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Report on the complaint of Bruce Van Essen

September 2008



IPCA

Independent Police Conduct Authority
Whaia te pono, kia puawai ko te tika



September 2008

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September 2008

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Introduction

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INTRODUCTION

1. This complaint arose from the execution of a search warrant on 1 September 2006 at the home of Mr Bruce Van Essen, in connection with allegations that Mr Van Essen had defrauded the Accident Compensation Corporation (ACC).
2. Mr Van Essen complained to police about several aspects of the warrant and search. Police conducted an internal investigation which did not uphold his complaints.
3. In the Authority's view, the police investigation was unsatisfactory in several respects. On 20 June 2007, the Authority started its own investigation under section 19(b) of the Independent Police Conduct Authority Act 1988.¹
4. After the Authority began its investigation, police re-investigated and upheld some parts of Mr Van Essen's complaint.
5. This report records the results of the Authority's investigation into Mr Van Essen's complaint, and makes recommendations.

¹ Then the Police Complaints Authority Act 1988.

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Background

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ACC INTEREST IN MR VAN ESSEN

6. Mr Van Essen, who lives in Fairfield (near Dunedin), has been an ACC beneficiary since 1994 as a result of a long-term impairment.
7. At the time the search warrant was executed, he had been under investigation by ACC on suspicion of fraud. An ACC examining officer had engaged a private investigator, Mr Peter Gibbons of Mainland Information Consultants Ltd (MIC), to carry out the investigation.
8. Mr Gibbons is a former police officer with many years of service in the Southern District. At the time he left Police, Mr Gibbons held the rank of detective senior sergeant.
9. After investigating Mr Van Essen's affairs, Mr Gibbons formed a view that Mr Van Essen had probably defrauded ACC. However, Mr Gibbons and the ACC examining officer believed they needed details of Mr Van Essen's banking transactions and other documentation to provide evidence for ACC to make further inquiries or to go ahead with a prosecution. Mr Gibbons believed that Mr Van Essen would not provide this information voluntarily and that a search warrant would be needed to obtain it.

THE AFFIDAVIT
AND SEARCH
WARRANTS

10. In August 2006, Mr Gibbons prepared a draft affidavit, in consultation with ACC, to support applications for warrants to search Mr Van Essen's home and two other premises he was connected with. The ACC examining officer then discussed the affidavit with Detective Senior Sergeant Kallum Croudís of the Dunedin CIB. Detective Senior Sergeant Croudís noted that no offences were listed in the draft, and that offences would need to be specified.
11. The ACC examining officer then instructed Mr Gibbons to work with police on applications for the warrants.
12. The officer assigned to work with Mr Gibbons and arrange the search warrant applications was Constable Andrew Henderson, who at that time worked in the enquiry section and had responsibility for liaising on ACC matters. He is Mr Gibbons' son-in-law. Constable Henderson's supervisors were aware of this relationship and had sanctioned his involvement with the ACC 'portfolio'.
13. Mr Gibbons showed Constable Henderson the ACC investigation file including the draft affidavit he had prepared, and Constable Henderson prepared an affidavit to support the search warrant applications. The affidavit contained information from Mr Gibbons' ACC investigation file and stated the nature and focus of the proposed search.
14. It stated that, according to an ACC investigation, Mr Van Essen had *"been suspected of fraudulent activity for many years"* and that the ACC investigation had confirmed business activities through which Mr Van Essen was alleged to be generating income.
15. In relation to offences, Constable Henderson's affidavit stated:

"VAN ESSEN has committed criminal offences punishable by imprisonment. These include making

a false statutory declaration, using a document for pecuniary gain."

