of the exhibits that have been seized, the receipt should contain sufficient particulars to enable the member to obtain further advice.

The executing officer should inform the member that to the greatest extent possible the AFP will provide or facilitate access to the exhibits where such access is necessary for the

performance of the member's duties. The AFP should provide or facilitate access on those terms. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.

The AFP will comply with any law, including the requirements set out in the legislation under which the relevant search warrant was issued.

If material is relevant to an investigation and a claim of privilege is upheld, the AFP must, in accordance with disclosure guidelines, notify the prosecutor that material subject to parliamentary privilege has been quarantined. The prosecutor then assess whether to advise the court and defence counsel.

If the relevant House determines material is protected by parliamentary privilege, the AFP must not make any use of that material. If the AFP is in possession of material that is subject to an upheld privilege claim, the AFP must consult with the affected member to either return or destroy that material.

## 6.7 Information held by a third party

Where information is held by a third party and the third party is holding that information on behalf of a person – for example a cloud service provider – and the AFP is aware that an issue of parliamentary privilege may arise, the executing officer should request the information directly from the person for whom the third party is holding the information.

Where a Deputy Commissioner or the SIOB determines this is likely to have an adverse impact on the investigation and information is to be sought from the third party, the executing officer should:

- notify the relevant presiding officer before executing the search warrant (If a presiding officer is not available, the executing officer should notify the Clerk or Deputy Clerk or, where a committee's documents may be involved, the chair (or if unavailable, the secretary) of that committee) and
- outline the reasons why requesting information directly from the person is likely to have an adverse impact on the investigation.

Members or their staff may make claims of parliamentary privilege in accordance with this guideline over material sought under warrant executed on a third party in this way. Once information is obtained from a third party, the executing officer must then inform members or their staff as soon as practicable with regard to operational requirements and ensure that they have a reasonable opportunity to claim parliamentary privilege in respect of any information obtained.

In addition, the disclosure of information by a third party to a parliamentarian for the purposes of assisting their parliamentary work may be protected by parliamentary privilege (in the same way that submission of evidence to a parliamentary committee is protected). If a third party claims information is protected by parliamentary privilege, the

relevant parliamentarian should be given an opportunity to make that claim and, if a claim is made, the quarantine procedure outlined above should be followed.

## 7. Reporting

For the Commonwealth Parliament, the AFP provides a confidential report to the relevant privileges committee and the relevant presiding officer annually on the number of instances in the last financial year where:

- prospective or historical telecommunication data requests are authorised in respect of a member or their staff;
- SD warrants are granted or renewed in respect of a member or their staff; and
- TI warrants are granted or renewed in respect of a member or their staff.

The AFP also provides a de-identified description of the general type of offences being investigated. There are risks associated with providing detailed information about law enforcement investigations and the use of covert powers as there is a potential for adverse inferences to be drawn from this data. Noting this, the AFP only provides the number of instances in categories such as:

- 0
- 1–5
- 6–10
- 11–15.

In respect of telecommunications data, AFP does not report data requests generated in response to investigations where the member or their staff is the victim or person requesting investigative activity, for example investigations into threats or abuse directed towards a member or their staff.

The AFP only reports on telecommunications data requests where it is known prior to the check being conducted that the person is a member or a staff member, and the investigative activity likely relates to their role as a member or staff member.

## 8. Review of this guideline

The guideline will be reviewed every three years.

## 9. Further advice

Queries about the content of this guideline should be referred to Commander Special Investigations.

## 10. Relevant legislation

- [Australian Federal Police Act 1979](#) (Cth)
- [Australian Federal Police Regulations 1979](#) (Cth)
- [Parliamentary Privileges Act 1987](#) (Cth)

## 11. Shortened forms

<b>AFP</b>	Australian Federal Police
<b>MOU</b>	memorandum of understanding
<b>SIOB</b>	Sensitive Investigations Oversight Board
<b>SD</b>	Warrants obtained under the Surveillance Devices Act 2004 (Cth)
<b>TI</b>	Warrants obtained under the Telecommunications (Interception and Access) Act 1979 (Cth)

## 12. Definitions

**A member** is a person elected as a member of a parliament.

**AFP appointee** means a Deputy Commissioner, AFP employee, special member or special protective service officer and includes a person:

- engaged under section 35 of the AFP Act as a consultant or contractor to perform services for the AFP and determined under section 35(2) of the AFP Act to be an AFP appointee
- engaged overseas under section 69A of the AFP Act
- seconded to the AFP under section 69D of the AFP Act.

(See section 4 of the AFP Act.)

**AFP member** means a 'member of the Australian Federal Police' as defined in section 4 of the AFP Act and the [AFP Glossary](#).

**Constables assisting** means a person who is a constable and who is assisting in executing the warrant, or a person who is not a constable and who has been authorised by the relevant executing officer to assist in executing the warrant.

**Clerk** means:

- in the Senate, the incumbent person holding the office of Clerk of the Senate, appointed by the President of the Senate under section 58(1) of the *Parliamentary Service Act 1999*; or
- in the House of Representatives, the incumbent person holding the office of Clerk of the House of Representatives, appointed by the Speaker of the House under section

58(2) of the *Parliamentary Service Act 1999*.

**Covert investigative power** means a warrant or authorisation under either the *Telecommunications (Interception and Access) Act 1979* (Cth) or the *Surveillance Devices Act 2004* (Cth).

**Independent Monitor Team** means a team which may comprise AFP appointees such as sworn investigators, lawyers (including external counsel), technical monitors or other suitable members who are not part of the AFP team conducting the investigation.

**Investigator** is an AFP appointee responsible for, or involved in, a particular investigation.

**Presiding Officer** means:

- in the Senate, the incumbent senator holding the office of President of the Senate under section 17 of the Constitution; or
- in the House of Representatives, the incumbent member of the House of Representatives holding the office of Speaker of the House under section 35 of the Constitution

## 13. Attachments

Attachment A – Memorandum of Understanding on the execution of search warrants in relation to a member of parliament between the Speaker of the House of Representatives, the President of the Senate, the Attorney-General, and the Minister for Home Affairs (PDF, 280KB).

**This National Guideline is an annexure to the MOU agreed to by the Executive, Government and Parliament. The text of this National Guideline cannot be changed without agreement from these parties.**

PUBLISHED PURSUANT TO THE

Last updated: 12/06/2024 9:29

FREEDOM OF INFORMATION ACT 1982 (COMMONWEALTH)

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INFORMATION PUBLICATION SCHEME (IPS)

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