

11 December 2008

## **Review of Detective Inspector Pinkham's Report into the Mr C Watson Complaint Regarding Operation TAM Affidavit**

### **Introduction**

- 1 This Report outlines my review of the investigation carried out by Detective Inspector Ross Pinkham, into the complaint lodged by Mr C Watson regarding an affidavit sworn by Deputy Commissioner R Pope in 1998.
- 2 This complaint arises from Operation TAM, the investigation relating to the disappearance and murders of Ben Smart and Olivia Hope on or about 1 January 1998. Deputy Commissioner Pope was the officer-in-charge of Operation TAM and at the time held the rank of Detective Inspector.
- 3 Mr Watson originally complained to the Police Complaints Authority (PCA) on 6 November 2003. The PCA declined jurisdiction and suggested to Mr Watson that he refer his complaint to Police.
- 4 On 20 April 2004 Mr Watson hand delivered his letter of complaint to the Blenheim Police. The complaint was referred to the Office of the Commissioner.
- 5 On 14 July 2004 Detective Inspector Pinkham was tasked by Assistant Commissioner P Marshall to investigate Mr Watson's complaint.
- 6 On 20 March 2008 Superintendent G Fraser, District Commander Southern referred Detective Inspector Pinkham's completed investigation report and file to me - received on 27 March 2008.
- 7 On receipt of the file I carried out an in-depth review of Detective Inspector Pinkham's report.

### **Review Purpose**

- 8 The purpose of my review was:
  - (a) To ensure that Detective Inspector Pinkham's investigation was carried out thoroughly and competently.
  - (b) To ensure that Detective Inspector Pinkham explored all reasonable avenues of enquiry.
  - (c) To ensure that the conclusions and recommendations arrived at by Detective Inspector Pinkham were well founded and that they had an evidential basis.

## Review Methodology

9 My review methodology consisted of the following tasks and activities:

- I received and read Detective Inspector Pinkham's investigation file and report
- I sought clarity around identified gaps or omissions in the report
- I consulted with the Operation TAM, File Manager, Detective Richard Rolton to enable me access to any relevant documents held on the TAM file. This included travel to Blenheim Police station to access file information
- I consulted with Detective Inspector R Pinkham and requested further information which was not immediately evident in his investigation report
- I liaised with and updated the Independent Police Conduct Authority (IPCA)
- I considered practice and policy principles relating to the construction of the affidavit
- I sought an independent legal peer review of the findings reached by Detective Inspector Pinkham. The independent reviewer, Mr Phillip Morgan QC was provided with a comprehensive analysis of my findings and conclusions in respect of each head of complaint. The scope of the legal review was two-fold and included:
  - (i) An assessment the conclusions reached by me as a result of my analysis and review and the report of Detective Inspector Pinkham against the various heads of complaint to ensure that those conclusions were well founded and;
  - (ii) An assessment as to whether or not any aspect of the affidavit construction, either by act or omission prima facie constitute an offence against any relevant New Zealand statute.

### *Note*

This review should not be confused with an investigation or re-investigation. I have undertaken little if any investigative functions, other than seeking clarity from various people about particular aspects of Detective Inspector Pinkham's investigation. On that basis the review has to a large extent been a 'paper' exercise which has involved many hours of sourcing, reading, analysing and interpreting relevant documents.

### *Process*

- All available correspondence (including reference and background material) was gathered
- Read and analyse correspondence
- Cross referenced investigation report with additional information gathered from the Operation TAM file
- Reached conclusions based upon the totality of all available information

### *Constraints and Limitations*

At the outset it is important to reinforce the point that the matters which relate to this complaint arose close to ten years ago. And, that specific areas of concern highlighted in the complaints are time-bound. In this regard the critical time period

relates to what information was available to the investigation team (including Detective Inspector Pope) from the commencement of the Op TAM enquiry on 2<sup>nd</sup> January 1998 through to 18 February 1998 when the first intercept warrant was sworn and to 20 May 1998 when the final warrant renewal was sought. And more importantly which pieces of that information was ‘reasonably’ believed to be relevant and true by the investigation team between those times.

After the affidavits were sworn other information came to hand and the judicial process took its course. Much of the information and evidence was tested and challenged throughout that process. And not surprisingly much of that information was confirmed and some was negated.

The passage time has created limitations as to what the various members involved in the investigation have been able to recall. Therefore I have relied heavily on the interpretation of documents contained on the operation TAM file as opposed to the memory (or lack of memory) of the various witnesses who were interviewed by Detective Inspector Pinkham.

The independent legal reviewer, Mr Morgan QC has quite rightly reinforced the fact that a review of this nature is not a hindsight exercise, stressing that “it will often be difficult to reconstruct with precision exactly what facts were known to the inquiry team for which Pope was the officer in charge at any particular time and even more difficult to establish what their beliefs may have been as a consequence of inferences they drew from those facts”.<sup>1</sup>

### **Conflict of Interest Declaration**

- 10 I declare that I have no known conflict of interest in terms of my ability to review this case. Although in my current role I report directly to Deputy Commissioner R Pope in relation to day to day administrative matters; my review has been completed independently and the without influence of any person or persons, including Deputy Commissioner Pope.
- 11 I have however noted and followed up on advice received from the independent legal reviewer and the New Zealand Police (Acting) Chief Legal Adviser<sup>2</sup> and factored their advice into my overall assessment of Detective Inspector Pinkham’s findings and conclusions.
- 12 I had no previous dealings with any issues arising from Operation TAM and my only prior knowledge about the case has arisen from media and public commentary. At the time of Operation TAM (January 1998) I was acting Area Commander, Central Business Area, Auckland City District. I am aware that Auckland Police were requested to make some enquiries on behalf of Operation TAM, but to the best of my knowledge I was not directly involved in that process.
- 13 I have had no previous operational dealings with Detective Inspector R Pinkham. I am unaware of any issue in terms of my relationship with Detective Inspector Pinkham that would give rise to any conflict of interest in relation to the review of his investigation.
- 14 I have 35 years Police service. I have spent a significant amount of time in the Criminal Investigation Branch (CIB), during which I have worked on and led many criminal investigations. I have extensive experience in investigation reviews and investigation debriefs.

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<sup>1</sup> Source – para 3, page 3 independent legal review doc.

<sup>2</sup> Inspector Scott Spackman

## Heads of Complaints

- 15 Mr Watson has complained that certain aspects of an affidavit, sworn by Detective Inspector R Pope pursuant to Section 312CB of the Crimes Act 1961, and subsequent renewals were either factually wrong and or misleading.
- 16 Mr Watson has raised eight specific complaints. Each complaint relates to specific paragraphs within the affidavit and has been addressed separately. However, complaints 2, 3 and 4 can be grouped together because they in essence relate to Scott Watson's appearance on the night of 31 December 1997 and the days after.
- 17 The specific paragraphs of the affidavit under challenge include;

### Complaint 1

Paragraph 8.2

*At about 5.30 am Mahony woke and noticed that the "Blade" had gone. He also noticed that Watson had left his fender, which had been placed between the two yachts, behind.*

Mr Watson's complaint is that David Mahony did not in fact awake at 5:30 am, but at 8:00 am. On that basis he believes that Detective Inspector Pope misled the court.

### Complaint 2

Paragraph 8.9

*Scott Watson claims to have been clean-shaven over 31 December 1997/1 January 1998 while approximately 23 witnesses describe the "third person", believed to be Watson, as unshaven. Watson is known personally to several of these witnesses.*

Paragraph 8.26 -

*Scott Watson has endeavoured to mislead the Police by:*

Paragraph 8.26.2

*misrepresenting the extent of facial hair that he had on 31 December 1997/1 January 1998.*

Mr Watson's complaint is that Scott Watson has never claimed to be clean shaven and that he has never been asked this question at any time. On that basis he believes that this aspect of the affidavit is misleading.

### Complaint 3

Paragraph 8.9

*Scott Watson claims to have been clean-shaven over 31 December 1997/1 January 1993 while approximately 23 witnesses describe the "third person", believed to be Watson, as unshaven. Watson is known personally to several of these witnesses.*

Mr Watson contends that there were only five persons who would be capable of describing "the third person". He asserts that none of them describe Scott Watson and none had any knowledge of him. He further claims that at least two of the five had participated in a formal identification procedure prior to 18/2/98 and neither chose Scott Watson from the montage shown to them. On that basis he believes that Detective Inspector Pope misled the court by inflating the number and relevance of available identification witnesses.

#### Complaint 4

Paragraph 8.26

*Scott Watson had endeavoured to mislead the Police by:*

- 8.26.2 *misrepresenting the extent of facial hair that he had on 31 December 1997/1 January 1998.*
- 8.26.3 *cutting his hair and, according to various witnesses, substantially tidying his general appearance.*

Mr Watson believes that paragraphs 8.26.2 and 8.26.3 as statements of fact are disproved by a series of photographs taken at about 10:00am 31/12/97, at about 9:30 pm 31/12/97, the early evening of 8/1/98 and the early evening of 12/1/98. He asserts that all of these depict a short haired, clean shaven Scott Watson with what would appear to be a natural amount of hair growth over the time period 31/12/97 to 12/1/98. On that basis he believes that Detective Inspector Pope could not be unaware of the photographs as he quotes the existence of one of them (Mina Cornelia photo) at paragraph 8.8 of his affidavit. At the time that this affidavit was sworn all of these photographs had been in police hands for at least thirty days – therefore, according to Mr Watson the statement of fact that Scott Watson cut his hair is plainly and demonstrably false.

#### Complaint 5

Paragraph 7.1

*Witnesses spoken to by the Police who were aboard the "Mina Cornelia" and "Bianco", including Dave Mahony, Ernest Rutte ("Mina Cornelia"), Deanna Cunliffe and Andrew Crawshaw ("Bianco"), described Scott Watson's behaviour when he arrived in Endeavour Inlet at about 4 pm on 31 December 1997 as normal. However each describe deterioration in his conduct following consumption of alcohol and drugs to such an extent that by 10 pm on 31 December 1997 he had become obnoxious. Their descriptions vary from 'aggressive', 'abusive' to 'rude'. Each began to feel threatened by, and frightened of his conduct.*

Mr Watson asserts that the witnesses Cunliffe and Crawshaw had no, or insufficient contact with Scott Watson that would allow them to form any opinion of "normal" behaviour; and that they were not present when he arrived in Endeavour Inlet. Further, Mr Watson asserts that these witnesses did not describe "deterioration" as stated and they were not present during the time period that this "deterioration" is said to have taken place. On this point he relies on Op TAM docs

20323 and 10340. Accordingly Mr Watson believes that these statements are false and misleading.