16. The affidavit further stated:

"Making a false statutory declaration using a document for pecuniary gain is an offence punishable by imprisonment under the Crimes Act 1961."
17. Under the Crimes Act 1961, 'making a false statutory declaration' and 'using a document for pecuniary gain' are separate offences. It is not clear from the affidavit whether Constable Henderson regarded the two as separate offences or as elements of the same offence.
18. The search warrants, which were granted on 31 August 2006, similarly stated that evidence was being sought in relation to *"an offence of Making a false statutory declaration using a document for pecuniary gain"*.
19. The affidavit contained no description of any statutory declaration, nor any document allegedly used for pecuniary gain. Nor were any such documents attached to the affidavit as exhibits.
20. No supervising officer appears to have been shown the completed affidavit in draft form.
21. The affidavit was submitted to the Dunedin District Court, and a Deputy Registrar issued three search warrants on 31 August 2006.
22. The search warrant for Mr Van Essen's home was executed on 1 September 2006.
23. The warrant to search Mr Van Essen's home was executed by Sergeant Sheldon Kindley, Constable Henderson and a member of the Dunedin police electronic crime lab, assisted by Mr Gibbons and the ACC examining officer.
24. Mr Van Essen arrived home partway through the search, having been contacted by his mother who also lived

EXECUTION
OF THE SEARCH
WARRANT AT
MR VAN ESSEN'S
HOME

at the address. Mr Van Essen was, by his own account, as well as those of the others present, extremely agitated by the search, and became abusive, particularly when he found out that Mr Gibbons and the ACC examining officer, who he clearly already knew, were present. He challenged their right to take part in the search, and objected to them searching his car without direct supervision by the police officers. As a result of his protests, the police officers agreed that Mr Gibbons and the ACC examining officer would leave the scene. The officers completed the search themselves.

25. The following items were seized during the search and documented on police property sheets:
- five computers and assorted computer equipment;
 - computer memory sticks (two according to the record of items seized, but three according to Mr Van Essen and Sergeant Kindley's job sheet);
 - Zippo lighters (which Mr Gibbons believed Mr Van Essen was trading); and
 - various documents.
26. On 5 September, committee members of Otago ACClaim (a support group for people in receipt of accident compensation, and their families) approached then Acting District Commander Detective Inspector Ross Pinkham. They expressed concern that the computers seized from Mr Van Essen contained personal information about other members of ACClaim, and sought assurances that this information would not be released to ACC. Detective Inspector Pinkham gave this assurance. Mr Van Essen was not at this meeting.
27. On 12 September, Detective Inspector Pinkham wrote to the Area Commander, Inspector Dave Campbell, advising:

"In discussing the investigation, it became apparent that Constable Henderson's involvement may indicate a conflict of interest between himself and

Mr Gibbons. It is therefore important that Constable Henderson has no further involvement in the file and that any ongoing liaison and investigation is conducted by another member."

MR VAN ESSEN'S
COMPLAINT

28. Mr Van Essen made a complaint to Dunedin police on the day his home was searched. The substance of his complaint was:
- (a) that police executing the search did not identify Mr Gibbons and the ACC examining officer as ACC fraud investigators, nor explain their role in the search;
 - (b) that Mr Gibbons and the ACC examining officer were allowed to search parts of his home and vehicle unsupervised;
 - (c) that he was not shown a signed copy of the warrant; and
 - (d) that the warrant was based on false information.
29. Two weeks after the search, Mr Van Essen was supplied with an inventory by police which stated that two memory sticks had been seized from his home. His recollection was that three had been seized. During an interview on 31 October 2006 with the police officer investigating his complaint, Mr Van Essen added to his complaint:
- (e) that a computer memory stick (which was seized in the search but not included in the record of items taken) and some documents from Mr Van Essen's wallet might have been stolen.
30. Mr Van Essen made a request under the Official Information Act for a copy of the affidavit used to obtain the search warrants. This request was assigned to Constable Henderson, who initially turned it down on the grounds that the investigation had not yet been completed.

