

Statement by the Commonwealth Ombudsman Michael Manthorpe on the Australian Federal Police's handling of allegations made about the Hon Angus Taylor MP

Introduction

This statement outlines the Office of the Commonwealth Ombudsman's investigation into the decision made by the Australian Federal Police (AFP) to finalise its investigation into allegations related to the Hon Angus Taylor MP, Minister for Energy and Emissions Reduction (the Minister) and information in the City of Sydney's annual report ('this matter'). This matter was referred to the AFP by NSW Police.

Our role and the scope of our investigation

Our role is to consider complaints and to seek to influence improvements in public administration. Complaints made about the administrative practices and procedures of the AFP are within our jurisdiction.

On 6 March 2020, we decided to conduct an investigation into the AFP's decision to finalise its investigation into this matter, after we received 150 related complaints from members of the public. Consistent with the *Ombudsman Act 1976* (the Act), our investigation tested whether the AFP's decisions and processes were:

- lawful
- reasonable and just
- based on facts.¹

Our investigation did not evaluate or judge the actions of the Minister, nor those of NSW Police, as their actions are outside our jurisdiction.²

We based our investigation on documents provided to us by the AFP and discussions with them over several months.

The background to and subject of the allegations of wrongdoing

Councillor Clover Moore, the Lord Mayor of Sydney, wrote to the Minister for Environment the Hon Susan Ley MP on 22 August 2019 regarding the declaration of a climate emergency by the Council of the City of Sydney. The letter was referred to the Minister for Energy and Emissions Reduction, the Hon Angus Taylor MP who is responsible for action on climate change.

The Minister wrote to Ms Moore on 29 September 2019, in response to her letter of 22 August 2019, and in this letter he outlined the government's policies to reduce greenhouse gas emissions. As part of this response the Minister outlined practical ways to reduce carbon emissions such as reducing air

¹ Consistent with the criteria at subsection 15(1) of the Ombudsman Act.

² Consistent with subsection 5(2)(a) of the Ombudsman Act.

travel and referred to travel expenditure by the City of Sydney Council of approximately \$15m. This figure was reportedly taken from the council's annual report.

The Daily Telegraph published a story the next day quoting the letter. Ms Moore disputed the story and stated that the City of Sydney's published annual report showed only \$5,934 had been spent on travel.

In a press release that was tabled in Parliament on 25 October 2019, the Minister stated and provided evidence that there were two versions of the annual report on the City of Sydney's website, and he rejected the suggestion that a staffer of his office had altered the document.

On the same day, the Hon Mark Dreyfus QC MP, Shadow Attorney-General wrote to the Commissioner of NSW Police, Michael Fuller APM alleging that the figures used in the newspaper article and in the Minister's letter were based on a forged document and requested this matter be investigated. On 26 October 2019, NSW Police confirmed in the media they had launched Strikeforce Garrad to investigate this matter.

On 31 October 2019, the Minister wrote to Ms Moore and acknowledged that the information he had relied on was incorrect and apologised to Ms Moore. He stated that the information was obtained from a version of the annual report on the council's website.

On 25 November 2019, the Minister tabled a statement in Parliament stating that neither he, nor any of his staff, had altered the annual report. The next day, the Minister stated he would cooperate with any investigation.³

In a letter dated 17 December 2019, NSW Police referred this matter to the AFP and finalised their investigation, partly on the basis that were any offence committed it was likely to have been an offence that fell within the Commonwealth or ACT jurisdiction of the AFP, rather than an offence under NSW law. The letter included attachments related to the NSW Police investigation.

Based on information included in the referral letter to the AFP, it is possible that the incorrect figure, quoted by the Minister, was never included in any public version of the City of Sydney's annual report. Evidence to this effect was also provided by NSW Police in the NSW Parliament. It is possible that a fraudulent document was created containing the incorrect figure upon which the Minister relied, the source of which is unknown.

We also note that there are two different versions of the Annual Report on the City of Sydney's website, a Word and PDF version, and they differ slightly in format, but not in content.

[The AFP's consideration of possible offences](#)

Based on the events that had occurred, and in deciding whether to investigate this matter, the AFP identified several potential offences, under both Commonwealth and ACT law. During our investigation we did not identify any issues or concerns with the range of offences or potential

³ House of Representatives Hansard, 26 November 2019

victims the AFP considered, while noting that the decision not to investigate this matter means there is uncertainty about whether any offence was committed. For absolute clarity, it is important to note that we have not undertaken an investigation into whether an offence was committed, and we make no inference in canvassing these issues. It is simply not known.