## Complaint 6

### Paragraph 8.11

*From photographs taken at about 8.30 pm on 31 December 1997 by a person on the shore, Watson's yacht is shown rafted alongside the "Mina Cornelia". A further photograph taken at about 6 am on 1 January 1998 shows the vessel, the "Mina Cornelia, but Watson's yacht, the "Blade", can no longer be seen in the photograph.*

### Paragraph 8.26

*Scott Watson has endeavoured to mislead the Police by:*

#### Paragraph 8.26.5

*Misleading the Police as to the time he left Endeavour Inlet*

Mr Watson believes that the photograph said to have been taken at 8:30 pm (taken at 6:30 pm according to Mr Watson) also shows the vessels 'Unicorn' and 'Bulletproof'. He asserts that the 'Unicorn' can also not be seen in the photograph said to have been taken at 6:00 am. He further claims that the four people aboard Unicorn give various times for leaving Furneaux ranging from 6:30 am to 8:30 am. [Reference Op TAM docs 20038, 20085, 20088 and 20112].

Mr Watson further claims that an independent witness describes a yacht with a dog similar to that aboard Unicorn left the area at 7:00 am. [Reference Op TAM doc 11390]. He also points out that the vessel 'Bulletproof' also does not appear in the photograph and that no person aboard this vessel stated that it left prior to 6:30 am. [Reference Op TAM docs 10477, 40105, 20819 and 10519]. He further contends that a person aboard the Unicorn describes this vessel leaving prior to leaving themselves. He therefore claims that the time as stated that this photograph was taken (6:00 am) is incorrect in that evidence existed independently of the photographer's timing that the photograph could have been taken as late or later than 7:00 am but not before 'Unicorn' had left the area.

Further, in support of this complaint Mr Watson relies on Op TAM doc 20112 - Police interview of Scott Watson, during which he states:

*"After waking up, checked the oil in the motor, and left. It was about half past 6, 7 o'clock when I left. It was dawn anyway. It was daylight. I am guessing it was that time. It was early, but it was a nice day."*

Mr Watson therefore believes that to suggest Scott Watson misled the police because his boat did not appear in this photograph is at best misleading and selective use of information.

## Complaint 7

### Paragraph 6.5

*The water taxi driver, Guy Wallace, and passengers on the Naiad at approximately 4 am on 1 January 1998, Morresey and Dyer, described a person of similar description to Scott Watson as being dropped off the water taxi in the company of Olivia Hope and Ben Smart near where Scott Watson's yacht was rafted.*

Mr Watson believes that none of the three witnesses (Wallace, Morresey and Dyer) described a person of similar description to Scott Watson in these circumstances. Mr Watson contends that the witness Morresey described a "long haired man" [reference Op TAM docs 10031, 10079, 30068]. He further contends that the witness Dyer supplied no description at all [reference Op TAM docs 10026, 10080, 20090]. However, he notes that while Wallace's description does at times include features of Watson, it also includes many more that exclude him [reference Op TAM docs 10861, 10859, 10017, 10081, 12635, 10587]. Mr Watson asserts that by 18/2/98 both Wallace and Dyer had participated in a formal identification procedure and neither chose Watson; and Wallace had also been shown a single photo and a moving TVNZ image of Watson and did not identify him. Mr Watson therefore believes that Detective Inspector Pope has misled the court.

## Complaint 8

### Paragraph 8.4

*Timothy George Harvey and Jeremy Vincent Grant Brown have given an account of watching a yacht of a similar description as Scott Watson's leaving Endeavour Inlet at approximately 5 am on 1 January 1998.*

Mr Watson believes that the statements by Harvey [reference Op Tam docs 11072, 11611] and Brown [docs 20218, 11612] are far from conclusive identification and vary significantly from a description of Blade. Mr Watson therefore believes that paragraph 8.4 is at best irrelevant and an exaggeration of the police case.

### Paragraph 15.7

*The statements of fact contained in this application are true and correct and all statements of opinion are true to the best of my knowledge and belief.*

Mr Watson believes that Detective Inspector Pope, by misrepresenting the facts has committed perjury as defined by section 108 of the Crimes Act 1961, or alternatively he has made a false oath as described in section 110 of the Crimes Act 1961.

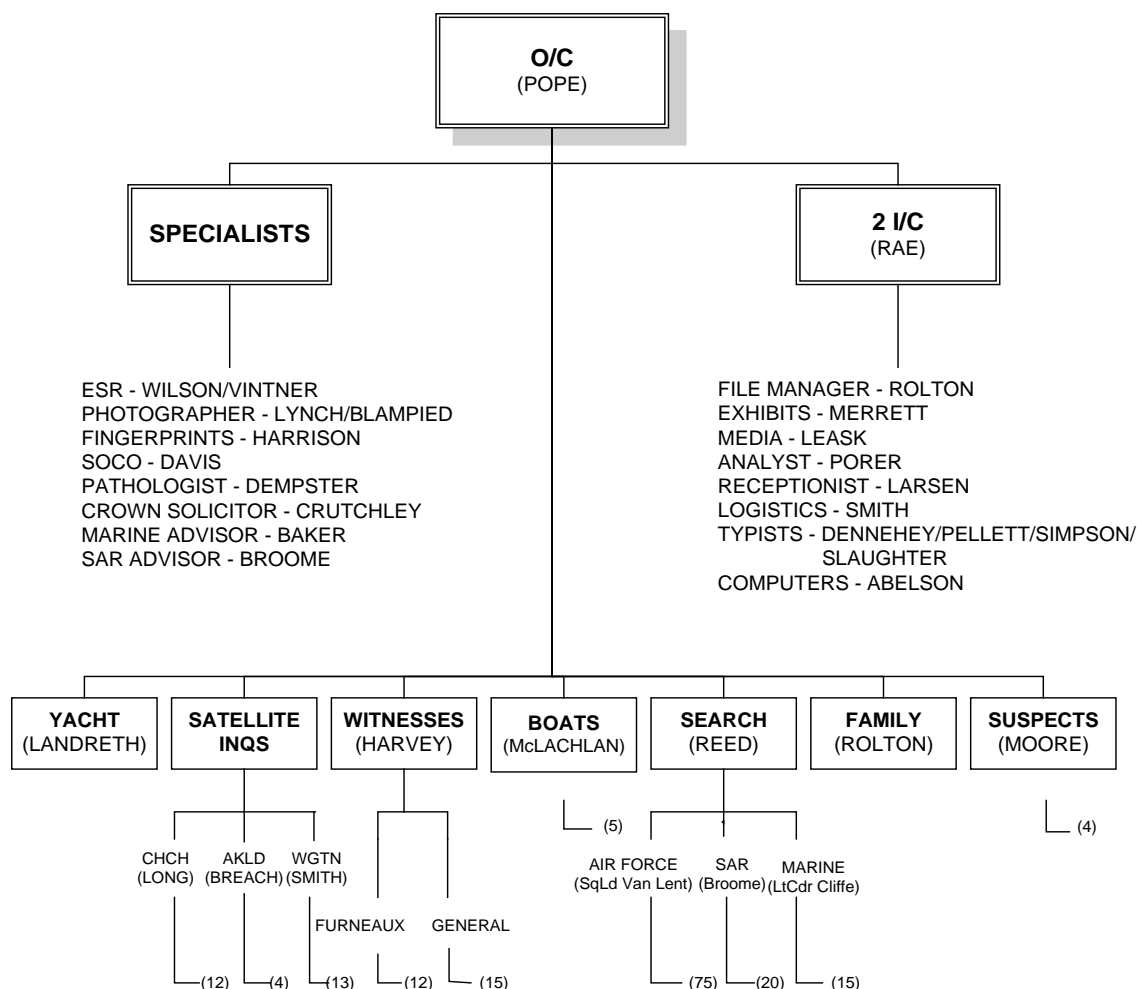
## Issues

- 18 Mr Watson's complaints give rise to two substantive issues. They are:
- a) Was any part or parts of the affidavit factually wrong, false or misleading; and if so either by act or omission
  - b) Did Detective Inspector Pope swear the affidavit knowing that any part or parts were factually wrong, false or misleading.

## Background Information and Context

- 19 Ben Smart and Olivia Hope were reported missing on 2 January 1998. Both had attended a New Years Eve party at Furneaux Lodge, in Endeavour Inlet, Queen Charlotte Sound.
- 20 Initially the missing person investigation was handled by Blenheim Police. It soon became apparent that Ben and Olivia's disappearance was at the very least suspicious and totally out of character.
- 21 Detective Inspector R Pope was appointed to take charge of the investigation on 5 January 1998. A mix of local (Tasman) and out of town staff (predominantly Canterbury) staff were seconded to the investigation. The investigation was structured in accordance with the national homicide pattern.
- 22 See organisation chart below. This is indicative only in terms of the many roles, responsibilities and accountabilities of staff deployed on the investigation. From time to time staff numbers were revised up and down to accommodate particular time bound phases of the investigation.

### OPERATION TAM ORGANISATION CHART



- 23 Following an early assessment of investigation requirements it became apparent that it would be necessary to track down and interview a large number of potential witnesses

who had been visiting Furneaux Lodge from both North and South Islands. Satellite investigation teams were established in Christchurch, Wellington and Auckland to meet this need.

- 24 The investigation generated a significant amount of correspondence (in excess of 6500 investigation documents and a further 800 administrative documents). These included statements, police job sheets, telephone messages, charts, exhibit sheets and reports. The flow of correspondence was controlled by the investigation 2 i/c, Detective Senior Sergeant J Rae and the File Manager Detective R Rolton.
- 25 An electronic file system was established that provided for 'entry' access to the file manager, typist, analyst and 2 i/c. Staff working on the enquiry had 'retrieval' access via ISYS.
- 26 ISYS is a free text retrieval system that can be used as an electronic means to query components of the file.
- 27 The file was constructed using a consecutive document numbering system from 10000 to 50000:
  - 10000 (typist 1)
  - 20000 (typist 2)
  - 30000 (typist 3)
  - 40000 (typist 4)
  - 50000 (administration)
  - 51000 Operation Celt (electronic intercept operation)
- 28 Various documents referred to in Mr Watson's complaint are numbered in accordance with the above described process.
- 29 The table (Appendix A) illustrates the electronic file directory system.
- 30 During the course of an investigation of this scale and complexity the flow of correspondence is constrained by a number of factors. These include;
  - The timeliness of investigators in referring correspondence to supervisors for checking before referral to typist
  - The availability of typist at any one time
  - Prioritisation of incoming and outgoing information
  - Staff working at a distance from the operation HQ, for example in this case satellite phases were undertaken in Christchurch, Wellington and Auckland
- 31 The net result of the factors listed above is that there can often be significant delays, sometimes days or weeks, between the documentation of work undertaken in the field, i.e. interviews and placement of the product of that field work on the investigation file. As a result the O/C Investigation, 2 i/c and file manager are not always aware of all real time case information or developments.
- 32 To overcome this issue daily conferences are conducted by either the O/C or 2 i/c. The purpose being:
  - To inform all staff of current developments (sit reps)
  - To establish priorities and areas of focus

