

Unlawful search of journalist Nicky Hager's property

OUTLINE OF EVENTS

1. On 13 August 2014, Nicky Hager released a book titled *Dirty Politics: How attack politics is poisoning New Zealand's political environment*. This book included emails hacked from the blogger Cameron Slater. Mr Slater then complained to Police that he had been hacked about six months earlier.
2. On 2 October 2014, Police searched Mr Hager's home in Wellington and seized or cloned many items including USB storage devices, documents, CDs, phones and computers. The search lasted for over 10 hours. While Mr Hager was not himself a suspect, Police were seeking evidence regarding the identity of a hacker known as 'Rawshark' who had confidentially provided Mr Hager with information for his book.
3. Mr Hager sought a judicial review of the Police's search warrant. On 17 December 2015, the High Court in Wellington issued a judgment declaring the search warrant was "*fundamentally unlawful*", and therefore the search was also unlawful.¹ These findings resulted from the Police's failure to comply with their 'duty of candour' when drafting the search warrant; in particular, Police did not mention that Mr Hager was a journalist and could claim 'journalistic privilege' to protect his confidential source.²
4. On 21 December 2015, Green Party co-leader Metiria Turei complained to the Authority about the Police's search of Mr Hager's property. She asked the Authority to investigate:
 - whether there was any misconduct or neglect of duty by any member of Police;
 - the Police's decision not to disclose in their warrant application the journalistic privilege issue "*and more generally the principles and issues relating to media warrants*"; and
 - the actions of officers who were involved in the decision-making process regarding the application for the warrant.

¹ *Hager v Attorney General* [2015] NZHC 3268.

² Section 68(1) of the Evidence Act 2006 states: "*If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.*"

5. The Authority conducted an independent investigation. Mr Hager raised further questions about the Police's actions, including whether Police:³
 - had reasonable grounds to obtain the search warrant;
 - conducted the search and subsequent investigation appropriately in the light of Mr Hager's journalistic privilege claim; and
 - breached Mr Hager's privacy by using information requests and production orders (some of which wrongly suggested he was suspected of committing a crime) to gather information about his finances and travel.
6. Mr Hager was particularly concerned that the Police's actions in this case endangered the media's freedom to access information from confidential informants. In June 2018, Police reached a settlement with Mr Hager, under which they issued an apology for breaching his rights, paid substantial damages and contributed towards his legal costs.

THE AUTHORITY'S INVESTIGATION

7. During its investigation the Authority reviewed Police investigation documents and interviewed Mr Hager, his lawyers, his daughter (who was present during the search), and seven Police staff involved in the 'Rawshark' investigation.
8. The Authority identified and considered the following issues:
 - 1) The search warrant:
 - a) Did the Police's failure to discharge their 'duty of candour' amount to misconduct or neglect of duty?
 - b) Did Police have reasonable grounds to believe they would discover relevant evidence by searching Mr Hager's home?
 - c) Were there deficiencies in the drafting of the warrant?
 - 2) The search:
 - a) Was the search conducted in an appropriate manner?
 - b) Was the seizure of material during the search in accordance with the warrant?
 - 3) Did Police breach journalistic privilege by recording and/or taking investigative steps to act on information they observed or collected during the search?

³ Mr Hager and his lawyers also complained about the Police's disclosure and provision of information following Privacy Act and OIA requests. These concerns are more appropriately dealt with by the Privacy Commissioner and the Ombudsman respectively.

- 4) Did Police fail to fulfil their duty of candour when applying for production orders after privilege had been claimed, and did they have reasonable grounds to believe they would find evidential material?
- 5) Was the Police's investigation into this matter disproportionate or given undue priority?

THE AUTHORITY'S FINDINGS

THE SEARCH WARRANT

Issue 1(a): Did the Police's failure to discharge their duty of candour amount to misconduct or neglect of duty?

9. The High Court found that Police failed in their duty of candour regarding the search warrant application because they did not communicate to the Judge that Mr Hager was a journalist and privilege issues might be involved.
10. When interviewing the officers involved in drafting and executing the search warrant, the Authority found they had no experience in dealing with journalistic privilege issues. The lead detective himself acknowledged he had never come across the issue of journalistic privilege before and did not know anything about it. It is therefore not surprising that he and others said that they simply acted on the legal advice they had received regarding the content of the search warrant application. The detective inspector overseeing the case told the Authority:

"...the warrant that I did on another ... address a couple of months prior, I did decide to put in the draft just two paragraphs saying we anticipated privilege would be claimed, and that's how we would deal with it if it was claimed, and that went to legal section and the advice was to take that out. So I essentially used that as the yardstick around not putting those two paragraphs in this application."
11. There is no evidence that the officers prepared the warrant with the intent of deceiving the Judge about the fact that the subject was a journalist and there might be privilege issues. Although the court found they failed to fulfil their obligations, this failure in the circumstances was an unwitting neglect of duty.
12. The officers' lack of knowledge of how privilege issues should be dealt with was compounded by gaps in Police policy in relation to journalistic privilege (and privileged material more generally), and by the fact that the Search and Surveillance Act 2012 did not provide a clear description of the processes to be followed. The Ministry of Justice and the Law Commission have subsequently recommended that the Act be amended to include a principle that powers under the Act be exercised in a manner that protects any privilege held by or available to any person.⁴ They have also proposed that there should be procedures to facilitate out-of-court resolution of privilege claims.

⁴ Ministry of Justice and Law Commission (2017), *Review of the Search and Surveillance Act 2012*.

FINDINGS ON ISSUE 1(A)

The Police's failure to fulfil their duty of candour to the Judge who issued the warrant, by failing to draw attention to the fact that a claim of privilege might be available, was an unwitting neglect of duty and did not amount to misconduct by any individual officer.

Police policy at the time did not adequately set out the procedure officers needed to follow when applying for a search warrant or executing a search in relation to potentially privileged material. The policy was particularly deficient in its coverage of possible journalistic privilege.

Issue 1(b): Did the Police's warrant application disclose reasonable grounds to believe they would discover relevant evidence by searching Mr Hager's home?

13. In the search warrant, Police claimed there were reasonable grounds to believe they would find evidential material relating to the crime of 'Accessing a computer system for dishonest purpose' (section 249 of the Crimes Act 1961) at Mr Hager's home. The High Court Judge commented, without expressing any final view on the matter, that it appeared Police were proceeding with the search warrant application in the hope, rather than expectation, of finding evidence.
14. The Authority has not reached a conclusion about whether the Police in fact had reasonable grounds to believe that they would find evidential material on the premises. However, the Authority is satisfied that the warrant application did not sufficiently articulate what those grounds were, and was therefore defective in this regard. The Authority notes that the Police themselves acknowledged this as part of the settlement reached with Mr Hager.

FINDINGS ON ISSUE 1(B)

The warrant application did not sufficiently address whether the officers had reasonable grounds to believe they would find relevant evidence in Mr Hager's home.

Issue 1(c): Were there deficiencies in the drafting of the warrant?

15. The Police's search warrant listed 'categories' of evidential material that were to be searched for and seized. The law is clear that, particularly in relation to electronic material, the warrant must specify precisely what is being looked for in a manner that clearly links it to the offence under investigation and should also specify how that material will be identified. In the absence of that specificity, the warrant will be invalid for want of specificity.
16. Three of the five categories clearly articulated the relevant evidential material being sought and were appropriately drafted and specific to the offence under investigation.
17. However, the other two categories were not specific enough. For example, Police sought "*evidential material comprising of documents in either electronic and/or paper form relating to the authoring of the 'Dirty Politics' book released on Wednesday 13 August 2014*". This would have covered a great deal of correspondence which had nothing to do with the material allegedly hacked by Rawshark. It was therefore of a general nature and invalid.

18. The remaining category was drafted so vaguely that it appeared to allow the seizure of all of Mr Hager's emails, regardless of the content. It also failed for want of specificity.
19. In these respects, therefore, the warrant as drafted was invalid and should not have been issued.
20. This last category also seemed to permit access to all internet-based material accessible from computers found at Mr Hager's address, whether or not password-protected. Mr Hager argued that the seizure of evidence under this category amounted to a 'remote access' search, which requires a special warrant.⁵ The Search and Surveillance Act allows a search (under a warrant or warrantless power), to encompass a "computer system", which is to include "two or more interconnected computers combined with any communication links between computers or to remote terminals or any other device". On one reading, this definition would appear to be broad enough to allow access to any web-based material that is accessible from a computer that is being lawfully searched. However, other interpretations are available, and the Authority understands that law enforcement practice is inconsistent in this area. As part of their review of the Act, the Law Commission and the Ministry of Justice have therefore proposed that the Act be amended to provide greater clarity on this issue. In the meantime, the Police approach cannot be criticised in the absence of any legal decision that it is unlawful.

FINDINGS ON ISSUE 1(C)

The search warrant was not specific enough when describing two of the five categories of evidential material that was to be searched for and seized.

THE SEARCH

Issue 2(a): Was the search conducted in an appropriate manner?