Decision making process for this matter

In deciding whether to investigate this matter, the AFP used their new Operational Prioritisation Model (OPM), which had been proposed in the *Review into the AFP's Response to and Management of Sensitive Investigations*, conducted by Mr John Lawler AM APM (the Lawler Review). The OPM is a framework that establishes the broad criteria for consideration in order to prioritise which matters to investigate, or not. We note that in using either the OPM or the previous decision making model, the Case Categorisation and Prioritisation Model (CCPM), a decision to proceed with investigating this matter was open to the AFP, as was the decision not to investigate.

We acknowledge that like all law enforcement agencies, the AFP cannot investigate every matter that comes before it. As context, in the 2018-19 financial year the AFP received 3,377 referrals and undertook 1,467 investigations⁴.

It is clear from the materials we have seen that the AFP gave this matter careful consideration, including through its revised governance arrangements to oversee sensitive investigations. Applying the OPM, the AFP specifically considered:

- the potential offence committed
- the impact and harm of the offence
- the availability of evidence, and
- the resources that would be needed to undertake an investigation.

In considering the harm of the potential offence, the AFP examined whether immediate harm and potential ongoing harm had been done to the community. The AFP formed the view that there was a low risk of ongoing harm to individuals, the community or national interest because:

- it had become widespread public knowledge that the information the Minister relied upon was factually incorrect
- the Minister's apology meant that the public record had been seen to be corrected
- as a result, it was unlikely that the misinformation would or could be further spread to Ms Moore's detriment, and
- this was likely a stand-alone incident with no allegation being made of ongoing criminal conduct.

In considering whether to proceed with an investigation, the AFP formed the view that significant resources would be required to pursue further lines of enquiry. This view had particular regard to the potential need to deploy resource intensive evidence gathering activities, possibly of a covert nature, and the possibility that Parliamentary privilege would attach to, or be claimed in relation to, evidence that might be needed to substantiate any future prosecution.

⁴ Australian Federal Police Annual Report – 2018-19

The AFP also considered the required resources in the context of the AFP's main role, as defined by the 2014 Ministerial Direction⁵, being to combat terrorism, child exploitation, war crimes, cybercrime and serious drug trafficking. The AFP formed the view that to investigate this matter would take resources away from these other tasks and, given the low harm and low seriousness of the alleged offence, it could not justify diverting the required resources to this investigation.

In answers to questions at Senate Estimates hearings, the AFP indicated that, when considering the level of harm caused by the alleged criminal activity, it probably did not consider "general trust in Australian politics" as a specific public interest factor⁶. It is possible, though not evident from the documents we have seen, that the AFP had regard to a broad array of potential public interest factors in determining not to proceed with the investigation. We note, however, that the OPM does not explicitly include in its definition of harm, the concept that harm can be done to public trust in government, the Parliament and related institutions as a result of certain kinds of wrongdoing. We consider this factor should be specifically included in the OPM considerations in deciding whether or not an investigation is commenced or continued.

The AFP's decision not to investigate this matter meant that the source of the incorrect figures was not and has not been determined. We note, however, that information from NSW Police that the document referred to in the Daily Telegraph story was altered from the original annual report was provided in responses to Questions on Notice to the NSW Parliament *after* the AFP made a decision to not investigate this matter further.

The AFP decided not to investigate this matter on 6 February 2020 and released a statement advising of this decision on the same day.

Parliamentary privilege and engagement with the Minister

The AFP has advised us that, while it considered doing so, it did not approach the Minister or his office to seek his cooperation in investigating this matter, despite the Minister stating in parliament that he would do so⁷. We acknowledge that there was some level of engagement with the Minister's legal representatives by the AFP and NSW Police. This included a letter from the Minister's legal representatives to NSW Police that was included in the referral to the AFP, and the AFP asking the Minister's legal representatives if the Minister had anything further to provide beyond information provided to the NSW Police.

However, the AFP's decision not to engage directly with the Minister or his office, specifically on the conflicting claims about the source of the incorrect figure that was used in the Minister's letter, left this issue neither investigated nor answered. It may be that if the AFP had engaged directly with the Minister or his office, they may have been able to determine with greater confidence whether or not a potential offence occurred and, if so, by whom. Such inquiries might not have been onerous or resource intensive for any of the parties.

⁵ <https://www.afp.gov.au/about-us/governance-and-accountability/ministerial-direction>

⁶ Senate Standing Committee on Legal and Constitutional Affairs - Additional Estimates 2 March 2020, Question on Notice AE20-003

⁷ Senate Standing Committee on Legal and Constitutional Affairs - Additional Estimates 2 March 2020, Question on Notice AE20-018

It is also possible, though a matter of speculation, that had such inquiries been conducted, Parliamentary privilege would have attached to or might have been claimed in relation to any evidence in the possession of the Minister or his office (if such evidence existed). Clearly, this was one factor which the AFP considered in determining whether to close the investigation. In recent years there have been significant instances in which the conduct of evidence gathering by the AFP has been subject to such claims.