- To provide the enquiry team with an opportunity to exchange views and information – freely and frankly in an open environment where participants are encouraged to consider all options, tactics and possibilities for current or further investigation
  - To attend to any particular administrative matters requiring immediate action
- 33 During Operation TAM daily conferences as described above were conducted and daily briefing notes were maintained. The investigation escalated from 5 January 1998 generating wide spread media and public interest.
- 34 A picture started to emerge around the movements of several people, yachts and other sea craft. In summary:
- On New Year’s Eve Benjamin Innes Smart went to Furneaux Lodge for the New Year celebration. He was staying at Punga Resort across the inlet that night.
  - Olivia Jane Hope went to Furneaux Lodge with a group who had chartered a yacht “Tamarack”.
  - In all there were about 1500 – 2000 people at Furneaux that night.
  - Both drank alcohol during the night and after New Year met at the Lodge. They had previously had a relationship but it had finished earlier in the year.
  - They both went back to Tamarack intending to sleep there, getting back to the yacht at about 4am, but on arrival found that they could not be accommodated.
  - They caught a passing water taxi driven by an employee of the Lodge, Guy Wallace, intending to sleep ashore. Also on the water taxi were another young couple and a solitary male person. This male person offered Ben and Olivia accommodation on his yacht which they accepted. The three of them were dropped off at a yacht among the 165 moored in the bay at that time. The water taxi then left to take the other young couple, to a nearby jetty called Solitude.
  - A combination of information and circumstances led the investigation team to form the view that the person who had offered Ben and Olivia accommodation was Scott Watson, a Picton man who lived on his 26 ft (7.93m) home-built steel sloop – the Blade.
  - The sighting of Ben and Olivia getting onto a yacht is the last known sighting of them.
  - The enquiry team investigated a number of persons of interest, but increasingly attention focused on Scott Watson.
  - As part of this focus the investigation head commenced an electronic intercept phase. This was code named Celt. For security reasons Celt was tightly controlled and only a few investigators on the enquiry were aware of it.
  - A detailed intercept warrant application (affidavit) was prepared off-site in Christchurch. The application coincided with an amendment to the law regarding interception warrants. Notably as of 1 February 1998 the scope of intercept capability was widened to include serious violence as a specified offence.
  - The preparation of affidavit was overseen in Christchurch by Detective Superintendent Miller and Senior Legal Adviser Ian McArthur.

- The first warrant was sworn on 18 February 1998, followed by renewals on 19 March 1998, 16 April 1998 and 1 May 1998. A fresh warrant was sought and granted on 20 May 1998.
- A picture started to emerge around the movements of several people, yachts and other sea craft.

## **The Warrant**

The purpose of the application was to obtain a warrant to intercept private communications. Warrants obtained pursuant to Section 312 CB of the Crime Act 1961 follow a tightly prescribed control process. A supporting application needs to set out reasonable grounds for the consideration of an issuing authority (High Court Judge). Such grounds need to establish that a serious crime of violence has been committed and that it is unlikely that the investigation cannot be concluded without the issuance of the warrant. And that there are reasonable grounds for the belief that evidence sought pursuant to the warrant will be obtained via intercepted communication.

### *Process*

Police policy and procedure requires that a draft warrant and application (duplicate) are prepared and submitted for checking and accuracy by a Police Legal Adviser. The application must be made by a Commissioned Officer who should approve the application in consultation with the Legal Adviser.

*In this case the drafting of the warrant was overseen by Detective Superintendent J Miller and Senior Legal Adviser Ian McArthur. The application was made by Detective Inspector R Pope in his capacity as officer in charge Operation TAM.*

The application consisted of three documents:

- a) Affidavit )
- b) The Application ) In duplicate
- c) The Draft Warrant(s) ) In duplicate

Policy requires that the Registrar of the nearest High Court where a Judge is sitting should be contacted and arrangements made for an appointment with a High Court Judge. The Registrar should only be advised that the appointment is required in relation to a matter under the Misuse of Drugs Amendment Act or Crimes Amendment Act.

*In this case arrangements were made for the warrant to be signed in the Wellington High Court. The rationale for going to Wellington, as opposed to Christchurch High Court was for security reasons.*

Policy requires that the affidavit be sworn by a Commissioned Officer before a Judge. The Commissioned Officer should be accompanied by a Legal Adviser and his 2I/C or member with the best knowledge of the application so that he can answer any questions from the Judge. Questioning by the Judge will take place under Oath or Affirmation.

*In this case Detective Inspector Pope was accompanied by Legal Adviser Ian McArthur to the Wellington High Court on 18 February 1998 and the warrant was approved and signed by Justice Heron.*

The warrant was subsequently renewed on 19 March 1998, 16 April 1998, and 1 May 1998. A fresh application for a new warrant was made on 20 May 1998.

#### *A legal Perspective – The Relevant Law*

The independent legal reviewer<sup>3</sup> provided me with some guidance on the manner in which an application on oath must be crafted citing the judgement of Fisher J in *R v Sanders* (1994) 12 CRNZ 12. Although this judgement relates to a search warrant<sup>4</sup> application the principles provide a useful reference point. Justice Fisher stated:

*"The evidence provided by or on behalf of the applicant is normally to be provided in writing (s 198(1)) but in appropriate cases it can be provided orally and recorded at the time of delivery (s 198(6)). Section 198(1) makes it plain that the facts are to be drawn from sworn evidence. "Sworn" in this context means that there must be an assertion of personal belief accompanied by an oath given in accordance with the requirements of ss 3, 4, and 15 of the Oaths and Declarations Act 1957. The applicant is not confined to evidence which would be admissible in a Court of law (Auckland Medical Aid Trust v Taylor [1975] 1 NZLR 728, 735 (CA); Rural Timber Ltd v Hughes [1989] 3 NZLR 178, 183 (CA)) but the very fact that the statute requires sworn evidence indicates that the deponent must expressly or impliedly assert his or her personal belief in the truth of the primary facts to which he or she is deposing. Normally when a deponent asserts particular facts, the context will justify an inference that he or she has personal knowledge of the facts asserted. If the context suggests otherwise, and some other reliable foundation for the deponent's belief is not given, the bald assertion will normally carry little or no weight. Much will depend, however, upon the context and the inherent likelihood of the facts asserted. The ultimate test of the evidence is whether the applicant has provided the judicial officer (a District Court Judge, Justice, or Registrar (not being a constable)) with reasonable ground for belief in the elements necessary for the issue of a warrant.*

*On the subject of beliefs, it is important to distinguish between the role of the applicant and that of the judicial officer. The applicant has the twofold task of requesting a warrant and providing sworn evidence. As already noted, the fact that the evidence must be sworn indicates that the deponent must have a personal belief in the primary facts alleged in the affidavit portion of the application. And as with most determinations of a quasi-judicial nature, there will be nothing to prevent a search warrant applicant from going on to make submissions, or perhaps even to express personal opinions, with respect to the ultimate issues. Nor would any particular harm be done in this context if these submissions or opinions were expressed on oath. But strictly speaking, the role of a non-expert witness is to give evidence as to primary facts, not evidence as to the conclusions to be drawn from those primary facts. There is nothing in s 198 which requires the applicant to express an opinion as to the ultimate issues upon which the issue of a warrant will turn, still less that such an opinion be expressed on oath. It is for the judicial officer, and the judicial officer alone, to decide what conclusions should be drawn from the evidence as to primary facts provided by or on behalf of the applicant. Only the judicial officer has to decide whether that evidence provides reasonable ground for belief with respect to the ultimate issues. [(1994) 12 CRNZ 12,21]"*

<sup>3</sup> Source Independent legal review para 3, page 2.

<sup>4</sup> Search Warrant s198 Summary Proceedings Act

The legal reviewer<sup>5</sup> suggested the commentary above gives rise to four key points in terms of the affidavit under challenge. They include.

- That the evidence in the affidavit is directed to provide reasonable grounds for a belief by the judicial officer considering the application.
- That the evidence offered by Detective Inspector Pope need not be admissible in a court of law.
- That the evidence may be either Detective Inspector Pope's personal expression of belief or the expressions of belief of other Police officers with which he agrees.
- That the purpose of the affidavit is to provide primary evidence from which the judicial officer can draw conclusions as to the ultimate issues but there is no bar to the affidavit containing personal expressions of belief as to the ultimate issues or submissions.

#### *The Law – Perjury and Allied Offences*

The statutory ingredients of the offence of perjury are<sup>6</sup> :

1. That the accused was a witness in a judicial proceeding;
2. That as part of the accused's evidence on oath he or she made an assertion;
3. That the assertion was false (which is implicit) ;
4. That the assertion was known by him or her to be false; and
5. That he or she intended to mislead the tribunal holding the proceeding.

As to the issue of whether there is a judicial proceeding, *Adams on Criminal Law* states (at CA108.01):

Relevant to the question of whether any activity taking place before one of the listed bodies is a judicial proceeding, is whether the body has the capacity in that proceeding to administer an oath. In *R v Aitken* (1913) 32 NZLR 1185 (CA), an applicant made a false statement on oath to a Magistrate when applying for a publican's licence. The Court found the magistrate had no power to require the oath, and the procedure was administrative in character and not judicial.

In *R v Goodyear-Smith* (High Court, Auckland, T332/92, 26/7/93 Anderson J) His Honour introduced a sixth ingredient that he found to arise out of the, 'cumulative essential elements of the offence'.

At page 5 of the judgment he states:

*I take the view that to be guilty of perjury a witness must make a wilfully false statement in respect of an issue which the witness believes is a material issue in the proceeding. Support for that view is found in Taylor v Manu [1975] 1NZLR 285. Thus the relevance of materiality is still envisaged in the New Zealand definition of perjury, albeit in terms of the accused's subjective belief or understanding. In my judgment the offence of perjury would be established if a person made an assertion as to a matter of fact, opinion, belief or knowledge, that assertion being wilfully false and being considered*

<sup>5</sup> Source Independent legal review para 5 page 2.

<sup>6</sup> Independent advice received from NZP Chief Legal Adviser

*by the witness, subjectively, to be material in that the witness believes it may have a bearing on an issue in the case, notwithstanding that objectively the evidence is not material.*

The passage has been cited with approval in *M v R* (High Court, Rotorua, T18/96, 29/8/96, Robertson J).

Anderson J's requirement for a 'wilfully' false statement also strengthens the *mens rea* requirement from simply 'knowledge' that the assertion was false to a requirement for a 'deliberate' act.

