

AFP National Guideline on investigative action involving professional journalists or news media organisations

1. Disclosure and compliance

This document is marked **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 is part of the AFP's professional standards framework. The [AFP Commissioner's Order on professional standards \(CO2\)](#) outlines the conduct expected of AFP appointees. Inappropriate departures from the provisions of this instrument may constitute a breach of AFP professional standards and be dealt with under Part V of the [Australian Federal Police Act 1979](#) (Cth) (AFP Act).

2. Guideline authority

This guideline was issued by Assistant Commissioner Counter Terrorism and Special Investigations Command using power under s. 37(1) of the AFP Act as delegated by the Commissioner under s. 69C of the Act.

3. Introduction

On 8 August 2019, the Minister for Home Affairs (the Minister) issued under s. 37(2) of the AFP Act a [Ministerial Direction](#) to the AFP relating to investigative action involving a professional journalist or news media organisation in the context of an unauthorised disclosure of material made or obtained by a current or former Commonwealth officer (the Ministerial Direction).

The Australian Government expects the AFP to take into account the importance of a free and open press in Australia's democratic society and to consider broader public interest implications before undertaking investigative action involving a professional journalist or news media organisation in the context of an unauthorised disclosure of material made or obtained by a current or former Commonwealth officer. The Ministerial Direction does not, however, prevent or otherwise constrain the AFP from conducting an 'unauthorised disclosure' investigation.

An 'unauthorised disclosure' investigation is broadly considered to be an investigation into the alleged or suspected unlawful use, dissemination, possession, communication or handling of certain categories of information as defined by various Commonwealth laws. For example, an investigation into alleged conduct contrary to Part 5.6 of the [Criminal Code Act 1995](#) (Cth) or other Commonwealth laws such as s. 60A of the AFP Act, [Australian Security Intelligence Organisation Act 1979](#) (Cth), [Defence Act 1903](#) (Cth), and [Intelligence Services Act 2001](#) (Cth).

This National Guideline:

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- extends beyond the Ministerial Direction to apply to broader AFP investigations involving a professional journalist acting in the course of their profession and a news media organisation acting in their role as a news media organisation
- does not apply to AFP investigations where the alleged conduct of a professional journalist is not connected with their profession or to a news media organisation acting outside their role as a news media organisation
- applies to decisions to accept or reject a Report or Request involving a professional journalist or news media organisation (as per s. 7 below)
- applies to investigative action involving the use of covert or overt intrusive/coercive strategies directly on a professional journalist or news media organisation (as per s. 9 below).

4. Public interest

Pursuant to this National Guideline, the AFP takes into account the importance of a free and open press in Australia's democratic society and will consider broader public interest implications:

- when deciding to accept or reject a Report or Request **involving** a professional journalist or news media organisation (as per s. 7 below) and
- before undertaking investigative action involving the use of covert or overt intrusive/coercive strategies **directly on** a professional journalist or news media organisation (as per s. 9 below)

Matters considered relevant to the public interest in the enforcement of the criminal law by the AFP include the:

- harm or potential harm caused by the alleged offending
- harm statement provided by the reporting department or agency which must be provided with an [AFP Agency Report a Crime Form](#) or as per this National Guideline
- seriousness and extent of the alleged offending
- culpability of the alleged offender in connection with the alleged offence
- passage of time since the alleged offence
- potential defences available for the alleged conduct
- availability and efficacy of any alternatives to prosecution
- effect on community harmony and public confidence in the administration of justice
- extent to which the privacy of any individual or group has been impacted by the conduct.

Matters considered relevant to the broader public interest in the importance of a free and open press in Australia's democratic society include:

- maintaining genuine freedom of expression, including political communication
- maintaining and protecting the freedom of the media to investigate and inform on matters of public concern and importance, particularly insofar as those matters relate to any one or more of the following:
 - the due administration of justice and government

- corruption and maladministration
- abuses of public trust
- national security
- public safety, health and the environment
- personal privacy.

AFP appointees should also consider relevant factors contained in the [CDPP Prosecution Policy](#).

5. Professional journalist or news media organisation

In considering whether a person or organisation may be a professional journalist or news media organisation, the following definitions apply:

A **news media organisation** is an organisation whose activities consist of or include the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public or a section of the public:

- material having the character of news or current affairs or
- material consisting of commentary or opinion on, or analysis of, news or current affairs.