It is for the Parliament to determine whether Parliamentary privilege applies to evidence in such circumstances, and the workings of the Parliament are beyond the jurisdiction of this Office. However, it is a matter of concern if the possibility that privilege might apply, or might be claimed, works against the potential investigation of possible criminal conduct which bears on the standing of Parliament by the principal Federal law enforcement entity.

This issue has been brought to the Parliament's attention on multiple occasions, most recently in the context of papers seized from the office of an Australian Border Force employee, over which a claim of privilege was made by Senator Louise Pratt. The Senate Committee of Privileges considered the matter and recommended that the claim of privilege was upheld,⁸ which was adopted by the Senate. In a separate report on the same matter,⁹ the Committee of Privileges also concluded that amendments were required to the 2005 *Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of Parliament* and *National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*.

In line with this report, on 6 December 2018, the Senate passed a resolution calling on the Attorney-General to lead the development of a new protocol to replace the existing MOU and National Guideline.¹⁰ This work is currently underway and, based on advice from the Attorney General's Department, is expected to include consultation with the AFP, other affected investigatory agencies, the Presiding Officers and this Office.

Communication with the public

The AFP noted that it does not routinely make detailed public statements about its decisions regarding investigations, in particular due to the AFP's obligations under section 60A of the *Australian Federal Police Act 1979* as well as the *Privacy Act 1988*, which cover secrecy in relation to prescribed information related to a person carrying out the duties, functions or powers of the AFP.

⁸https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Dispositionofmaterial/Report, [1.26].

⁹https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Dispositionofmaterial/174th_report, [1.52]

¹⁰https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/eb54de0c-def5-4a0c-869c-5724f65bff20/toc_pdf/Senate_2018_12_06_6843_Official.pdf;fileType=application%2Fpdf

However, on 6 February 2020 the AFP made a statement to the media¹¹:

‘Following inquiries undertaken and information provided by NSW Police, the AFP has determined it is unlikely further investigation will result in obtaining sufficient evidence to substantiate a Commonwealth offence.

The AFP assessment of this matter identified there is no evidence to indicate the Minister for Energy and Emissions Reduction was involved in falsifying information.

The low level of harm and the apology made by the Minister for Energy and Emissions Reduction to the Lord Mayor of Sydney, along with the significant level of resources required to investigate were also factored into the decision not to pursue this matter.’

The AFP’s decision was subject to considerable media and political attention and, as noted above, generated a large number of complaints to this office. It may be that had the AFP explained in greater detail why it refrained from investigating – including with reference to the possibility of parliamentary privilege being invoked, as well as having regard to the application of the OPM and relevant ministerial directions – the public might have been better apprised of the justification for the AFP’s decision.

Conclusions

The AFP cannot investigate every matter that is referred to it and often a decision to either continue or to close down an investigation requires careful judgement. It exercises these judgements within a framework comprising legislation, Ministerial Directions and its own internal policies and procedures.

Having regard to the above, including the newly developed OPM, it was lawful and open to it to refrain from further investigating the matter subject to this report. Factors weighing against continuing the investigation included its assessment of harm relative to other matters in the AFP’s jurisdiction; the fact that an apology had been made by the Minister in relation to the use of incorrect information; the potential difficulties arising from seeking to gain further evidence that might ultimately support any prosecution; and the resources a more detailed investigation might have required.

In our view, however, a better course would have been to have taken at least one further step to test the logic of two of the above factors. The AFP refrained from investigating further in part because it judged that to do so would have required resource-intensive investigatory activities, including potentially the use of intrusive powers, yet this was not tested by simply seeking further information from the Minister or his office by less formal means. Indeed, the Minister had placed on the public record that he was prepared to cooperate with any investigation. The AFP also refrained from investigating further in part because of the possible application or claims of parliamentary privilege, yet this too was not tested.

¹¹ <https://www.abc.net.au/news/2020-02-06/angus-taylor-clover-moore-investigation-dropped-by-afp/11937906>

There is also the matter of harm, which can take many forms. There was, and still is, an unresolved question about where an allegedly fraudulent document, used for political purposes, came from. It is possible that a criminal offence occurred in its creation and use, by a person or persons unknown. The AFP in both its guise as a national law enforcement agency or through its ACT Policing arm, is the principal entity that has the jurisdiction to examine such alleged offences, in this case associated with a senior figure in the Commonwealth Government. If allegations of wrongdoing in this or other broadly analogous cases are not examined by the AFP, there is a risk that trust in Parliament, Government and their related institutions might be weakened.