In the Perjury Act 1911 (UK), the crime is defined as wilfully making a false statement material in the proceeding. *R v Millward (Neil)* [1985] QB 519; [1985] 1 All ER 859 (CA) interprets 'wilful' to mean a statement deliberately and not inadvertently made or made by mistake.

In *Hammerley v Scandrett* [1921] NZLR 455 it was held:

In order to constitute the offence of "wilful obstruction" created by s.68 of the Police Offences Act, 1908, it is necessary to establish that the obstruction was done deliberately and intentionally with the idea of preventing the police from going away to other duties.

The Concise Oxford Dictionary (10th ed, 1999) defines "deliberate" as:

1. done consciously and intentionally; fully considered; not impulsive.
2. done or acting in a careful and unhurried way

As to the requirement for an intention to mislead the tribunal, *Adams* states (at CA20.15 citing Buxton, "*Some simple thoughts on intention*" [1988] Crim LR 484, pp 485-486):

... a requirement of intention probably means no more than that the conduct should have been voluntary and not accidental.

Section 112 of the Crimes Act provides a further ingredient; that of 'corroboration'. It states:

### **112 Evidence of perjury, false oath or false statement**

No one shall be convicted of perjury, or of any offence in section 110 or section 111 of this Act, on the evidence of one witness only, unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused.

*Adams* states (at CA112.01):

The section ensures that the question of falsity is not determined only by setting the testimony of one witness against that of another, or by contrasting two contradictory statements by the accused. There must be something which corroborates the allegation that an element of the offence occurred. Corroboration exists where there is an admission of false testimony by the accused, together with evidence of another witness, or there is evidence of two witnesses as to the false statement, or as to an admission by the accused of its falsity. Corroboration may also be found where the defendant has made contradictory statements, when the truth of one is proved by other evidence so as to establish logically the falsity of the other.

Accordingly, there are eight elements that must all be proved before a prosecution for perjury can succeed:

1. A judicial proceeding in which the accused gave written or oral evidence under oath;
2. An assertion i.e. a statement of fact, opinion, belief or knowledge;
3. That the assertion was false;
4. Knowledge by the accused that the assertion was false;
5. A deliberate intention to lie;
6. A belief by the accused that the statement related to a material issue in the proceeding;
7. An intention on the part of the accused to mislead the tribunal holding the proceedings; and
8. Corroboration of the falsity of the statement.

There is a view that an Application for Interception Warrant is not a judicial proceeding but simply an administrative one. If that is the case a case for perjury cannot be established.

### **Perverting the course of Justice**

Section 117(e) of the Crimes Act states:

#### **117 Corrupting juries and witnesses**

Every one is liable to imprisonment for a term not exceeding 7 years who....

(e) wilfully attempts ... to obstruct, prevent, pervert, or defeat the course of justice in New Zealand or the course of justice in an overseas jurisdiction.

In respect of the meaning of “course of justice” *Adams on Criminal Law* states (at CA116.04 adn 117.04):

... that key phrase is not defined. At its core lies the administration of justice by the Courts or other publicly established tribunals....

The critical question will be whether the conduct in question relates to actual or contemplated proceedings before publicly constituted tribunals ... [In Canada] the offence has been extended to cover conduct intended to affect whether or not proceedings will ever be commenced, such as the exercise of a police officer's discretion to pursue an investigation into possible offending with a view to the possible later launching of a prosecution

... Thus conduct which interferes with, or improperly triggers police action has been held to be perverting the course of justice ...

... to “pervert” the course of justice requires only that the accused adversely influence the course of justice

The “Perversion” of the course of justice embraces both conduct intended to secure a wrong or unjust result (as for example by seeking to find the wrong person liable for an offence) and conduct intended to bring about what the accused believes to be the correct or just result by the use of improper means ... In such cases the end does not justify the means.

A false allegation that a described or named person has committed an offence may constitute an attempt to pervert the course of justice ...

The creation of false documents which it is intended will be placed before the court and affect the course of proceedings can be an offence under the section.

As with Perjury, Perverting the Course of Justice is all about 'court processes' and there must be some 'court proceeding' in process (or at least clearly contemplated) before the section can apply.

Accordingly, the first issue is whether the Application for an Interception Warrant is 'too soon' to come within the section. Arguably, insofar as the purpose of an Interception Warrant is to collect information that might then provide an evidential basis for the laying of charges, one could not say that proceedings were, at that time, within contemplation. However note that Canadian courts have been willing to extend the offence to decisions as to whether to investigate (which would cover this case).

Accordingly, if there is sufficient *actus reus* evidence to warrant proceedings. The issue then comes down to the *mens rea* of 'intent'.

The above legal principles have been considered in respect of my discussion and analysis of each head of complaint.

## Discussion and Analysis

### 35 Complaint 1

Paragraph 8.2 of the affidavit attributes a comment to the witness Mahony; namely that *At about 5.30 am Mahony woke and noticed that the "Blade" had gone. He also noticed that Watson had left his fender, which had been placed between the two yachts, behind.* Mr Watson's complaint is that David Mahony did not in fact awake at 5:30 am, but at 8:00 am. On that basis he believes that Detective Inspector Pope misled the court.

Mr Watson is correct in his belief that the witness David Mahony did not wake up on the morning of 1 January 1998 until 8.00 am. This is confirmed by Mr Mahony's statement. The statement in the affidavit should have been attributed to the witness Warwick Eastgate<sup>7</sup>. In his statement he states "*I got up at 5.30 am and noticed then that Scott's boat wasn't there*".

#### Conclusion

The statement in the affidavit attributed to Mahony should in fact have been attributed to the witness Eastgate. This is a genuine drafting error and does not detract from the overall truthfulness of the affidavit. There is no evidence that this error was a deliberate attempt by Detective Inspector Pope to mislead the court.

I agree with Detective Inspector Pinkham's conclusions.

### 36 Complaint 2

In this complaint Mr Watson challenges the assertion that "Scott Watson claims to have been clean shaven over 31 December 1997/ 1 January 1998....." Mr Watson contends that Scott Watson did not claim to be clean shaven; was never asked

<sup>7</sup> Op TAM doc 20084

whether he was clean shaven and there are no documents on the TAM file to support this claim.

The Operation TAM file contains two documents that provide a basis for the inclusion of this comment in the construction of the affidavit.

Firstly, a document titled 'liability summary'<sup>8</sup>. Included in this document is a reference to a statement attributed to Scott Watson stating "*I was clean shaven, I had a shave that day*".

Secondly, a document<sup>9</sup> prepared following a briefing conference on 12 January 1998. Included in this document is commentary from the O/C Suspect Team. He has made reference to the interview with Scott Watson that day. He talks about a discussion with Watson about inconsistencies, quote: "*He says he was shaved and we cannot confirm if he was unshaven*". I assume that the briefing notes referred to are notes produced during the daily conference which I have discussed at paragraph 31 of this memorandum.

These documents tend to indicate that Scott Watson did make a verbal statement that day claiming he was clean shaven.

The file also contains a compilation of information about Scott Watson which would have been collated from a variety of source documents including witness statements. This appears to be a dossier completed by the suspect team. This dossier is marked "RESTRICTED II" and titled "Summary of Inconsistencies relating to Scott Watson's statements." It appears to contain an analysis of documents from the file regarding Scott Watson's activities.

This document is unsigned and is dated as of 12 March 1998 and is likely to have been used to support some of the assertions contained in the affidavit.

Under a heading of "Facial Hair" is the quote: "*I was clean shaven, I had a shave that day.*" *Watson tells Det Fitzgerald on 12.01.98.*

It seems clear that Detective Tom Fitzgerald (now Detective Inspector) is the source of the two references which include comments attributed to Scott Watson. Detective Fitzgerald did speak with Scott Watson on 12 January 1998.

I have spoken to Detective Fitzgerald and he recalls and confirms the comment made by Watson. He believes that he would have documented the conversation in his notebook and possibly on a job sheet. Detective Inspector Fitzgerald no longer has his notebook and I have not been able to locate a job sheet.

## **Conclusion**

I am satisfied that there was a basis for inclusion in the affidavit the comment attributed to Scott Watson "*I was clean shaven, I had a shave that day.*" The basis being the documented comment made by Detective Inspector Fitzgerald.

For the sake of completeness it would have been desirable to have sighted a source (contemporaneous) document in support of Detective Inspector Fitzgerald's commentary - for example his notebook entry or job sheet. Notwithstanding the

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<sup>8</sup> Op TAM admin doc 50188

<sup>9</sup> Op TAM admin doc 50026

absence of any such source document, for the purpose of the affidavit construction I am satisfied that there was a belief that Scott Watson had made the comment "*I was clean shaven, I had a shave that day.*"

Therefore this complaint is not upheld and I agree with Detective Inspector Pinkham's conclusion, albeit for different reasons than those disclosed in his report.

### 37 Complaint 3

Complaint 3 is a further challenge to paragraph 8.9 of Detective Inspector Pope's affidavit, specifically "*.....approximately 23 witnesses describe the third person, believed to be Watson, as unshaven. Watson is known personally to several of these witnesses*". Mr Watson contends that there were only five persons who would be capable of describing the third person and none of them describe Scott Watson and none of them had knowledge of him. Mr Watson's complaint is therefore that Detective Inspector Pope inflated the number and relevance of available identification witnesses.

In essence there are two aspects to this complaint. Firstly the use of the term 'third person', and secondly the number of witnesses capable of describing the 'third person'.

In terms of the first aspect I understand that the term "third person" was used during the enquiry to describe a person who fitted the description of the principal person of interest and the investigation team formed a view that the third person was Scott Watson.

In terms of the second aspect the Op TAM file identifies a number of witnesses who provided statements prior to the affidavit being sworn that show that Watson or the person believed to be Watson (the third person) described as – 'unshaven, a little unshaven, had stubble, or had two days growth'.

The list of witnesses below demonstrates this point. The list includes the name of witness, reference file document number and date interviewed. The list also indicates those witnesses who knew Watson personally, or were introduced to him by someone who knew him personally or who Watson introduced himself to by first name at Furneaux.

<u>NAME</u>		<u>DOC NO</u>	<u>DATE</u>
Simon Bell		20203	170198
Lawrence McKay	Intro to SW	20286 20674	150198 040298
Stefan Zajkowski	Intro to SW	20283 30301	150198 050298
Jonathan Thompson		10306	130198
Camilla Savill		20214	120198
Richard Egden		20043	120198

Amanda Egden		10184	120198
Timothy Everest		20022 10106	080198 080198
Edward Sundstrum		10268	160198
Oliver Perkins		10120 10121	080198 080198
Vicki Eastgate	Knew SW	20038	120198
Andrew Crawshaw		20323	150198
Anna Kernick		20294	130198
Evan Doolan		11484	120298
Jarod Cowan		11479	110298
Sean Thompson		11417	240198
Mary Stewart		10280	120198
Rachael Queree	Intro as Scott	10168	060198
Christopher Bishman		10055	120198
Andrew Bailey		30144	220198
Stewart Allen		11476	120298
Hannah Fox		10254	140198
Geoffrey Hall	Intro to SW	20088	110198

### **Conclusion**

There were a number of witnesses who provided descriptions of the third person and it is clear that the investigation team believed that the third person was Scott Watson.

