

**IN THE MAGISTRATES COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION**

Draft

BUICK V DALE

MEMORANDUM OF ADVICE

1. I have been asked to prepare documents and to appear in relation to this matter, on behalf of the Chief Commissioner of Police.
2. The primary issue of concern relates to document disclosure and potential public interest immunity claims arising in relation to documents the subject of a proposed defence subpoena in the current proceedings. It is anticipated that the subpoena will be issued shortly but that it will be of limited scope.
3. As discussed below, the proposed subpoena follows on from an earlier subpoena ("the murder subpoena") issued prior to a committal hearing in respect of murder charges laid against Paul Dale and Rodney Collins for the murder of Terrance and Christine Hodson. Following the death of Carl Williams, the charge against Dale was withdrawn. However, disclosure issues in respect of some documents pursuant to that subpoena remained outstanding.

General background.

4. In late 2003 Paul Dale, David Miechel and Terrence Hodson were charged with drug trafficking and other offences arising out of the burglary of a house in Dublin Street, Oakleigh on 27 September of that year. At the time of their arrest and charging, Dale and Miechel were members of Victoria Police Major Drug Investigation Division ("MDID").

5. The Dublin Street house was to have been searched as part of a legitimate Victoria Police drug investigation. This investigation was being undertaken by Dale and Miechel. Hodson and Miechel were initially arrested close by the scene of the burglary. Subsequently, Hodson cooperated with police, indicated that he intended to plead guilty and made a statement implicating Dale and Miechel. Miechel refused to cooperate with investigating police.
6. On 16 May 2004, Terrence and Christine Hodson were murdered at their home in Kew. It is believed that the murder of Terrence Hodson was undertaken by Rodney Collins on the instructions of Paul Dale. It is also believed that Carl Williams acted as a middle man in the arrangement between Collins and Dale for the killing. As a result of the Hodsons death, the burglary and trafficking case against Dale collapsed and was withdrawn by the prosecution in October 2004.
7. The Hodsons murder was initially investigated by the Victoria Police homicide squad.
8. On 7 September 2005 an approach was made to the MDID by a confidential source who offered to supply information in relation to Antonios Mokbel.
9. In about 2002 Mokbel had been charged by members of both the former Victoria Police Drug Squad and the Australian Federal Police in respect of a variety of drug related offences. The Victorian charges related to drug trafficking whereas the Commonwealth charges related to drug importation and trafficking.
10. At the time there were difficulties in relation to the State charges against Mokbel as a number of drug squad members who were to give evidence, were themselves under investigation for drug related offences. This resulted in significant delays in hearing of the various Mokbel proceedings. Ultimately, a decision was made that the Commonwealth charges, which related to a drug importation from Mexico, would proceed first in time.

Significantly, at all relevant times the source was part of the Mokbel legal team in relation to both sets of charges.

11. Following the initial approach the source was managed for a number of years by the predecessor of the Source Development Unit ("the Unit"). Day to day management of the source was by handlers who tasked the source in respect of various investigations on behalf of MDID. The information and intelligence received was disseminated by way of information reports. A log was kept which recorded in a summary way details of the contacts between the source and handlers, some of the instructions given and other matters.
12. To date I have only reviewed the Unit's log. It may well be that there was prior contact and tasking of the source by members of MDID or other Victoria Police investigators. This issue has not been considered further as yet.
13. On 21 September 2005, the confidential source was debriefed by members of the Unit in respect of criminal activity being undertaken by Mokbel and his associates. At this time the source was acting in a legal capacity in relation both the Mokbel and other of his associates. There was a follow up debrief on 24 October 2005 in relation to the same targets.
14. Throughout 2006 there was extensive and continuing contact between the source and unit handlers during which information was provided in respect of various targets and persons of interest in relation to drug investigations. The source continued to act as part of the legal team in respect of a number of the targets of investigation. It is also apparent from the log that the source was tasked from time to time in relation to various other investigative targets.
15. The information provided by the source was of very high value. Thus, identification of the source would have led to severe retribution.