Irrespective of whether further inquiries were or were not conducted, it would also be desirable for the AFP to consider how best to communicate its decisions to the wider public, when matters of public confidence in Australia's democratic institutions are at play. Notwithstanding the conclusions we have outlined above, its decision to cease the investigation was finely balanced and could have been more transparently elucidated.

Finally, this case highlights an unresolved tension in the interplay between the appropriate operation of parliamentary privilege and AFP investigations into alleged wrongdoing by, or associated with, Members of Parliament. It is a matter of concern that the principal entity with jurisdiction to investigate alleged criminal activity in or associated with the Parliament refrained from doing so in part because parliamentary privilege might apply or be claimed. We note that this has been a contentious matter in recent Parliaments and that work has been commenced by the Government to work with the presiding officers and the AFP to review the longstanding guidance that exists in this area.

Recommendations

As a result of this investigation we recommend that:

1. The AFP place on the public record a more detailed statement explaining their decision making process used in this matter.
2. The AFP consider including in the Operational Prioritisation Model provisions which more clearly contemplate that harm to public confidence in Australia's democratic institutions is a factor that should be considered when assessing whether to investigate future matters.

The AFP has advised this office that it accepts both recommendations, and a copy of their response is attached.

Michael Manthorpe PSM
Commonwealth Ombudsman

16 November 2020



23 October 2020

Mr Michael Manthorpe PSM
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By email: Michael.Manthorpe@ombudsman.gov.au

Dear Mr Manthorpe

Thank you for your letter of 25 September 2020 where you provided a copy of your report and a statement arising from your Office's own motion investigation into the Australian Federal Police's handling of the NSW Police referral of information relating to the Hon Angus Taylor MP.

The AFP appreciates the time, effort and careful consideration that has gone into this inquiry by your Office. The AFP also welcomes the finding that the AFP's decision to cease further investigation into this matter was a lawful exercise of the AFP's discretion and made within the AFP's decision making framework.

You have sought my formal response to this statement, which includes two recommendations arising from your investigation, namely:

1. *The AFP place on the public record a more detailed statement explaining their decision making process used in this matter; and*
2. *The AFP consider including in the Operational Prioritisation Model provisions which more clearly contemplate that harm to public confidence in Australia's democratic institutions is a factor that should be considered when assessing whether to investigate future matters.*

I thank your Office for its thorough investigation of this matter. The AFP accepts the two recommendations.

However, I will take the opportunity to respond briefly in relation to the finding in your statement about the AFP decision not to formally approach the Minister, or his office in this matter.

The AFP agrees further inquiries can always be made in relation to any given matter. The more difficult decision is to determine where, and when, it is appropriate not to make those further inquiries. The role of the Sensitive Investigations Oversight Board, as envisaged by the Lawler review, is to bring their judgment and experience into decision making in these matters, where the decision to continue or finalise an investigation is likely to be contentious, as there may be a number of compelling factors both for and against continuing the investigations.

The AFP had the benefit of the NSW Police investigation, which was detailed and thorough. The AFP did not consider it necessary (in order to make a decision) to duplicate these inquiries. As also acknowledged in your statement, the AFP did have some engagement with the Minister's legal

representatives. In engaging with the Minister's legal representative, the AFP made appropriate enquiries as to whether the Minister had anything further to provide beyond information provided to NSW Police. As the response was there was no additional information to provide, the AFP determined it was not necessary to otherwise approach the Minister.

In relation to recommendation 1, the AFP has to carefully consider what information it discloses to the public in any given matter, cognisant of its legislative obligations under both the *Australian Federal Police Act 1979* (Cth) and the *Privacy Act 1988* (Cth). The AFP accepts that a greater level of detail relating to its decision making in this matter may be of assistance to the public in being better informed of the justification for the AFP's decision.

You advised that where I agreed with recommendation 1, you invited me to provide that more detailed statement in my response, such that it could be included as an attachment to your public statement. In accordance with this recommendation, **Attachment A** is the more detailed AFP statement explaining the AFP decision making process.

In relation to recommendation 2, the AFP will consider how best to include provisions within the Operational Prioritisation Model (OPM) that more clearly contemplate this factor.

I note the findings in relation to Parliamentary Privilege. The AFP makes no comment in relation to this point, deferring to the Attorney-General's Department in this regard.