The witnesses variously described that person as ‘unshaven, a little unshaven, had stubble or had two days growth’. Some of these persons either knew Watson, were introduced to him, or he introduced himself to them. On that basis at the time the affidavit was constructed there was a basis upon which Detective Inspector Pope could reasonably justify his comments at paragraph 8.9, notwithstanding that some of those witnesses had previously failed to identify Watson via photographic montage.

This complaint is not upheld and I agree with Detective Inspector Pinkham’s conclusion.

### 38 Complaint 4

This complaint challenges paragraphs 8.26 (1) and (2) of Detective Inspector Pope's affidavit on the basis that there existed photographic evidence that clearly showed that Scott Watson was short haired and clean shaven, but for natural growth. Mr Watson contends that there were three such photographs taken 31 December 1997, 8 and 12 January 1998 to illustrate his point.

Notwithstanding the existence of photographs the list of witnesses as described above (complaint 3) provided various descriptions of the third person, believed by the enquiry team to be Watson, as having facial hair of varying length.

Additionally, at least three witnesses spoken to by the enquiry team stated that they believed Watson had tidied himself up early in the new-year. Those witnesses include: Charlie Proctor, David Coard and Garry Kenny.

#### *Proctor*

Proctor was interviewed on 5 January and 25 January 1998. In his 25 January statement he stated<sup>10</sup>:

*"I know what Scott Watson looks like. He's been walking past my place here for years. Other times I've noticed him he's been a scruffy guy. He'd wear jeans and his clothes would be well worn and he'd be unshaven. His hair was reasonably scruffy.*

*He'd always look at me and look in here but he'd never speak.*

*It was only 5 - 6 days ago that I noticed Scott walking up the street. I was outside with my neighbour Dave Coard working on the house he lives in. Scott walked past and just looked at us. It was the day before you brought the sloop up out of the water.*

*That's how I remember it because the next day Dave said, "That's the guy - that's Scotty's sloop they've taken out of the water". Dave knows the boat and told me it used to be red and white. He told me that before the media or anyone said it was red and white.*

*Scott's appearance has changed. He's got tidier I suppose. When we saw him his hair was shorter, just like it had just been cut. He was wearing a creamy / brownish dress shirt. He had gold framed shades on with green lenses. He was clean shaven. I noticed it. He had definitely changed."*

#### *Coard*

Coard was interviewed on 25 January 1998. He stated<sup>11</sup>:

*"The day before the sloop was taken out of the water I had been water blasting the house at home with my neighbour, Charlie Proctor. Scotty walked past and I pointed out to Charlie who he was and commented how he'd hit me up to buy my .303 rifle.*

<sup>10</sup> Reference page 4 and 5 Proctor statement Op TAM doc 10335

<sup>11</sup> Reference page 4 and 5 Coard statement, Op TAM doc 10007

*The next day we heard about the sloop being brought in. Charlie and I went out to have a look at it. I commented that if it had have been red and white instead of blue and white, it would have been Scotty's boat.*

*The next day on the mail run I heard that it was Scotty's boat. I've never been aboard his yacht.*

*With his fishing money he bought bits and pieces for the boat from David Oddie at Oddie's Marine in Beach Road, Waikawa Bay. He was buying secondhand sails from Oddie's. I think they came from Auckland.*

*Because I'm not much into boating myself I never really took much notice of what he was getting.*

*I never knew his yacht by any name. It never had a name that I knew of.*

*The day he walked past my place, the day before the Police took his yacht, I hardly recognised Scotty. His hair was normally a bit longer, it was shorter than normal.*

*He was wearing a short sleeved shirt and his jeans were tidy and a lot cleaner than normal. I didn't notice whether he was clean shaven. He didn't speak or really look over".*

#### *Kenny*

Kenny was interviewed on 22 January 1998. He stated<sup>12</sup>

*"Last Sunday week (11.1.98) at about 10 am I was at work to do a wee job. I heard some banging next door at Owen's yard. It sounded like door being slammed or something being dropped. The noise came from the direction of the logging yard.*

*I walked to the corner of my yard and had a look. I couldn't see anything. I then rang Dennis Preece and told him to come and have a look at his yard because I had heard noises in there.*

*I finished my job, then opened Owen's gate up and did a visual on all the gear around the office and the loaders. I relocked the gate, drove down the road and stopped to talk to some people in a car further up the road. This was down beside Peter McManaway's.*

*About within 5 minutes of locking the gate, I saw a person walk out from between the gate and the hill. I saw this through my rear vision mirror.*

*I watched him walk towards my car and I recognised this person as Scott Watson.*

*I didn't take any notice of what he was wearing but he was a lot more tidily presented than what he normally is. He normally has hair longer than normal, not real tidy, scruffy looking. Although I didn't see him often its hard to say whether he's cleanshaven or not. On this particular day he was clean-shaven. He also looked like he'd had a hair cut. I can't really remember what*

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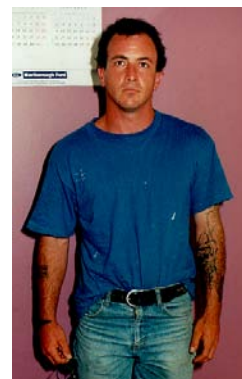
<sup>12</sup> Reference Kenney statement pages 1 and 2, OP TAM doc20329

*his hair was like prior to it being cut as I know who he is but I have never taken much notice of him.*

*The bag that he was carrying was thrown over his shoulder. I seem to vaguely remember that it was possibly a green and black bag. It was a carrybag like a bag you might carry gear in for footy or something. The bag looked half empty. It didn't appear heavy. I almost took a photo of him but when I recognised him I didn't bother".*

The second aspect of this complaint relates to Mr Watson's concern that there was photographic evidence that clearly indicated that (Scott) Watson did not change his appearance. It is quite correct that the investigation team did have a series of photographs of Scott Watson which were taken at various times between the 31<sup>st</sup> December 1997 and 12 January 1998. These included photographs taken on board the Mina Cornelia, a super market and at the Picton Police station.

See attached below copies of some of these photographs



Mr Watson asserts that the photographs show that the statement of fact that Scott Watson cut his hair is plainly and demonstrably false. Balanced against that is the reliance by Detective Inspector Pope that three witnesses provided commentary indicating that Scott Watson had cut his hair and tidied his general appearance (see Proctor, Coard and Kenny); plus commentary from the other witnesses who offered information about Scott Watson's general appearance.

I cannot advance this matter any further other than to speculate that for the purpose of constructing the affidavit Detective Inspector Pope considered all of the available information regarding Scott Watson's appearance and formed a view that on balance there was a basis to conclude that his appearance had changed.

## Conclusion

Whether or not photographs of Scott Watson clearly demonstrated that he was unshaven or was bearing some growth is a matter of conjecture. The fact of the matter is that there were witnesses who variously described Watson as being unshaven, and there were at least three who believed that he had tidied himself up.

Further, I note that identification was an issue during Scott Watson's trial and the issue of identification warnings formed part of Watson challenge to his conviction, heard in the New Zealand Court of Appeal in 2000 [Watson Scott v R, 384/99], heard by Richard P, Gault J and Henry J. Of note pages 8 to 12 deal with the trial Judges direction to the jury in relation to identification (as required by s344D of the Crimes Act 1961). The Court of Appeal<sup>13</sup> discussion on this point provides some context in terms of identification issues faced not only during the course of the trial, but also during the course of the investigation.

I conclude that there was a basis for Detective Inspector Pope to believe that 'according to witnesses' Watson had cut his hair and substantially tidied up his appearance; and it was reasonable for him to include comments of those witnesses in his affidavit, albeit that photographic images of Watson could have been interpreted differently.

Mr Watson's complaint on this point is understandable, but he appears to have either looked at the available photographic evidence in isolation or he may have been aware of the various witness accounts regarding Scott Watson's appearance and rejected them.

In hindsight for the purpose of constructing the affidavit it may be helpful to have included reference to the photographs and some supporting commentary around the apparent discrepancy between the witness accounts and the interpretation of the photographs. I don't raise this as a criticism, but rather as an observation.

I therefore conclude that complaint is not upheld and I agree with Detective Inspector Pinkham's conclusion.

## 39 Complaint 5

This complaint arises from paragraph 7.1 of Detective Inspector Pope's affidavit. Mr Watson contends that the witnesses Cunliffe and Crawshaw had insufficient contact with Scott Watson to enable them to form an opinion as to his behaviour; they were not present when he arrived in Endeavour Inlet and they did not describe or refer to Watson's "deterioration". Mr Watson believes that inclusion of such claims are patently false and misleading.

The investigation file contains two statements relevant to this issue:

Andrew Crawshaw	20323	150198
Deanna Cunliffe	10340	150198

According to Crawshaw's statement he did have contact with Watson - they both rafted up to "Mina Cornelia" at the same time, and Crawshaw was in fact able to describe Watson. However, this interaction with Watson was fleeting and Crawshaw offered no comment about Watson's behaviour.

<sup>13</sup> Refer Court of Appeal notes [Watson Scott v R, 384/99] – Pinkham file

According to Crawshaw he next saw Watson during the early hours of the morning and he describes Watson as having come aboard his boat – Crawshaw believed this person to be Watson – or at least the person he had met earlier during the previous day. During this second encounter with Watson Crawshaw commented in his statement<sup>14</sup>:

*“After going to bed the next thing I remember is someone coming on board the boat. I heard a thump or someone come on board. I have done a lot of sailing and you get to know the different sounds that occur on a boat.*

*The sound I heard was of a person jumping down onto the deck, if was a thump and that is what woke me up. This person did not climb up onto yacht, from a dinghy or small boat.*

*I heard the person walk down into the hatchway; he squatted in the hatchway and talked to us. I immediately assumed it was the guy from the boat rafted up on the other side of the Sunfast.*

*I assumed this because he looked the same, and from the direction he had come. When I say he looked the same, I could only see his outline.*

*He had a drink in one hand and a cigarette in the other and he was leaning in through the hatch. He said “are you’s asleep down there”. By this stage I was quite awake. I realised who it was and I had heard earlier that he had been causing trouble so I didn’t want to get involved in any conversation so I answered “Yes so fuck off:”. Then he said “I want to party” or something similar. I then said to him “look mate just go away”. At this stage he must have seen Deanna because he said, “Give her to me I’ll look after her”. I said look “mate just go away” and he did.*

*He left the same way he had come, up onto the Sunfast.”*

Cunliffe was Crawshaw’s partner. According to Cunliffe she also had contact with Watson albeit a brief view of him rafting up against "Mina Cornelia" – nothing more than a fleeting glimpse, and she makes no particular reference in relation to Watson’s behaviour although she does provide a description of him.