16. During 2006 there also appears to have been significant speculation about the role being played by the source by various persons charged with serious drug trafficking offences and their lawyers. Included amongst this group was Tony Hargraves, the solicitor acting for Paul Dale. He was actively canvassing this issue in mid to late October 2006. Furthermore, complaints about the source were made to professional conduct bodies by Carl and Roberta Williams and Zarah Garde-Wilson. These complaints were dismissed.
17. It may also have been the case that during 2006 the sources' handlers were also receiving and passing on information not only in relation to ongoing criminal activity by Mokbel and others but also as to the manner in which their respective defences were being conducted. There is a suggestion that on at least one occasion handlers gave the source instructions concerning whether an adjournment application on behalf of Mokbel might be made.
18. Also during 2006 the Unit made payments to or on behalf of the source. These were referable to the assistance being provided at that time to the Unit and the information being passed on to investigators. These payments continued until January 2009.
19. During 2006 a number of murder charges were laid against Carl Williams. Later that year he indicated a willingness to co-operate with Police and provide information and evidence in relation to the Hodsons murder.
20. By April 2007 Carl Williams had agreed to cooperate fully with Victoria Police in relation to a number of matters including the investigation of the Hodsons murder. He ultimately made three statements which detailed his involvement with Dale and set out Dale and Collins' roles in the murders.

Assistance in relation to Paul Dale.

21. On 12 February 2007 the source was targeted to meet with Paul Dale as part of the Hodsons murder investigation. As noted in the Unit log, the instruction given to the source

by her handlers was that “any meeting was to be in business hours and consistent with professional contact.”

22. In April 2007 the Petra taskforce was formed and took over the investigation of the Hodsons murder.
23. Thereafter, although it is not clear from the log, it would appear that the source had a number of meetings with Paul Dale. On 21 May 2007 the source was debriefed in relation to Paul Dale, Dublin Street and a variety of other matters. The information obtained was passed on by the Unit to Petra investigators.
24. On 24 May 2007 the source offered to wear a recording device in relation to further meetings with Dale. I believe that this subsequently occurred.
25. By this time it is apparent from the log that the Unit's dealings with the source were becoming fraught. A number of handlers had been involved and because of particular activity which had occurred, management were concerned that the source may in fact be engaging in illegal activities such as drug trafficking, without an indemnity. Handlers were also concerned about the constant risk to the source of identification as a police informant.
26. By 6 August 2007, a decision was made that the source would only be deployed for intelligence gathering purposes and without specific tasking. This was a significant change in the nature of the deployments to that date and appears to have been met with some resistance by the source. Information continued to be received by the Unit on a regular basis but was not disseminated for immediate investigative action due to risk of disclosure of the source.
27. On 26 February 2008 a decision was made that the source would be informally interviewed by investigators from the Petra taskforce. There was consideration of a possible handover of management of the source to the taskforce.

28. On 4 March 2008 Unit handlers gave the source an instruction not to offer assistance in gathering evidence on behalf of the Petra taskforce. On 6 March 2008 details of the discussions between the Unit member and Petra taskforce investigators were logged. Later that month Petra taskforce investigators were shown documents by the source which had been received from or compiled in respect of Dale. It is not clear whether copies were provided or taken.
29. On 3 June 2008 the source reported contact with Dale which had occurred. Thereafter further activity occurred in relation to the management of the source by the Unit. This included the provision of further financial rewards and assessment of the information provided in respect of Dale and Carl Williams.
30. On 30 November 2008 an important meeting occurred between the source and Dale. It was recorded and the recording provided to Petra taskforce investigators.
31. Following this meeting that the log notes consideration being given to a "break barrier strategy" being put in place having regard to the source's change in status to that of a possible witness. This resulted in a meeting on 16 December 2008 which noted the change in status and the source's motive for co-operation and assistance.
32. At about this time the matter was obviously considered at a very high level within Victoria Police Command. However, it was only on 8 January 2009 that a decision was made that the Unit cease management of the source. Deactivation occurred on 12 January 2009 with a direction that subsequent meetings with Unit members were to be recorded. A number of further contacts did occur and the recordings made have been transcribed by the Briars taskforce.