21. When Police arrived to search Mr Hager's home in Wellington on the morning of 2 October 2014, he was in Auckland. Mr Hager's daughter answered the door and telephoned her father to advise him. Mr Hager then spoke to the lead detective over the phone and raised his objections to the search. The lead detective consulted a more senior officer and, during a second phone conversation with Mr Hager a short time later, asked if he was claiming journalistic privilege. Mr Hager confirmed he was and arranged for his lawyers to go to the house. However, Police had already started searching the property before they raised the issue of journalistic privilege.
22. Police had prepared for the existence of a privilege claim by bringing bags and seals to ensure they could appropriately seal any material that was claimed to be privileged, and by engaging a Crown solicitor to deal with the anticipated claim. However, they did not plan how to give Mr Hager the opportunity to claim privilege if he was not home when they arrived. This is demonstrated by the fact that Police had planned to force entry if no one was home. When

⁵ A remote access warrant is obtainable if an issuing officer is satisfied that the facility being searched is not situated at a physical address that is capable of being entered and searched (see section 103(6)). The warrant must specify with sufficient particularity the access information that identifies the thing to be searched remotely, such as the email address or the log on information relating to the site to be searched.

interviewed, the officers were unable to explain how privilege could have been claimed by Mr Hager given that circumstance.

23. As with the officers' lack of candour in the search warrant application, this oversight appears to have been due to their unfamiliarity with the requirements relating to privileged material rather than any disregard for their legal obligations. Their failures can therefore be attributed to both this lack of familiarity and the inadequacies in Police policy that did not provide them with appropriate guidance.
24. The plan for facilitating a claim of privilege should have included ensuring that:
 - reasonable efforts would be made to contact Mr Hager before the search commenced;
 - he would be given a reasonable opportunity to claim privilege;
 - he would be given a reasonable opportunity, either personally or through his lawyers, to identify the material in respect of which that claim was being made; and
 - this material would then be seized and secured without being perused by Police.
25. Police would then have been free to search the remaining material over which privilege was not claimed, and the material in respect of which privilege was claimed (whether or not relevant) would have been assessed by the Court in due course.
26. In this case the process Police used to sort relevant from irrelevant material involved perusal of all the documents, which in itself breached privilege. The Authority understands there was a surprisingly large volume of hardcopy material in the house being searched, and Police felt it necessary to sort the material so they did not seize and secure too much. It is also fair to note that the legislation provides no guidance as to how the Police should approach this situation. There is no evidence that the officers were acting in bad faith or deliberately setting out to undermine the privilege claim. Nevertheless, when coercive powers are being exercised, it is incumbent on officers to ensure that they are acting in accordance with the applicable law.

FINDINGS ON ISSUE 2(A)

Police did not conduct the search in an appropriate manner because they did not adequately plan how to give Mr Hager the opportunity to claim privilege over the material being searched if he was not at home. Nor did Police adequately plan how to secure the relevant documents without breaching privilege.

Issue 2(b): Was the seizure of material during the search in accordance with the warrant?

27. The Authority considers that Police did not sufficiently narrow down what they were looking for when they were conducting the search. As a result, they seized some items that could not conceivably have had any evidential value. Mr Hager told the Authority that Police seized a "*ludicrously random set of things*", including a tramping food list, and:

“... they took things with a wide selection of names and contacts on them, not because they were looking for a particular person because they can't have been because they were way too random for that....”

This included some – I'm very careful with my confidential sources, so there were no risky sources there but there were people who would not have liked the Police to know that they talked to me....”

28. The Authority considers that this resulted from the Police's lack of an effective process for identifying the documents over which privilege was being claimed. While Mr Hager's lawyers were present during most of the search, they were not necessarily able to discern which material Mr Hager would want to claim privilege over. This led Police to seize, in a non-selective way, a large volume of material without properly assessing its relevance, including documents that had not been the subject of any specific privilege claim. It is understandable that the search was conducted in this way: Mr Hager was not there to identify the material in respect of which he was asserting privilege; and the Police did not want to scrutinise the material too closely for fear of breaching privilege. If there had been a better plan in place from the outset, this could have been avoided.
29. The High Court Judge raised a question about the lawfulness of the search of Mr Hager's daughter's computer, although he made no decision on the matter. Mr Hager's daughter also queried why Police felt it necessary to search her bedroom, laptop and phone, and noted it was extremely inconvenient for her.
30. However, in the Authority's view there was no reason under the terms of the warrant to distinguish between the daughter's bedroom or computer and any other part of the house. If Mr Hager had set out to conceal evidential material in the house, it was reasonable for Police to assume he might have concealed it anywhere.

FINDINGS ON ISSUE 2(B)

Police seized, in a relatively non-selective way, a large volume of material without properly assessing its relevance, including documents that had not been the subject of any specific privilege claim. If there had been a better plan in place from the outset to deal with potentially privileged material, this could have been avoided.