Cunliffe also recalls ‘someone’ – a drunk person coming on board their boat during the early hours of the morning and she believed that person to be the same person seen rafting up against the “Mina Cornelia”. She heard the conversation between her partner, Crawshaw and this person, but again only got a fleeting glimpse of him.

In the context of paragraph 7.1 of the affidavit neither Crawshaw nor Cunliffe were in a position to observe or comment on Watson’s behaviour up to 10 pm on 31 December 1997. However they were able to comment on his behaviour and “deterioration” when he came on board their boat during the early hours of the morning.

The other witnesses on board the "Mina Cornelia" were in a good position to make such observations – those witnesses included Dave Mahony, Ernestes, Marcel and

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<sup>14</sup> Reference Crawshaw statement, Op Tam doc 20323.

Monique Rutte, Stefan Zajkowski, and Deborah Corless. All of these witnesses provided ample evidence about Watson's behaviour with comments such as – rude and obnoxious, demeanour changed, became obnoxious and abusive, pissed and abusive, frightened and felt threatened by Scott Watson.

### **Conclusion**

For the reasons outlined above Mr Watson is quite correct in his assertion that the witnesses Crawshaw and Cunliffe did not describe Watson's behaviour as deteriorating "following consumption of drugs and alcohol to such an extent that by 10 pm on 31 December 1997 he had become obnoxious". However, they were able to comment on his appearance when they first met during the afternoon and also when he came aboard their boat during the early hours of the following morning.

Therefore, but for the discrepancy in timings i.e. the reference in the affidavit to "to 10 pm" the thrust of the paragraph 7.1 is correct, but in the case of witnesses Crawshaw and Cunliffe their description of Watson's behaviour during their encounter in the early hours of the morning should have been referenced to that timeframe.

This aspect of the complaint is partly upheld only because of the timing discrepancy only, which in my view does not necessarily adversely impact in the overall integrity of the affidavit. In order to understand the relevance of paragraph 7.1 it needs to be considered in the context of paragraphs 7, 7.2, 7.3, 7.4, 7.5, and 7.6 of the affidavit - not in isolation.

I agree with Detective Inspector Pinkhams conclusion in respect of this complaint but my rationale for doing so differs for the reasons set out above.

## **40 Complaint 6**

This complaint relates to paragraphs 8.11 and 8.26 of the affidavit. Mr Watson contends that the suggestion that Scott Watson misled Police because his boat does not appear in a particular photograph is at best misleading and selective use of information in the construction of the affidavit.

Central to the complaint is the time that Watson left Endeavour Inlet on the morning of 1 January 1998. In the affidavit there are references to two photographs – one said to have been taken at 8.30 pm on 31 December 1997 by a person on shore and the other said to be taken at about 6 am on the morning of 1 January 1998.

There is evidence to establish that there was available to the enquiry team several photographs showing Watson's boat present at 8.30 pm on 31 December 1997.

The 6.00 am photograph quoted appears be that taken by the witness Bamford (reference Photo Exhibit No: 52, Court Photo Booklet page 26) – copy attached at appendix B to this memorandum.

In a statement to Police, Bamford said that he took a photo of the bay at about 6.00 am on 1 January 1998. The "Blade" is not shown in that photograph. On that basis it seems that the timing of 6.00 am was relied on in terms of the construct of the

affidavit, albeit that there were witnesses who made statements that could have contradicted the timing of the 6.00 am photograph.

Statements that Scott Watson made concerning his timings are as follows:

Scott Watson	40424	070198
	10083	080198
	20029	120198
	40483	120198
	13574	120198

Document 40424 Watson states: *"got up at 7.30 am and sailed home"*

In his complaint Mr. Watson quotes document 20112 as a statement by Scott Watson. On this aspect he is mistaken. Document 20112 is in fact a statement from Lynette Hall taken on 11 January 1998. In this statement she states that they got up at 6.00 am and left about 6.30 am: *"as we were about to leave Vicki or Warwick noticed Watson's boat gone by then"*.

### **Conclusion**

The basis of this complaint is that Detective Inspector Pope has misled the court by being selective in the use of available information. This claim is rejected on the basis that the totality of paragraph 8 (including sub-paragraphs 8.1 to 8.26.6) needs to be considered collectively, rather than in isolation.

I believe that Detective Inspector Pope in constructing the affidavit was entitled to use or reject information from a wide variety of sources and in the case of paragraph 8.11 clearly preferred the statement of the witness Bamford in terms of timings.

Similarly, Detective Inspector Pope was entitled to use information in the affidavit that Scott Watson had provided during interview of his recollection of his departure time.

This complaint is not upheld and I agree with Detective Inspector Pinkhams conclusions.

## **41 Complaint 7**

This complaint relates to paragraph 6.5 of the affidavit.

*"The water taxi driver, Guy Wallace, and passengers on the Naiad at approximately 4 am on 1 January 1998, Morresey and Dyer, described a person of similar description to Scott Watson as being dropped off the water taxi in the company of Olivia Hope and Ben Smart near where Scott Watson's yacht was rafted"*.

Mr Watson contends that none of the three witnesses (Wallace, Morresey and Dyer) described a person of similar description to Scott Watson. Mr Watson believes that the witness Morresey described a "long haired man" [reference Op TAM docs 10031, 10079, 30068].

He further complains that the witness Dyer supplied no description at all [reference Op TAM docs 10026, 10080, 20090]. However, he notes that while Wallace's description does at times include features of Watson, it also includes many more that exclude him [reference Op TAM docs 10861, 10859, 10017, 10081, 12635, 10587].

Mr Watson asserts that by 18 February 1998 both Wallace and Dyer had participated in a formal identification procedure and neither chose Watson; and Wallace had also been shown a single photo and a moving TVNZ image of Watson and did not identify him.

Mr Watson therefore believes that by inclusion of paragraph 6.5 Detective Inspector Pope has misled the court.

The documents available to the enquiry team at the time the affidavit was prepared were as follows:

Hayden Morresey	10031	070198
	10079	080198
	30068	300198
	20616	080298
Sarah Dyer	10026	050198
	10080	080198
	30268	060298
Guy Wallace	10017	050198
	10016	060198
	10081	090198
	10704	070298
	30380	060298

Other documents relating to the witness Wallace include 10861, 10859, 12635 and 10587.

#### *Witness Morresey*

In Morresey's first statement<sup>15</sup> he describes a person who was similar to the description or profile that was being formed of Scott Watson. In this regard Morresey stated:

*"I can only remember seeing the back of the guy that I thought was the owner of the boat<sup>16</sup>. I'm not sure of his race. I would put his age at between 25 and 35 yrs. His hair was quite scraggly looking. By that I mean it was quite wavy. It went down to just before his shoulder line. I think it was brownish in colour. He had long pants on and I think he had a long sleeve shirt on but I can't remember anything about it."*

<sup>15</sup> Op Tam doc 10031 Morresey statement no 1

<sup>16</sup> It is inferred that the 'owner of the boat' is the 'third person' (the investigation team believed that Scott Watson was the third person)

Second statement (10079)<sup>17</sup>:

*"I think that the guy who had been walking in front of us had longish hair. By this I mean it looked like it needed a bit of a cut. It was wavy and sort of shoulder-length. This is the guy that got on to the second yacht."*

Third statement (30068)<sup>18</sup>:

*"He didn't appear to be that big. He wasn't stocky. If he was standing up he would probably be about 5'8"-5'9". There is nothing unusual or distinctive that I can remember about his voice. I wouldn't know whether his shirt was lighter or darker than his jeans. I think all his clothes were darker because if they were white it would have shown. I think his shoes could have been boots because I don't remember seeing any white like a sneaker."*

*Witness Dyer*

The only description that Dyer provided of the "third man" on the Naiad is (10026)<sup>19</sup>:

*"I can't remember about the guy who asked them to come and stay on their boat.....I think he was sitting next to me or the same side as I was because the way I was facing I didn't look at him at all. By the sound of his voice he wasn't an old man or really young.....When we got to the other guy's boat they all hopped out. I didn't notice at all of the other boat, not even the colour."*

In a second statement (10080)<sup>20</sup> Dyer confirmed that she was unable provide any further description:

*"I can't remember what the other guy in the dinghy looked like".*

However, Dyer does confirm that all three (Ben, Olivia and the third person presumed to be Scott Watson) got off the dinghy together onto the third person's boat:

*"They got on the dinghy and said there was no room on the boat. The other guy on the dinghy said you can stay on my boat. I think it was the female who said okay, thanks."*

The third and final statement made by the witness Dyer does not assist on this point.

*Witness Wallace*

In Wallace's statement<sup>21</sup> of 5 January 1998 he describes a person who throughout the enquiry was similar to that of Scott Watson:

*"The guy that got on board with Olivia and Ben was a male, Caucasian, aged about 32 years. He was about 5'8" tall, wiry build. I think he may have had tattoos on his arms but I can't be sure. His hair was a brownie colour, wavy*

<sup>17</sup> Op Tam doc 10079 Morresey statement no 2

<sup>18</sup> Op Tam doc 30068 Morresey statement no 3

<sup>19</sup> Op Tam doc 10026 Dyer statement no 1

<sup>20</sup> Op Tam doc 10080 Dyer statement no 2

<sup>21</sup> Op Tam doc 10017 Wallace statement

*and medium length. He had about two day's growth on his face. He was bourboned up, like his eyes weren't focussing.*

*He was wearing a Levi shirt with short sleeves, 100 per cent cotton. It had a collar with a button-up front. I saw the Levi brand on it. It was a short sleeved shirt and the colour was between khaki and very pale green. He was wearing blue jeans and I think sandshoes."*

These comments are consistent with those made by Wallace in his statement of 3 January 1998 (Op TAM doc 10861):

*"The guy on the ketch would have been about 32, about 5' 9" tall, wiry build. He was unshaven but didn't have a moustache. He had short dark wavy hair and smelled like a bottle of bourbon."*

Mr Watson complains that the witnesses Wallace and Dyer had participated in a 'formal' identification procedure prior to 18 February 1998 and neither identified Scott Watson. In addition he complains that Wallace was shown a single photograph of and a moving television image of Scott Watson and failed to make identification.

The Op TAM file confirms that two photographic montages were prepared containing photographs of Scott Watson, hereafter referred to as Montage A and Montage B.

#### *Montage A*

A montage was shown to Dyer<sup>22</sup> on or about 13 January 1998 and she was unable to identify anyone. I assume Montage A was used because Montage B was probably not constructed at that time.