POLICE
HANDLING OF
MR VAN ESSEN'S
COMPLAINT

31. On 12 September 2006, Police National Headquarters notified the Independent Police Conduct Authority² about Mr Van Essen's complaint. Police advised that they were investigating the complaint and asked that the Authority wait for the outcome of the police investigation. The Authority agreed to that approach.
32. The police investigation was initially assigned to Detective Sergeant Malcolm Inglis. However, he excused himself on grounds of a conflict of interest arising from a close connection with an ACC employee.
33. The investigation was then assigned to Detective Sergeant Brett Roberts. It comprised several interviews with Mr Van Essen and a review of job sheets/reports from the two police officers primarily involved. Detective Sergeant Roberts did not interview Mr Gibbons or the ACC examining officer.
34. Detective Sergeant Roberts' report was completed on 2 November 2006. He concluded that the police had acted appropriately. In relation to Mr Van Essen's specific complaints, Detective Sergeant Roberts recorded in his report:
 - (a) Detective Sergeant Roberts said there was no dispute that the ACC examining officer and Mr Gibbons were not introduced to Mr Van Essen. Sergeant Kindley made the initial decision not to make the introduction because it was felt that to do so would make an already tense situation worse, but shortly afterwards Mr Van Essen asked if they were present and was told that they were. Detective Sergeant Roberts concluded that there is no requirement for such introductions and that the police officers had done nothing wrong. He observed that, in hindsight, perhaps there should have been introductions but not to do so was the judgement at the time.

2 Then the Police Complaints Authority.

- (b) Mr Van Essen claimed that he had not been shown a signed copy of the warrant. Detective Sergeant Roberts noted that Mr Van Essen was agitated when he arrived and had demanded to see the search warrant. The detective sergeant reported that Mr Van Essen was shown the signed warrant by Constable Henderson and that this was witnessed by Sergeant Kindley. Mr Van Essen was given an unsigned copy. Mr Van Essen disputed being shown the warrant but accepted that another visitor to his address had been shown a signed copy. Detective Sergeant Roberts concluded that Mr Van Essen had been shown the signed warrant but noted that he would continue to dispute this.
- (c) Detective Sergeant Roberts reported that the ACC examining officer and Mr Gibbons were supervised at times during the search, but not the whole time. He commented that such people are effectively agents of the police in such circumstances and are therefore able to take part in the search. He said that Mr Van Essen will not accept that such people can search unsupervised; however, total supervision is not practical and the police officers did nothing wrong.
35. As the allegations against Mr Van Essen were at that time still under investigation and might be tested in court, Detective Sergeant Roberts made no finding about Mr Van Essen's claim that the warrant was secured on the basis of false information. Since then, ACC has advised Mr Van Essen that it has decided not to prosecute him as a result of the investigation.
36. In response to Mr Van Essen's allegation of theft of personal property, Detective Sergeant Roberts arranged through the district professional standards officer for a theft inquiry to be undertaken. This was assigned to Detective Sergeant Inglis. In his report, Detective Sergeant Roberts mentioned the theft allegation. However, since it was the subject of a separate incomplete investigation,

the result was not referred to in, nor associated with, his report.

37. Detective Sergeant Roberts' report was reviewed by Inspector Campbell and by an external reviewing officer who is also a retired police officer. Both endorsed his conclusions, with one adding that *"Mr Van Essen's fight is with ACC and not the police."*
38. In the Authority's view, Detective Sergeant Roberts' report (and the file that accompanied it) was unsatisfactory, in that it did not address the substance of Mr Van Essen's complaint. In a letter to police on 13 June 2007, the Authority identified three particular shortcomings:
 - (a) The report did not assess the affidavit used to obtain the search warrants, nor was a copy of the affidavit provided in the file.
 - (b) Detective Sergeant Roberts did not interview Mr Gibbons and the ACC examining officer, even though such interviews would have been relevant to the content of the affidavit and what took place during the search of Mr Van Essen's home.
 - (c) There was no information in Detective Sergeant Roberts' report about the outcome of Mr Van Essen's theft complaint.
39. It was in light of these concerns that the Authority decided to carry out an independent investigation into Mr Van Essen's complaint pursuant to section 19(b) of the Independent Police Conduct Authority Act 1988. The Authority began its investigation on 20 June 2007.
40. Early in its investigation, the Authority learned that Mr Gibbons is Constable Henderson's father-in-law – a close relationship that created the appearance of a conflict of interest.
41. Detective Sergeant Roberts had not included any reference to this apparent conflict of interest in his report. Nor had Inspector Campbell or the external reviewing

