

10 September 2015

Ms Anna Harmer
Assistant Secretary
Electronic Surveillance Policy Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Via email: anna.harmer@agd.gov.au

Dear Ms Harmer,

We thank you for your correspondence of 4 September 2015 regarding the matter of the Public Interest Advocates within the Journalist Information Warrant Regime of the *Telecommunications (Interception and Access) Act 1979* (the Act).

The Journalist Information Warrant scheme (JIW scheme) requires agencies to obtain a warrant prior to authorising disclosure of journalists' telecommunications data for the purpose of identifying journalists' sources. According to the Department's website, Public Interest Advocates may make submissions in relation to journalist information warrants.

REQUEST TO REVIEW THE DRAFT REGULATIONS

As is well known, the media organisations were not a party to, nor were privy to, the detail and/or negotiations to develop and introduce the legislative provisions that now constitute the JIW scheme. As is also well known, the JIW scheme was developed in a very short period of time and the media organisations were specifically 'locked-out' of and unable to directly contribute to the development of the regime.

Since that time, and as acknowledged, we have written regarding what we believe to be the outstanding issues for the JIW scheme, including the operational aspects of the PIA role.

Given these aspects of the development of the JIW scheme, and that the JIW scheme will be operational from 13 October 2015 – requiring ASIO and enforcement agencies to apply for a JIW before accessing journalists' telecommunications data for the purpose of identifying journalists' sources – we request to be given the opportunity to review the draft regulations in an adequate timeframe before they are finalised and put to the Governor-General for approval.

THE THREE MATTERS RAISED IN THE CORRESPONDENCE

The correspondence seeks the views of the joint media organisations on the following matters:

- i. Eligibility for appointment as a Public Interest Advocate;
- ii. Proposed terms of appointment of Public Interest Advocates; and
- iii. the process by which agencies will engage with Public Interest Advocates and issuing authorities in connection with applications for JIW.

We offer the following regarding each of these matters:

i. Eligibility for appointment as a Public Interest Advocate

This section of the letter includes a brief description of the role of the Public Interest Advocate. The description of the role is expanded in more detail in section (iii) of the correspondence.

We do not support the (brief and expanded) descriptions of the role of the Public Interest Advocate. We address this below regarding section (iii) of the correspondence: 'Engagement between agencies, Public Interest Advocates and issuing authorities'.

With this concern, in addition to the lack transparency of the mechanics of the JIW scheme contained in the draft regulations which we have not seen, it is difficult to comment regarding the eligibility for appointment of the Public Interest Advocate.

Having said that, the person who fulfils this role needs to be someone with the highest levels of legal knowledge and understanding. A retired judge seems to be an appropriate benchmark for this role.

In addition to the highest levels of legal knowledge and understanding, consideration should also be given to the highest of ethical obligations that judges have exemplified in their professional careers. Therefore we query whether or not, or to what level, a security clearance may be necessary. In any event, we do not see that a security clearance be the first hurdle for identification and/or appointment of a Public Interest Advocate. Rather, it is appropriate that the most suitable person/s for the role be identified, and then consideration given to the requirement (or not) for appropriate security clearance.

Regarding the duration for appointment, maximum non-renewable five-year tenures would be considered appropriate, allowing the ranks of Public Interest Advocates to be refreshed on a regular basis while still maintaining continuity.

ii. Proposed terms of appointment of Public Interest Advocate

Our concerns regarding the proposed terms of appointment are similar to the above regarding the eligibility for appointment as a Public Interest Advocate. That is, that we do not support the description of the role of the Public Interest Advocate. In addition, we find it difficult to provide views on the proposed terms of appointment of the Public Interest Advocate when the mechanics of the JIW scheme contained in the draft regulations are not available.

Notwithstanding this, given that the Public Interest Advocate is not engaged by the journalist, the journalist's employer or the source, the potential conflicts of interest boundaries may be unnecessary.

iii. Engagement between agencies, Public Interest Advocates and issuing authorities

The role of the Public Interest Advocate

As foreshadowed above, we do not support the role of the Public Interest Advocate as outlined in the correspondence.