Examples of a news media organisation include:

- organisations forming part of the radio and television industry, as regulated by the Australian Communications and Media Authority
- print or online media organisations that are members of the Australian Press Council.

A **professional journalist** is a person employed or engaged by a news media organisation in the profession or occupation of journalism or is working in a professional capacity as a journalist.

Indicators that a person may be a professional journalist include:

- regular employment
- formal qualifications
- adherence to enforceable ethical standards
- membership of a professional body.

If there is uncertainty whether the definition applies to a person or entity, AFP appointees should consider escalation of this decision.

6. Reports/Requests to the AFP

A Report that involves a professional journalist or news media organisation may be received by the AFP from a variety of sources. Where the AFP receives a Report without, or with an incomplete, [AFP Agency Report a Crime Form](#), in exceptional circumstances the AFP may consider the Report and obtain the additional information from the reporting department or agency as soon as

practicable thereafter. In the case of unauthorised disclosure allegations, AFP appointees must obtain a harm statement and advice whether injunctive relief under s. 123.1 of the *Criminal Code 1995* (Cth) has been considered or sought, with reasons.

Where a Report is received from a source other than a government agency or department in relation to unauthorised disclosure of material, consideration must be given to obtaining a harm statement from the affected agency or department where it would not compromise an investigation.

7. Decision on Reports/Requests upon receipt

A decision to accept or reject a Report or Request involving a professional journalist or news media organisation where broader public interest considerations apply, must be based on the following factors and made with approval by the relevant Commander (or Manager):

- whether, on balance, the public interest in the importance of a free and open press in Australia's democratic society is outweighed by the public interest in the enforcement of the criminal law by the AFP including the effect on public confidence in the administration of justice (as per s. 4 above)
- whether the investigation is a *sensitive investigation*, and if so whether it should be escalated for oversight and decision as per the [National Guideline on sensitive investigations](#)
- the way in which the AFP would seek to obtain evidence, including:
 - the possible use of covert or overt intrusive/coercive strategies directly on a professional journalist or news media organisation
 - seeking voluntary assistance
- action already taken by the reporting department or agency to remediate the alleged conduct
- the harm and risk occasioned by the alleged conduct, including any conduct aimed at minimising the harm or potential harm or risk.

If the public interest in the importance of a free and open press in Australia's democratic society outweighs the public interest in the enforcement of the criminal law by the AFP, the decision maker must consider rejecting the Report/Request unless other relevant factors apply including those from the list above.

8. Seeking voluntary assistance from a professional journalist or news media organisation

Where consistent with operational imperatives, AFP appointees must consider seeking voluntary assistance from a professional journalist or news media organisation prior to considering the investigative action outlined in s. 9 below.

Where seeking voluntary assistance from a professional journalist or news media organisation, for instance the provision of information by consent either verbally or in writing, AFP Legal must first be consulted and consideration given to creating an engagement plan through AFP/ACT Policing Media.

Any voluntary engagement with a professional journalist or news media organisation must be conducted at an appropriate level from the AFP with the professional journalist or news media organisation or their representative.

9. Investigative Action involving a professional journalist or news media organisation during an investigation.

For the purposes of this National Guideline, investigative action involving a professional journalist or news media organisation is the use of a covert or overt intrusive/coercive strategy directly on a professional journalist or news media organisation, which includes:

s 47E(d)

- a journalist information warrant (JIW) (e.g. IPNDe, subscriber, CCR, CAD). (refer to the [Better Practice Guide on procedures to obtain a JIW](#) for all circumstances where a JIW is required)
- any other type of warrant, authorisation, notice, order or the like to obtain evidence directly from a professional journalist or news media organisation
- a compulsory examination of a professional journalist or news media organisation (e.g. under the [Proceeds of Crime Act 2002](#) (Cth)).

The above-listed investigative action need not require the physical presence, participation or knowledge of a professional journalist or news media organisation for it to be conducted 'directly on' them.

Typically, investigative action is considered to be 'directly on' a professional journalist or news media organisation when they are the subject of the investigative action or where the investigative action is reasonably expected to result in the collection of evidence directly from the professional journalist or news media organisation.