The issue as to whether Wallace was shown Montage A is unclear, at least as of 18 February when the first affidavit was sworn. The briefing notes of 11 January 1998 include a comment from Detective Sergeant Moore<sup>23</sup>: "*The only thing of note relates to Scott Watson. It seems very unusual that Wallace does not know Scott Watson. He does know his mother. When shown a photographic Montage Wallace did not pick Watson out*".

It seems that the source of this comment may have arisen from a Q/A interview of Wallace by Detective Sergeant Moore on 11 January after Detective Fitzgerald had completed a video interview with Wallace. There is a documented reference on the Op TAM file to the Q/A interview<sup>24</sup> in which Detective Sergeant Moore questions Wallace about being shown a 'single' photograph. There is no other information on the Op TAM file that clearly establishes that Montage A was shown to Wallace. Therefore in my assessment it is more likely that the reference in the briefing notes to the Montage should in fact have been a reference to the 'single' photograph. However, my assessment is speculation only and I cannot advance this issue any further.

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<sup>22</sup> Op Tam doc 20090

<sup>23</sup> OP Tam doc 50019

<sup>24</sup> Op Tam doc 40856

### *Montage B*

Montage B was shown to Dyer<sup>25</sup> and Morresey<sup>26</sup> in April 1998 and both were unable to make an identification.

Wallace<sup>27</sup> was also shown the Montage in April 1998 and he did make an identification.

Wallace had previously been shown television footage of Scott Watson early in February 1998 and he did not make an identification. However, according to TAM doc 10587 it appears that Wallace sought to retract his non-identification *Wallace said "I have just rung Julie Roberts from TVNZ. I told her that I didn't want her to show that story, I've thought about it and I don't think I can stand by what I have said"*. I assume that these comments may have been linked to the (non) identification of Scott Watson via TVNZ footage.

On my assessment there was a reasonable belief to at least draw an inference that the witnesses Wallace and Morresey had provided a description which could be interpreted as being similar to that of Scott Watson.

However, on the basis of information that I have been able to source, the same could not be said in terms of Dyer as this witness was unable to provide any description at all. At best Dyer could only provide a general description of voice, ie *"by the sound of his voice he wasn't an old man or really young"*.

Detective Inspector Pinkham's interviews<sup>28</sup> of the various staff involved in the construction of the affidavit do not specifically address this issue. In my view this aspect could possibly have been fleshed out during their interviews by asking more specific or probing questions on this point. On that basis on 12 October 2008 I referred this aspect back to Detective Inspector Pinkham in order to identify whether or not staff involved in the construction of the affidavit were now able to recall whether or not there existed additional information (at the time) that was not readily apparent from the Op TAM file documents.

On 6 November 2008 Detective Inspector Pinkham reported back to me that he had canvassed both Mr McArthur and Detective Senior Sergeant Rae and neither are able to advance this any further. Detective Inspector Pinkham advised that during his assessment of this particular complaint he adopted a wider interpretation of the use of the word 'similar' and referred to the definition (via [www.dictionary.com](http://www.dictionary.com)) as *"having a likeness or resemblance especially in a general way"*. And on that basis Detective Inspector Pinkham believes that Dyer's comment *"the guy.....by the sound of his voice he wasn't an old man or really young man"* in a general sense match Watson in that they are 'similar' to Watson to the extent that he is a male and was aged 26 years.

## **Conclusion**

The purpose of paragraph 6 in the affidavit was to demonstrate that on the basis of information known at the time an inference could be drawn that the "third"

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<sup>25</sup> Op Tam doc 40825

<sup>26</sup> Op Tam doc 40824

<sup>27</sup> Op Tam doc 40462

<sup>28</sup> Detective Inspector Pinkham interviewed Deputy Commissioner Pope, DSS Rae, Mr I McArthur, D I Fitzgerald, ex DS S Moore, ex D Supt Miller, Sgt M Porter

unidentified person was in fact Scott Watson. Paragraphs 6.1 through to 6.7 were constructed to make this point.

In terms of paragraph 6.5 the descriptions provided by the witnesses Wallace and Morresey were sufficiently proximate to Scott Watson to justify inclusion in the affidavit, albeit that there are some variances in the descriptions, such as Morresey's reference to the third man's hair ("*it was quite wavy. It went down to just before his shoulder line*"). Therefore, I believe that the use 'similar' as a descriptor was reasonable and not misleading.

The witness Dyer was unable to provide a description and therefore it could not be said that she described a person of similar description to Scott Watson, albeit I note but don't necessarily agree with Detective Inspector Pinkham's view that Dyer's description could be construed as being similar to Scott Watson. On that basis I agree Mr Watson's challenge to inclusion of Dyer in paragraph 6.5.

The question therefore arises as to whether or not the reference to Dyer in paragraph 6.5 of the affidavit is in itself prima facie evidence of the commission of any of the offences contained within Sections 108 to 117 of the Crimes Act<sup>29</sup> or any other statute. And if so does it necessarily follow that Detective Inspector Pope or any of the persons involved in the construction of the affidavit intentionally or deliberately misled the issuing authority.

In the absence of any other direct evidence on this point there are number of possibilities as to why the reference to Dyer may have been included in paragraph 6.5 of the affidavit. Some of those possibilities include:

- a) It is possible that those responsible for the construction and drafting of the affidavit were aware of information in terms of the Dyer reference that is not readily apparent on the Op TAM file; or
- b) It is possible that those responsible for the construction and drafting of the affidavit genuinely held the belief that Dyer's reference to gender, voice and age were sufficiently similar to Scott Watson; or
- c) It is possible that the inclusion of the Dyer reference was simply a mistake – a drafting error; or
- d) It is possible that those responsible for the construction and drafting of the affidavit deliberately included the reference to Dyer with the express intent to deceive.

I can only speculate as to which of the above four possibilities apply. However, as a matter of commonsense and objective deduction I believe that there are only three realistic possibilities - either/or a), b), and c) above.

I have rejected the possibility that the Dyer inclusion was deliberate and done so with intent to deceive. In my view it is plainly obvious to anyone reading Dyer's statements that she was clearly unable to offer a detailed description of any sort. To have included this reference with any intent to deceive is not tenable given that such a deception would have been easy to uncover.

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<sup>29</sup> Sections 108 to 117 of the Crime Act deal with Misleading Justice.

*Possibility 'a'*

Although I have not been able to locate any information that may have been available to the Op TAM investigation team in addition to statements made by the witness Dyer I can neither confirm nor negate this possibility.

*Possibility 'b'*

Although it is possible that those responsible for the construction and drafting of the affidavit genuinely held the belief that Dyers reference to gender, voice and age were sufficiently 'similar' to Scott Watson I believe that to do so is 'drawing a long bow' in terms of the dictionary meaning of the word 'similar'.

*Possibility 'c'*

I tend to favour the notion that it is possible that the inclusion of the Dyer reference was most probably a mistake – a drafting error. My rationale being that in the context of paragraph 6 and in particular sub-paragraph 6.5 there was little material relevance in the inclusion of the Dyer reference other than to add some support to the descriptions provided by Wallace and Morresey which I have previous concluded were sufficiently 'similar' to Scott Watson to justify inclusion in the affidavit.

Nothing turns on the exclusion of the Dyer reference in terms of the overall integrity of the warrant. Had the application contained no reference at all to Dyer I believe that it still would have been issued. Further I understand that no evidence was advanced during any of the subsequent trial proceedings linked directly or indirectly to the Dyer reference in paragraph 6.5 of the affidavit. Therefore, the consequences for the inclusion have no bearing on the outcome of those proceedings.

In addition, complaint 1 reinforces the fact that drafting errors can and have occurred in the construction of the affidavit and therefore it is reasonable to assume that this is another such example.

Given my commentary above I do not believe that the Dyer inclusion merits any further examination in terms of any potential Crimes Act (or any other statute) breach. Other than to confirm that although the actus reus (the act) component can be satisfied the mens rea (requisite intent) component cannot.

## 42 Complaint 8

Complaint 8 relates to paragraphs 8.4 and 15.7 of the affidavit.

In terms of paragraph 8.4 Mr Watson believes that the statements by the witnesses Harvey [reference Op Tam docs 11072, 11611] and Brown [docs 20218, 11612] are far from conclusive identification and vary significantly from a description of Blade. Mr Watson therefore believes that paragraph 8.4 is at best irrelevant and an exaggeration of the police case.

The documents available to the enquiry team regarding the witnesses Harvey and Brown were:

Timothy Harvey	11072 11611	220198 100298
Jeremy Brown	11612 20218	100298 140198

Harvey's first statement<sup>30</sup> includes the following:

*"The yacht I saw appeared to be a single masted yacht with a white hull. It was not large. Because it was coming light on the other side of the bay I could not see any colours on the yacht, just the white hull. I did not notice any lights on it. I did not or could not see any people on it. I couldn't hear any voices.*

*It looked a similar size to the one I have been shown at the Police Station today which was coloured brown and is now apparently coloured blue.*

*I cannot say for sure if it was the same yacht. It was certainly similar in size."*

Harvey's second statement (11611) includes:

*"The yacht appeared to be predominantly white with a single mast. The mast had a light on it. I'm not sure where the light was but I think it was at the top of the mast.*

*I didn't notice anyone on board the yacht; it wasn't quite light enough to see any detail on the yacht."*

Brown's first statement<sup>31</sup> includes:

*"The yacht was a single mast. I remember that it was white coloured above the water line. You could not see the deck area but the mast could be seen and it appeared white. It was about an hour and a half later that the sun came up.*

*There is nothing else that I recall about the boat. There were no other yachts or motor boats moving in the area that I saw. I have now looked at a photo of a yacht (before and after written on it) and it does look like the type of boat that I saw. The areas of dark colouring appear to be the same also."*

Brown's second statement<sup>32</sup> includes:

*"I saw a yacht which was heading away from the Furneaux area. This boat was definitely white with a stripe along the side. I don't know what colour the stripe was. I couldn't see anyone on board. I saw a light; I'm not sure how many, at the top of the mast or masts. I don't know what colour the light was. I would say the boat was about 40 foot long; I could see the outline quite well. It had safety rails on it as well."*

I understand that both witnesses provided their statements after being shown the before and after photographs of the Blade, which depict the fact that Blade had changed appearance (trim colours from red to blue).