The following descriptions of the role of the Public Interest Advocate are detailed in the correspondence from AGD:

- *‘The role of the Public Interest Advocate will be to review applications for Journalist Information Warrants and to make submissions to issuing authorities concerning the public interest in issuing or not issuing the warrant, including whether the warrant should be subject to conditions and restrictions’*
- *‘The role of the Public Interest Advocate will be to make submissions in the public interest, rather than to stand in the shoes of the journalist, their employer or their source’*
- *‘We anticipate that this will often require Advocates to balance the public interest in the protection of the confidentiality of a journalists’ source, insofar as it promotes freedom of expression and a free and vibrant press in a democratic society, against the public interest in the full availability of information in the administration of justice’*
- *‘Accordingly, neither the Act nor the Regulations will require that Advocates act as ‘contradictors’ of warrant applications. Indeed, we anticipate that there will be occasions on which an Advocate will support the issuing of a particular Journalist Information Warrant as being manifestly in the public interest’*

We do not support the descriptions of the role of the Public Interest Advocate for the following reasons:

- It is clear that the legislation allocates the determinative role to the issuing authority

According to the legislative framework, it is the role of the issuing authority (in the case of agency applications for a JIW) or the Minister (in the case of ASIO application for a JIW) to decide whether or not to issue a JIW (at sections 180T(1) and 180J(1) respectively).

The issuing authority (at section 180T(2) in the case of an agency) or the Minister (at section 180L(2) in the case of ASIO) must not issue a JIW unless s/he is satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source, having regard to:

- (i) *the extent to which the privacy of any person or persons would be likely to be interfered with by the disclosure of information or documents under authorisations that are likely to be made under the authority of the warrant; and*
- (ii) *the gravity of the matter in relation to which the warrant is sought; and*
- (iii) *the extent to which that information or those documents would be likely to assist in the performance of the Organisation’s functions; and*
- (iv) *whether reasonable attempts have been made to obtain the information or documents by other means; and*
- (v) *any submissions made by a Public Interest Advocate under section 180X; and*
- (vi) *any other matters the Minister considers relevant.*

- The agency/ASIO advocates for the public interest in issuing the warrant

In making the application for a JIW, and making any further any submission/s, the agency/ASIO is the advocate of the public interest in issuing the warrant.

The public interest in issuing the warrant is one of the considerations the issuing authority must ‘weigh’ in making its decision as stipulated by sections 180T(2) and 180L(2).

- The Public Interest Advocate advocates for the public interest in protecting the confidentiality of the identity of the source

The role of the Public Interest Advocate is not to assist the issuing authority but to advocate the public interest in what would otherwise not be represented – that of the public interest in protecting the confidentiality of the identity of the source.

In fact, to allocate a determinative role to the Public Interest Advocate burdens the Public Interest Advocate with a conflict and disables the person from representing the public interest of protecting the confidentiality of the identity of the source.

The role of the Public Interest Advocate is one of advocacy. It is not determinative. The determinative role is allocated to the issuing authority. To load the Public Interest Advocate with a ‘balancing exercise’ corrupts the intention of the role as legislated.

Given the legislative framework of the JIW scheme we do not agree that Public Interest Advocates are required at any time to balance the competing interests. That role is correctly allocated to the issuing authority.

It is therefore correct – and indeed necessary – that the application for a JIW which represents the public interest in issuing the JIW (which would of course stand in the shoes of the agency/ASIO) requires the Public Interest Advocate to act as a contradictor of warrant applications.

Applications for a Journalist Information Warrant

The Correspondence outlines three methods for applying for a JIW. We offer the following comments in light of our position on the role of Public Interest Advocate as detailed above.

- *Standard, written applications*
 - The framework requires agencies to provide the Public Interest Advocate with a copy of the proposed application for the JIW
 - The agency is restricted from making the application until the Public Interest Advocate has finalised their submission

Joint media organisation response

Given our views on the role of the Public Interest Advocate – that it must act as a contradictor of warrant applications – it should be the case that the agency has to provide the Public Interest Advocate with a copy of the proposed application for the JIW. The agency should then be restricted from making the application until the issuing authority or Minister has received the submissions and made a decision under sections 180T or 180L respectively.

- *Oral applications*
 - Typically limited to urgent circumstances
 - The framework requires agencies to notify the Public Interest Advocate of their intention to apply for a JIW
 - The agency is restricted from making the application unless the Public Interest Advocate has agreed to attend, for the purpose of listening to the application and making oral submissions

Joint media organisation response

Again, given our views on the role of the Public Interest Advocate – that it must act as a contradictor of warrant applications – it should be the case that the agency has to provide the Public Interest Advocate with a copy of the proposed application for the JIW either in writing or orally. The agency should then be restricted from making the application until oral submissions have been made and the issuing authority or Minister has made a decision as to whether the JIW should be issued or no.