Given that the evidential material being sought could have been held in any electronic form in the house, it was appropriate that the Police search both the daughter's bedroom and her electronic devices.

Issue 3: Did Police breach journalistic privilege by recording and/or taking investigative steps to act on information they observed or collected during the search?

31. Mr Hager complained about four potential breaches of his privilege rights as a result of investigative steps taken during and after the search.
32. First, a detective photographed a document he found during the search and emailed it to another detective in Auckland who investigated the information. Police have acknowledged that this was a breach of privilege. The detective who sent the photograph frankly conceded in

interview that he should not have done this and said he did not have the privilege issue in mind when he made the decision.

33. Secondly, Police took copies of information relating to a cellphone and used them to send information requests to phone companies. Although it turned out there was no information to be obtained, the Authority considers that this was a breach of privilege.
34. Thirdly, Mr Hager and his lawyers have raised the fact that Police may have breached privilege by forwarding details of a Hushmail account they found to the Electronic Crime Laboratory, so that attempts could be made to ascertain the account holder. Although the account could not be found, the Authority considers that the Police actions in this respect again constituted a breach of privilege, since they infringed on Mr Hager's legal right to protect his sources.
35. Finally, Police retained records of what was seized from Mr Hager's property, in accordance with their usual practice, and provided the occupier of the searched place with a written notice recording what was seized, in accordance with section 133 of the Search and Surveillance Act.
36. However, there is a conflict between the requirements of section 133 of the Search and Surveillance Act and the privilege provisions, which require Police to seal any evidence which is subject to a privilege claim and provide it to the Court for determination of the privilege issue. The Authority considers that the privilege provisions override the section 133 requirement. As a result, a record of what was seized should not have been kept on the investigation database; it should have accompanied the sealed material sent to the court.

FINDINGS ON ISSUE 3

Police breached privilege and thereby acted unlawfully by taking investigative steps to act on information they observed or collected during the search.

It was also a breach of privilege and unlawful for officers to take notes of items which had been seized and in respect of which privilege had been claimed, and to retain them on the investigation database instead of sealing them and sending them to the Court.

Issue 4: Did Police fail to fulfil their duty of candour when applying for production orders after privilege had been claimed, and did they have reasonable grounds to believe they would find evidential material?

37. After searching Mr Hager's property, Police sought and obtained Mr Hager's private information from various companies including Air New Zealand, Paypal, NZ Customs, and Jetstar. Police failed to fulfil their duty of candour when applying for these production orders, because they neglected to advise the issuing officer that the material being sought could be the subject of a claim of journalistic privilege.
38. The Authority also considers that Police did not even come close to demonstrating that the officer making the application had reasonable grounds to believe that the Police would find evidential material. For example, the applications for information from Air New Zealand and Jetstar were simply based upon the possibility that Police might discover evidence of a link between Mr Hager and some other person as a result of his travels. The applications do not even

specify whether this evidential material might relate to fellow passengers or places visited. There is nothing in the applications to support the belief that Mr Hager's meetings with Rawshark occurred as a result of travel on these airlines. These production orders cannot be characterised as anything other than a fishing expedition.

39. The Police's failure to fulfil the duty of candour in the applications for the production orders is explicable, as with the search warrant application, on the basis that the officers concerned were simply not attuned to the significance of the privilege issue. The investigating officers were relying on legal advice that section 68 of the Evidence Act 2006 did not apply, and that there was therefore no need to mention the issue in the application.⁶ This advice was presumably given on the basis that privilege could not have been claimed by Air New Zealand and Jetstar, because Mr Hager held the privilege rather than them. While this is true, the Authority disagrees with the view that the existence of the privilege did not need to be mentioned in the application. Air New Zealand and Jetstar would not have been able to withhold the information on the basis of the privilege, but the fact that the information was privileged under section 68 of the Evidence Act 2006 was clearly a relevant factor in whether the order should be issued at all. The Police therefore had a duty to disclose it. The Police acknowledged this in their settlement with Mr Hager. However, the officers cannot be criticised for relying on the incorrect advice they received.
40. In relation to the reasonable belief test, there does not seem to be any evidence available to the Police that Mr Hager had been travelling anywhere with Rawshark. The applications were clearly made on a hope rather than an expectation.

FINDINGS ON ISSUE 4

Police failed to fulfil their duty of candour in respect of the production orders.

Police did not have reasonable grounds to believe they would find evidential material.

Issue 5: Was the Police's investigation into this matter disproportionate or given undue priority?