10. Decision on the use of covert or overt intrusive/coercive strategies directly on a professional journalist or news media organisation

Before deciding whether or not to use covert or overt intrusive/coercive strategies directly on a professional journalist or news media organisation, AFP appointees must consider:

- whether, on balance, the public interest in the importance of a free and open press in Australia's democratic society is outweighed by the public interest in the enforcement of the criminal law by the AFP including the effect on public confidence in the administration of justice (as per s. 4 above)
- whether the investigation is a *sensitive investigation*, and if so whether it should be escalated for oversight and decision as per the [National Guideline on sensitive investigations](#)
- where, consistent with operational imperatives:

- exhausting alternative investigative action including investigative action in relation to any other persons that may be involved in the investigation
- seeking the voluntary assistance of the professional journalist or news media organisation (as per s. 8 above).

If the public interest in the importance of a free and open press in Australia's democratic society outweighs the public interest in the enforcement of the criminal law by the AFP, the decision maker must not conduct investigative action involving the use of a covert or overt intrusive/coercive strategy directly on a professional journalist or news media organisation.

A single decision may cover a range of investigative actions; however, if circumstances change or additional investigative action is contemplated, another decision must be made in accordance with this section.

11. Notification to professional journalist or news media organisation of their status

In accordance with the Australian Government's response to the Parliamentary Joint Committee on Intelligence and Security 2019-20 inquiry into Press Freedom, the AFP is now required to consider advising journalists or media organisations when they are no longer persons of interest in an investigation, where doing so would not jeopardise the future of the investigation.

Where a professional journalist or news media organisation knows they are a person of interest in an investigation, consideration must be given to advising them when they are no longer considered to be a person of interest. Such notification should only be given where it would not jeopardise or prejudice the investigation. For instance, in some cases it may be desirable that notification is given when a person is charged or at the end of the investigation.

Where a decision is made to advise the professional journalist or news media organisation that they are no longer a person of interest, reasonable steps should be taken to advise them in a reasonable timeframe.

Consultation with AFP Legal should occur regarding the content or form of any notification to a professional journalist or news media organisation under this section. For instance, the content of such advice might include that it is based on information available at the time and does not preclude the AFP from reconsidering their status as a person of interest.

12. Further advice

Queries about the content of this National Guideline should be referred to Assistant Commissioner Counter Terrorism and Special Investigations Command via s 47E(d) @afp.gov.au).

13. References

AFP governance instruments

- [AFP National Guideline on sensitive investigations](#)
- [Better Practice Guide on Procedures to obtain a Journalist Information Warrant \(JIW\)](#)
- [Better Practice Guide on Processing Reports/Requests within the AFP](#)

Other sources

- [Ministerial Direction dated 8 August 2019](#)
- [CDPP Prosecution Policy](#)

14. Shortened forms

AFP	Australian Federal Police
AFP Act	Australian Federal Police Act 1979 (Cth)

15. Definitions

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

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

(see s. 4 of the AFP Act.)

Investigation means a process of seeking information relevant to an alleged, apparent or potential breach of the law involving possible judicial proceedings. The primary purpose of an investigation is to gather admissible evidence for any subsequent action, whether under criminal, civil penalty, civil, disciplinary or administrative sanctions. Investigations can also result in prevention and/or disruption action. The term investigation can also include intelligence processes, which directly support the gathering of admissible evidence. (See [AFP Investigations Doctrine](#)).

Investigative action means any action undertaken by the AFP that is directed to the progress of an investigation, whether an AFP investigation or otherwise.

News media organisation means an organisation whose activities consist of or include the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public or a section of the public:

- material having the character of news or current affairs
or
- material consisting of commentary or opinion on, or analysis of, news or current affairs.

Professional journalist is a person employed or engaged by a news media organisation in the profession or occupation of journalism or is working in a professional capacity as a journalist.

Report means an allegation that a crime has been, is being, or may be committed.

Request, for the purpose of this National Guideline, means a request for investigative service only, being a service that supports an (internal or external) investigation or requires the execution of police powers.

Unauthorised disclosure investigation can also be referred to as an 'information secrecy' investigation and is broadly considered to be an investigation into the alleged or suspected unlawful use, dissemination, possession, handling or communication of certain categories of information as defined by various Commonwealth laws.

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