- *Applications without submission*
 - Ensures the framework can accommodate exceptional circumstances
 - Allows agencies to make an application without submission with the approval of a Public Interest Advocate or the issuing authority
 - This flexibility would facilitate, in particular, applications in exigent circumstances, where it may not be practicable for an Advocate to either prepare a submission or attend an oral application

Joint media organisation response

We do not believe a case should arise whereby it is not practical for a Public Interest Advocate to either prepare a submission or attend an oral application – particularly in times of technology (for example, via phone, teleconference, Skype link etc).

OTHER MATTERS

Media organisations wrote to the Attorney-General on 11 May 2015 regarding what we saw as outstanding issues with the JIW scheme which should be addressed as a matter of importance. We re-state some of those concerns here.

Criminal offence to disclose a JIW

It is a criminal offence to disclose a JIW. Therefore a carriage service provider that is requested to provide details of a journalists' source that asks if the necessary warrant is in place cannot be told if in fact the JIW is in place, or not.

This is an issue which should be addressed in the regulations.

Inconsistent approach to application for content and data of journalists' communication

To ensure the consistent application of laws, the JIW process should apply equally to accessing the content of journalists' communications. It would be illogical if as a result of this scheme the process for accessing the content of a communication is less onerous than the process for accessing the metadata in relation to that communication.

Lack of connection between establishment of the PIA and being notified of a request for a JIW – s180L and 180T

The Bill made provision for the establishment of a PIA but did not set out the operational aspects of that role or clearly link the PIA's role with the JIW process.

This connection is required to be established in the regulations, and must include:

- A requirement that the Minister (in the case of ASIO) or issuing authority must not issue a JIW unless:
 - Notice of the request for a JIW is given to the PIA; and
 - The PIA has been requested to make submissions;
- The process for how PIA submissions are made;
- Details of what PIA submissions must include; and
- A requirement that the PIA must present the public interest argument in favour of freedom of speech (i.e. the PIA must be required to argue for the public interest in NOT providing access to the journalist’s data).

The JIW is focused on the purpose rather than effect of accessing the data – s180H(1)(b) and (2)(b)

Currently, a JIW is only needed if the enforcement agency knows they are looking for a journalist’s source. Specifically:

- only in circumstances where the authorising body knows or reasonably believes that it is a journalist involved; and
- the purpose of making the authorisation would be to identify another person known or reasonably believed to be a source.

However, the JIW process should apply regardless of whether (or not) the journalists’ data is accessed for the purpose of identifying sources. This is because it is highly likely that the effect of accessing journalists’ data will be the identification of sources – regardless of the stated purpose for accessing the data.

To put it another way, limiting the application of the JIW process to circumstances where the purpose of data access is to identify journalists’ sources provides inadequate protection to journalist’s sources which are revealed when the data is accessed for any other purpose – and not subject to the JIW process. This makes the JIW scheme vulnerable to circumvention.

The application of the JIW process to revealing/identifying journalists’ sources where that is the effect of accessing journalists’ data (or where it is not the stated purpose for the access) requires clarification.

Matters to have regard to – s180L(2)(b) and 180T(2)(b)

There is nothing in the legislation that acknowledges any free-standing value in the confidentiality of sources and a free media.

The JIW scheme should include a clear requirement to take into account the intrinsic value in confidentiality of journalists’ sources and freedom of the media.

Offences regarding disclosure/use of JIW information – s182A

The offences should be limited to investigations that are ongoing.

Other matters for consideration

While we raise these matters here we acknowledge that some of these may require changes to legislation.

- Definition of journalist is required

We recommend this be consistent with the definition of journalist in the *Evidence Act 1995 (Cth)* (shield law).

– No transparency regarding JIW applications and/or authorisations

We recommend that reporting provisions are required, including in the annual reports of the Attorney-General's Department's *Telecommunications Intercept and Access Act 1979* and the Inspector General of Intelligence and Security (IGIS).

We are strongly of the view that reporting requirements regarding JIWs must be separate from reporting in relation to interception and stored communications warrants.

– Inconsistency between ASIO and other agencies in applying for a JIW

We recommend that a consistent process for application of JIWs is required, specifically that ASIO should have to apply to an issuing authority in the same way as other agencies.

– Issuing Authority is currently one of the persons authorised to give Part 3 warrants – judge, magistrate, member of AAT etc

We recommend that this be amended such that only judges of a higher court can issue JIWs.

We would appreciate an opportunity to meet with the Attorney-General's Department and the Minister's office to discuss these matters in more detail.

We look forward to further consultation and being able to review the draft regulations.