41. Mr Hager and his lawyers suggested to the Authority that the amount of resources put into the Rawshark investigation seemed disproportionate.
42. Mr Hager noted that the Police's investigation into Rawshark began after Mr Slater sent an email to Assistant Commissioner Malcom Burgess' PA, complaining that he had been hacked. Mr Hager implied that this contact with a senior Police officer was designed to bring indirect political pressure to bear.
43. On the other hand, Assistant Commissioner Burgess told the Authority he did not know why Mr Slater emailed his complaint directly to his PA. The Police have maintained that this was a serious offence and that the investigation was run like any other of this sort, apart from the fact that there was probably a bit more oversight because of the high-profile nature of it.

⁶ Section 68 deals with the protection of journalists' sources.

44. The Authority does not have information about the competing demands upon investigative resources in the Counties Manukau District at the time and is therefore unable to make any real comparison between this and other similar cases.

FINDING ON ISSUE 5

The Authority is unable to reach any conclusion as to whether the resources devoted to the investigation were proportionate to the seriousness of the alleged offence.

SUBSEQUENT POLICE ACTION

45. As a result of this case, Police have revised the chapter on privilege in the Police manual by:
- a) clarifying the responsibility of officers to identify privilege issues when applying for a search warrant or planning the exercise of a warrantless search power; and
 - b) prescribing the procedures that are to be followed during the execution of a search when privilege is claimed, or potentially privileged material is identified.
46. The Authority has reviewed the revised policy and is satisfied that, in this respect, it appropriately addresses the issues raised by this case.

CONCLUSIONS

47. The Authority determined that:
- 1) The Police's failure to fulfil their duty of candour to the Judge who issued the warrant, by failing to draw attention to the fact that a claim of privilege might be available, was an unwitting neglect of duty and did not amount to misconduct by any individual officer.
 - 2) Police policy at the time did not adequately set out the procedure officers needed to follow when applying for a search warrant or executing a search in relation to potentially privileged material. The policy was particularly deficient in its coverage of possible journalistic privilege.
 - 3) The warrant application did not sufficiently address whether the officers had reasonable grounds to believe they would find relevant evidence in Mr Hager's home.
 - 4) The search warrant was not specific enough when describing two of the five categories of evidential material that was to be searched for and seized.
 - 5) Police did not conduct the search in an appropriate manner because they did not adequately plan how to give Mr Hager the opportunity to claim privilege over the material being searched if he was not at home. Nor did Police adequately plan how to secure the relevant documents without breaching privilege.
 - 6) Police seized, in a relatively non-selective way, a large volume of material without properly assessing its relevance, including documents that had not been the subject of

any specific privilege claim. If there had been a better plan in place from the outset to deal with potentially privileged material, this could have been avoided.

- 7) Given that the evidential material being sought could have been held in any electronic form in the house, it was appropriate that the Police search both the daughter's bedroom and her electronic devices.
- 8) Police breached privilege and thereby acted unlawfully by taking investigative steps to act on information they observed or collected during the search.
- 9) It was also a breach of privilege and unlawful for officers to take notes of items which had been seized and in respect of which privilege had been claimed, and to retain them on the investigation database instead of sealing them and sending them to the Court.
- 10) Police failed to fulfil their duty of candour in respect of the production orders. Police did not have reasonable grounds to believe they would find evidential material.
- 11) The Authority is unable to reach any conclusion as to whether the resources devoted to the investigation were proportionate to the seriousness of the alleged offence.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

20 August 2019

IPCA: 15-1173

ABOUT THE AUTHORITY

Who is the Independent Police Conduct Authority?

The Independent Police Conduct Authority is an independent body set up by Parliament to provide civilian oversight of Police conduct.

It is not part of the Police – the law requires it to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Colin Doherty.

Being independent means that the Authority makes its own findings based on the facts and the law. It does not answer to the Police, the Government or anyone else over those findings. In this way, its independence is similar to that of a Court.

The Authority employs highly experienced staff who have worked in a range of law enforcement and related roles in New Zealand and overseas.

What are the Authority's functions?

Under the Independent Police Conduct Authority Act 1988, the Authority:

- receives complaints alleging misconduct or neglect of duty by Police, or complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- investigates, where there are reasonable grounds in the public interest, incidents in which Police actions have caused or appear to have caused death or serious bodily harm.

On completion of an investigation, the Authority must form an opinion about the Police conduct, policy, practice or procedure which was the subject of the complaint. The Authority may make recommendations to the Commissioner.

This report

This report is the result of the work of a multi-disciplinary team of investigators, report writers and managers. At significant points in the investigation itself and in the preparation of the report, the Authority conducted audits of both process and content.



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