Paragraph 8.4 needs to be considered in the overall context of paragraph 8 and sub paragraphs 8.1 to 8.26.6 of the affidavit. The purpose of these paragraphs was to provide a summary of Scott Watson's movements and the efforts that he went to disguise the appearance of his yacht, eliminate possible evidence, mislead the police

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<sup>30</sup> Op TAM doc 11072

<sup>31</sup> Op TAM doc 11612

<sup>32</sup> Op TAM doc 20218

and also to show the result of enquiries that tend to show that Ben Smart and Olivia were deceased. Paragraph 8.4 was but one piece of the picture that Detective Inspector Pope used to demonstrate these points. Whilst there may have some factual discrepancies in both Harvey and Browns descriptions of the yacht in question, it was reasonable to assert that their descriptions were at least ‘similar’.

Paragraph 15.7 of the affidavit contains the declaration (oath) by Detective Inspector Pope that *“The statements of fact contained in this application are true and correct and all statements of opinion are true to the best of my knowledge and belief”*. The purpose for inclusion of these words in the affidavit are intended to convey to the issuing Judge that the facts stated in the document are true *to the best of Detective Inspectors Pope’s knowledge and belief* and that any inferences that he has drawn from information, opinions or facts obtained during the course of his investigation are honestly held.

### **Conclusion**

For reasons set out above I do not agree that the inclusion of paragraph 8.4 in the affidavit was ‘irrelevant or an exaggeration’. This complaint is not upheld and I agree with Detective Inspector Pinkham’s conclusion.

In terms of paragraph 15.7 Detective Inspector Pope attested to an honestly held belief. It doesn’t necessarily follow that if parts of the document are found to be in error or wrong that Detective Inspector Pope deliberately or intentionally set out to knowingly mislead. Nor does it necessarily follow that a criminal liability threshold is met.

In order to reach a criminal liability threshold Detective Inspector Pope would have needed to know that the facts or opinions expressed in the affidavit were clearly wrong and despite this knowledge deliberately included them in order to mislead.

### **Detective Inspector Pinkham’s Investigation**

43 A specific purpose of this review<sup>33</sup> was to satisfy myself that:

- Detective Inspector Pinkham’s investigation was carried out thoroughly and competently.
- Detective Inspector Pinkham explored all reasonable avenues of enquiry
- Detective Inspector Pinkham’s conclusions and recommendations were well founded and had an evidential basis.

44 In terms of the review purpose I have identified three areas that I should comment on:

- First, the delay in finalising the investigation
- Secondly the depth of analysis in support of conclusions; and
- Thirdly the use of the Southern Legal adviser to provide a legal opinion

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<sup>33</sup> See sub-heading Review Purpose para 8 page 1

### *The delay*

Mr Watson originally complained to the Police Complaints Authority (PCA) on 6 November 2003. The PCA declined jurisdiction and suggested to Mr Watson that he refer his complaint to Police.

On 20 April 2004 Mr Watson hand delivered his letter of complaint to the Blenheim Police. The complaint was referred to the Office of the Commissioner.

On 14 July 2004 Detective Inspector Pinkham was tasked by Assistant Commissioner P Marshall to investigate Mr Watson's complaint.

On 20 March 2008 Superintendent G Fraser, District Commander Southern referred Detective Inspector Pinkham's completed investigation report and file to me - received on 27 March 2008.

It has taken about 4 years from receipt of complaint to completion of the investigation. This is an unacceptable delay for an investigation of this type.

Detective Inspector Pinkham has acknowledged the delay in his investigation report. He advises:

*"I apologise for the length of time taken to address the matters in this complaint. Various factors have contributed to the length of time taken including a transfer from one posting to another, involvement in a number and range of criminal investigations, and other responsibilities as Southern District Crime Services Manager.*

In addition Detective Inspector Pinkham has advised that there were delays in Detective Inspector Pope returning draft job sheets to him.

I have noted from records<sup>34</sup> held by PNHQ Professional Standards Office that the investigation progress was being monitored. Monitoring including nothing more than checking with Detective Inspector Pinkham as to case progress. The result of progress or delays was recorded on a centrally managed administration file. Beyond noting the administration file no proactive steps were taken to escalate the lack of urgency around the completion of the investigation to an appropriate person. Additionally Mr Watson was not provided with regular updates.

In this regard I invited the acting National Manager: Professional Standards, Acting Superintendent Jon Moss to provide commentary. He responded as follows<sup>35</sup>;

*"The office of the National Manager: Professional Standards operates an Administration process to monitor and manage the 2500 - 3000 files flowing into and out of the office annually.*

*One of the functions of the office is to monitor timelines for reporting and updating of progress for complaint (and non-complaint) files. General Instructions still require a monthly schedule to be submitted to this office updating progress. Those schedules are then sent to the IPCA for their attention.*

*In the investigation under discussion, it is worth noting these points:*

- *The matter was under investigation by an investigator independent of a District or Service centre of the employee complained of. The matter*

<sup>34</sup> Professional Standards admin file records 10 progress reports (referred to as bring ups)

<sup>35</sup> Response provided by Acting National Manager: Professional Standards

*therefore did not appear on any formal schedule. This raises an issue as to how those matters are monitored in this office. This might include matters attended to by the Detective Superintendents under PNHQ.*

- *In this case, updates were requested by the Administration staff in the national office, of the investigator. It appears that those were either ignored or did not provide any meaningful information as to progress in the enquiry. The Administration staff who asked for updates, in this case did not elevate the delay to their supervisor. I have spoken to the staff involved and they report that they had no mandate / understanding of a need to do this - ie - there was no expectation that this should occur.*
- *There appears at the time to have been no formal process for managing these situations.*
- *My analysis of other (serious) investigations indicates that this was not a unique situation. Districts and Service Centres are having to be regularly prompted to either resolve investigations or to provide meaningful updates in order that we (and the IPCA) might be satisfied that the matter is progressing.*
- *To that end, significant work is underway in this office to address these and other related issues. This work has come about also from the Commission of Inquiry Recommendations owned by the NM: PS.*
  - a) *Better supervision of the administration systems and process staff.*
  - b) *Refinement and change to those systems to allow for more efficiencies and role clarity.*
  - c) *A mandate to the Administration staff to elevate matters subject to unexplained delay to the NM:PS for discussions with relevant District / SC*
  - d) *Modifications to the PS - PeopleSoft database to flag investigations both in terms of delay (setting of limits before escalating) and seriousness.*
  - e) *Analysis of the database for flaws in recording. Significant resource invested in closing old files and cleaning up recording and data entry practices.*
  - f) *CoI work on development of centralised national system for recording and managing complaints. The requirements of which clearly take account of situations such as this. Currently the office operates three separate databases.*
  - g) *Analysis of the existing database to identify benchmarks for timeliness of District turnaround for investigations. Intention to build this into Organisational Performance Group (OPG) reporting.*
  - h) *Development of Schedules for other Service Centres and proposal for same for the Detective Superintendents. ( Well underway)*

- i) *Change of file bring up management processes to ensure appropriate escalation procedures are in place to manage a complaint files when they are outside of the specified time parameters for reporting and resolution. To require an appropriate action plan from the District or Service Centre to address the delay. ( Work in progress)*

In my assessment the delay in finalising this matter arose due to a combination of (1) a lack of urgency on the part of Detective Inspector Pinkham; and (2) a failure by Professional Standards Office to escalate the lack of progress.

I have noted Detective Inspector Pinkham's explanation that he was busy on other serious crime and related matters. However, as time passed he should have sought relief to allow him to pursue his investigation.

I also note that the Professional Standards Office have acknowledged that they needed to be more proactive and have since put measures in place to provide more robust oversight of cases of this nature.

Detective Inspector Pinkham's final report was received by me on 27 March 2008. In the intervening period I have spent many hours reviewing the report findings and I referred my preliminary review conclusions to an Independent Barrister for peer review. On that basis I accept any comment or criticism in terms of delay during that intervening period.

Despite delays I am satisfied that the conclusions reached have not been compromised. But I have no doubt that the passage of time has understandably impacted on witnesses recall and memory.

#### *The Depth of Analysis in Support of Conclusions*

Detective Inspector Pinkham had electronic access to all Op TAM file documents. He also sought other relevant paper based documents. These are variously referred to in his investigation report. At times I struggled to draw any conclusions from complaint discussion due to a lack of detailed analysis under each separate head of complaint. Therefore in my assessment the overall construction of the report could have been improved by the inclusion of detailed analysis of witness accounts or reference to relevant documents within the body of the report in support of the conclusions reached.

#### *Use of Southern Legal Adviser for Legal Opinion*

During the investigation Detective Inspector Pinkham sought the advice of the Southern Legal Adviser, Mr McArthur for a legal opinion relating to '*The consequences of including inaccurate information in applications for interception warrants*'. Mr McArthur was also a witness in this investigation.

Detective Inspector Pinkham subsequently sought independent legal advice from Crown Law Office on the matters responded to by Mr McArthur to mitigate any actual or perceived conflict of interest arising out the advice provided.

In my view an independent legal opinion should not have been sought in the first instance from Mr McArthur given his witness status.

I accept that the advice provided by Mr McArthur ultimately had no bearing on the conclusions reached by Detective Inspector Pinkham.

## Conclusions

- I find there is no basis to conclude that Detective Inspector Pope swore the affidavit knowing that any part or parts were false or misleading, albeit that I have concluded that there were errors or mistakes in terms of the accuracy of the drafting of paragraphs 8.2 (complaint 1) and 6.5 (complaint 7). Those errors or mistakes either individually or collectively do not adversely impact on the overall integrity of the affidavit nor do they meet a criminal threshold.
- I am now satisfied that all reasonable avenues of enquiry have been considered and explored in terms of Mr Watson's complaints.
- It should be noted that the passage of time between 1998 and the review of this matter has been a constraint. Staff involved in Op TAM have now moved to other positions within police, retired or resigned. Staff spoken to by Detective Inspector Pinkham have been helpful, but have needed to rely heavily on memory of key events which after 6 or 7 years has no doubt impacted on their recall.
- I acknowledge the assistance provided to me during this review by Detective Richard Rolton, the Op TAM File Manager. He has provided me with access to a number of key documents for the purpose of this review.

## Complaint

45 Detective Inspector Pinkham and I visited Mr Watson on 9 December 2008. Our purpose was to:

- Explain our respective roles
- Advise the result of the investigation (Pinkham)
- Explain the review process and result the result of the review (Jones)
- Advise Mr Watson of next steps

Mr Watson has requested a copies the investigation report and review. These will be furnished to him during the week commencing 15 December 2008.

## Other Advisories

46 .Detective Inspector Pinkham has been advised of the result of this review.

47 Deputy Commissioner Pope has been advised of the result of the investigation.

## Next Steps

48 The file will be forwarded to the IPCA for review.

49 The IPCA will report independently on this investigation and review and in due course will advise the Commissioner of Police the result of their findings.

## G R Jones

Assistant Commissioner

Investigations & Intelligence

## Appendices

Operation TAM file directory APPENDIX A

## APPENDIX A

## OPERATION TAM

## FILE DIRECTORY