The current charges

33. On 7 March 2007 and 26 November 2008 Dale was examined by the Australian Crime Commission ("ACC") in respect of the Hodsons murders. During the hearings he was asked questions concerning various matters contained in the 3 witness statements made by Carl Williams. During the hearings he was represented by Tony Hargraves who advised him not to speak to the source.
34. Following the ACC hearing, Dale spoke to the source. That conversation was recorded. Dale inferentially confirmed the truth of the Williams' statements. I have been instructed that continuity of the recording is not an issue as it was activated and deactivated in police presence.
35. On 13 February 2009 Dale was charged with the murder of Terence Hodson. A committal in respect of that charge commenced on 9 March 2009. The source was listed as a witness and relevant statements provided.
36. On the 19th of April 2010, during an adjournment of the Dale committal proceedings, Carl Williams was murdered at Barwon gaol. Carl Williams was to give evidence in the committal and linked Dale to Rodney Collins, the person contracted by Williams to undertake the Hodsons murder on behalf of Dale.
37. On 28 January 2011 Dale was charged by Det. Snr. Sgt Boris Buick of Victoria police with various charges arising from the evidence given by him to the ACC. It is those matters which give rise to the current proceedings. Once again the source was listed as a witness in respect of that prosecution and relevant statements provided. These confirmed the recording and that the source was not acting as Dale's lawyer at the time the recording was made.

Pre-trial discovery.

38. The question of pre-trial discovery of documents in the current proceeding has been adjourned until 6 October 2011. Arrangements have been made for the defence solicitors to be released from an undertaking in respect of documents provided to them pursuant to murder subpoena referred to above. However, in addition to other matters the murder subpoena also sought materials including -

“all audio tapes, video tapes, information reports, notes, transcripts, diary entries, day book entries and all other documents (whether in written or electronic form) concerning any discussion, interview, debriefing or conversation with any witness in this investigation.”

39. The investigation referred to is the murder investigation in respect of the Hodsons.

40. The approach to disclosure taken to the murder subpoena was to only provide documents created by Petra taskforce investigators. A claim of public interest immunity was made in relation to the broader classes of documents sought and in particular documents created by the Unit insofar as they related to the murder investigation. The basis for this decision was that that a “break barrier” existed prior to any targeting of the confidential witness in respect of Dale and in particular in respect of the Hodson murders. It was to be contended that all the documents held by the Unit were the subject of public interest immunity based on witness security and informer identification.

41. However, at the time that the murder committal proceedings were withdrawn, compliance with the murder subpoena had not been completed. Dale's solicitor had been told that documents existed which fell into the category of materials sought set out above but that a claim of public interest immunity existed in respect of them. None of these documents had been reviewed.

42. It was in this context and having regard to the likelihood of a subpoena in the current proceedings, which relate to very different charges, that a limited review of the documents held by the Unit has taken place. A similar review was undertaken in respect of documents held by the Witness Protection Unit. No review of the Petra taskforce documents, now held by the Driver taskforce, has occurred and I do not know what if any material pre-dating the involvement of the Unit exists.
43. Dale's solicitor has stated that whilst he proposes to issue a subpoena in the current proceedings, he is otherwise content with the disclosure which has occurred in relation to the murder subpoena and will confine any request for additional material to any communications between the police and the source since the murder committal. This position may change once the defence appreciate that compliance with the murder subpoena was never completed.

The Dale defence

44. Dale's defence is that at all times that he was speaking to the source it was on an occasion which attracted legal professional privilege. Legal Professional privilege is now codified in s.118 and 119 of the **Evidence Act 2008**. S.117 of the Act defines client to include “a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service).” The source denies that Dale was ever a client and says that only a personal relationship existed between them.
45. Furthermore, the circumstances of the recording itself and the fact that Hargraves acted for Dale during the ACC hearings strongly suggest that there was no engagement of the source as a lawyer to provide legal services such as would give rise the the requisite relationship. Rather, the recording suggests that the disclosure which occurred was not as required by the Act and at common law, “for the dominant purpose of the lawyer ... providing legal advice to the client” or for “ the dominant purpose of the client being provided with

professional legal services relating to an Australian or overseas proceeding (including a proceeding before the Court) or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.”