Yours sincerely



Ian McCartney APM
Deputy Commissioner Investigations
Australian Federal Police

Further Statement in relation to the Taylor investigation

The AFP acknowledges the significant level of interest this matter has generated in the community. The Commonwealth Ombudsman in completing its investigation into the AFP's decision making in this matter, recommended the AFP place on the public record a more detailed statement explaining the decision making process used in this matter.

AFP decision-making process and considerations

The AFP, like all law enforcement organisations, must carefully categorise and prioritise the matters it investigates to ensure its finite resources are deployed to maximum effect. To this end, the AFP has a transparent, objective and consistent basis for commencing, rejecting, terminating, finalising and resourcing operational matters.

Some allegations made to the AFP are considered 'sensitive'; however, this does not mean they should be investigated. While the AFP recognises there may be significant political and media interest in allegations of criminal conduct relating to politicians and their staff, the AFP must still properly consider whether to proceed with an investigation based on an impartial assessment.

The AFP received a letter from the NSW Police on 20 December 2019 in relation to this matter. In addition, NSW Police provided a body of material collected as part of their own investigation into the matter. The NSW Police investigation was thorough and detailed, including numerous inquiries and witness statements. Therefore, the AFP determined it was neither necessary nor appropriate to duplicate the enquiries conducted by NSW Police.

The AFP considered potentially applicable offences under both Commonwealth and ACT law. The AFP then formally considered whether to proceed with the investigation or not. The AFP drew upon the principles of the Lawler Review in undertaking this process. In summary, the AFP considered the following factors.

Ongoing harm

The AFP considered the risk of ongoing harm to the Australian community or any other party. The AFP determined the risk of ongoing harm was 'low' for the following reasons.

The apology and public acknowledgment the figures were incorrect ameliorated the harm caused to Ms. Moore by the alleged conduct. There was a low risk of ongoing harm to the community, as once the figures were publically acknowledged by the Minister to be incorrect, there was little risk of the public continuing to be misled or form an adverse view of Ms. Moore based on the incorrect figures. The AFP concluded there were no national security implications. Finally, any further action by the AFP would have little to no bearing on ongoing criminality, as the matter related to a stand-alone incident with no allegation of ongoing criminal conduct.

Seriousness of the alleged conduct

The AFP considered the seriousness of the alleged conduct and assessed it as comparatively low for the following reasons.

In the context of possible applicable offences, there was no evidence to suggest the Minister falsified a document. Having discounted the involvement of the Minister in this way, the assessment of the seriousness of the harm the alleged conduct caused was reduced.

The alleged conduct did not involve the misuse of Commonwealth funds or deception to gain financial advantage. Therefore, the seriousness of the alleged conduct was considered to be on the lower end of the scale.

The alleged criminality in this matter should also be read in the context of the numerous serious criminal allegations, which are routinely referred to the AFP, relating to, amongst other things, war crimes, child exploitation, terrorism, cybercrime and serious drug and fraud matters. Comparative to these crime types, the alleged criminality is relatively low.

Possible further enquiries/investigative steps

The AFP considered what further inquiries and investigative steps could be undertaken to obtain additional information, including engaging with Minister Taylor's legal representative. In doing so, the AFP made appropriate enquiries as to whether the Minister had anything further to provide beyond information provided to NSW Police. The response being that there was no additional information to provide, and noting the thoroughness of the NSW Police investigation, the AFP determined it was not necessary to otherwise approach the Minister.

Obtaining any additional information or evidence to prove the element of intent in any of the potentially relevant offences would likely require more than cooperative statements, and would require investigative action using coercive powers.

Such investigative action could include the execution of a search warrant on parliamentary premises, which may have attracted claims of Parliamentary Privilege, or investigative enquiries in relation to a journalist to seek to identify the source of the material. The AFP made an objective assessment of a broad range of public interest factors (including the low level of criminality, ongoing harm to the Australian public and the improbability of obtaining sufficient admissible evidence), which ultimately weighed against the public interest in taking further investigative action in this case.

Resourcing

Finally, the resources required to investigate this matter were considered. The AFP concluded that the resource requirement was significant. In circumstances where the comparative level of criminality was assessed as low, and there was a low risk of ongoing harm to the community or any individual, the resourcing allocation was not justifiable when compared to other significant AFP priorities.

Formal decision-making

On 5 February 2020, the Sensitive Investigation Oversight Board considered the matter. The Sensitive Investigation Oversight Board consists of a quorum of Deputy Commissioners and Assistant Commissioners, with Deputy Commissioner Investigations (DC McCartney) as the decision maker.

Having considered the advice of the Sensitive Investigation Oversight Board (drawing on the above considerations), Deputy Commissioner McCartney decided to support the recommendation to cease investigation and notify relevant parties of that decision. This decision was actioned on 6 February 2020.