46. However, it is clear that the “break barrier” referred to above did not come into existence until about 18 months after the confidential witness was first targeted in respect of Dale. Furthermore, that targeting was specifically in relation to the murder of the Hodsons.
47. It may be contended that the instruction given at the time of the initial targeting leaves open the contention by the defence that the totality of the dealings between Dale and the source attract a claim of legal professional privilege. The instruction given was that “any meeting was to be in business hours and consistent with professional contact.” Whilst such a construction is likely to fail, in the context of the current proceedings it cannot be dismissed out of hand. It remains an issue which it is open to the defence to explore.

Release of the material.

48. In my view some limited disclosure of material from the Unit may be required, in particular the initial instruction and any information reports or other materials concerning that initial tasking. The date on which the instructions were given would also need to be disclosed. At the very least the matter will need to be considered by the prosecutor to determine whether redacted copies of the relevant documents should be provided to the defence as a matter of fairness.
49. The appropriateness of making this material available can be tested in a number of ways. First, it might be asked whether the defence has a legitimate forensic purpose in obtaining access to such a document. In my view the answer has to be yes, based both on the content of the document itself and also the implications for the source's credit insofar as it is said that no relationship of lawyer and client existed.

50. Secondly, even if public interest immunity was claimed in respect of the document, the issue remains whether its disclosure might be necessary so as assist in establishing the innocence of the defendant. A Magistrate or Judge may accept that it should be released despite the fact that it would compromise informer identification.
51. A number of other consideration also arise in the context of the impending committal -
- (a) in the absence of disclosure, the source may be induced to provide inaccurate or even false evidence based on the "break barrier" scenario and a contention that there was no targeting of Dale prior to the involvement of Petra taskforce investigators;
 - (b) in the event of the source being asked questions about the first contact with Dale in respect of the murder investigation a claim of public interest immunity will need to be made. This will have the effect of confirming in the minds of interested persons that the source was an informer at a time prior to the creation of the Petra taskforce
 - (c) Furthermore, any public interest immunity claim would have to be made on the basis of informer identification and witness security which, if made publicly, would defeat the purpose of making the claim. The Magistrate would have to be provided with confidential material in support of the claim. Such material would have to set out the circumstances in which the source was registered and thereafter deployed not only in respect of Dale but also, potentially, in respect of other persons who were clients.
 - (d) However, disclosure of the material relating to the targeting of Dale, will confirm that as at February 2007 the source was providing assistance to the Unit.
52. The source is not a participant in any witness protection program. Victoria police have not been able to persuade the source to enter their program. [REDACTED]
- [REDACTED]
- [REDACTED] As a result, I have been instructed that if identified as a long-

term police source the safety risks for the source will be extreme.

53. A further complication is the professional role undertaken by the source. Once identified as acting as an informer from February 2007 it is likely that the defence will press to obtain documents in relation to all other dealings between the police and the source on the basis that it will show that the source was providing legal services and advice to other targets at the same time as information was being provided to police. This would form the basis of a credit attack as well as bolstering the proposition that the recorded conversation with Dale was on an occasion which attracted legal professional privilege.
54. If the role of the source were to be fully exposed there is also a possibility that persons such as Mokbel, who was convicted in absentia in March 2006, would seek to challenge their convictions on the basis that it was improperly obtained. It is difficult to predict how such an issue might be raised or played out but there might be an attempt to raise the issue in a venue such as the Court of Appeal. It might also have a collateral effect in relation to the current sentencing of Mokbel for drug trafficking offences after he fled the jurisdiction.

Recommendations.

55. I suggest that these issues be raised with senior management within Victoria Police for their consideration in the context of the current committal which is due to commence in November 2011. I suggest that urgent consideration be given to providing a copy of the relevant log entries to the prosecutor for the purpose of determining what if any disclosure is required in the interests of fairness. This may require relevant information reports or members diary entries to also be obtained and reviewed.
56. If there are any questions arising out of this advice I will be happy to advise further or discuss these in conference should that be required.

Gerard J. Maguire,
Winneke Chambers,
28 September 2011.