officer who reviewed Detective Sergeant Roberts' report mentioned the apparent conflict of interest. In the Authority's view, the failure to address this apparent conflict of interest was a further shortcoming of the police response to Mr Van Essen's complaint.

POLICE REINVESTIGATION

42. On 27 June 2007, after the Authority had notified and begun its investigation, police appointed the Southern District Operations Manager, Inspector Lane Todd, to reinvestigate Mr Van Essen's complaint.
43. The findings of this investigation were reported to the Authority in a letter from Southern District Commander, Superintendent George Fraser, on 15 January 2008.
44. The reinvestigation upheld Mr Van Essen's complaint that the affidavit was based on incorrect information. It accepted an explanation from Constable Henderson that this was caused by a typing error (see paragraph 90) and found that this suggested "*a lack of sufficient care*" but not "*deliberate intent to deceive*".
45. The reinvestigation also concluded that the decision to put Constable Henderson in the ACC role was "*flawed*" because of the apparent conflict of interest in his relationship with Mr Gibbons.
46. Superintendent Fraser acknowledged that Detective Sergeant Roberts' report should have acknowledged the apparent conflict of interest involving Constable Henderson and Mr Gibbons.

The Authority's investigation

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SCOPE OF THE AUTHORITY'S INVESTIGATIONS

47. Under the Independent Police Conduct Authority Act, the Authority's function is to investigate (among other things) complaints alleging police misconduct or neglect of duty, or complaints about police policies, practices and procedures affecting a complainant. The Authority does not have power to investigate or make findings about ACC or its investigators.

MATTERS CONSIDERED

48. On the basis of Mr Van Essen's complaint, the Authority considered the following issues:

Issue 1: Why did police executing the search warrant at Mr Van Essen's home not formally introduce the ACC investigators to Mr Van Essen?

Issue 2: Did police executing the search warrant at Mr Van Essen's home show Mr Van Essen a signed copy of the warrant? If not, why not?

Issue 3: Were ACC investigators permitted to search Mr Van Essen's home unsupervised? If so, was this acceptable?

Issue 4: Do police have standard procedures for situations where ACC and other agencies seek assistance with securing and executing search warrants? If so, were the procedures followed in this case?

Issue 5: Did the affidavit used to support the search warrant applications meet an acceptable professional standard?

Issue 6: What independent scrutiny did Constable Henderson apply to the evidence presented to him, and was he influenced by Mr Gibbons when preparing and presenting the affidavit?

Issue 7: Are there police procedures for addressing conflicts of interest of this nature, and were those procedures followed?

Issue 8: Why did Detective Sergeant Roberts' report not mention the relationship between Constable Henderson and Mr Gibbons?

Issue 9: Was the allegation of theft properly investigated?

Issue 10: Was it appropriate for Constable Henderson to be the officer responsible for handling Mr Van Essen's request under the Official Information Act?

Issue 11: What steps were taken to give effect to Detective Inspector Pinkham's assurances to ACC that personal information unrelated to the Van Essen case would not be made available to ACC or its representatives?

METHODOLOGY

49. The Authority's investigation into the Van Essen complaint involved interviews with all those involved, including Mr Van Essen, Mr Gibbons, ACC staff, Dunedin District Court staff, and the following police officers: Constable Henderson; Sergeant Kindley; Detective Sergeant Roberts; Detective Senior Sergeant Croudis; Inspector Campbell; Detective Inspector Pinkham; former Inspector Terry Richardson (Police Professional Standards Division); Detective Sergeant John Ferguson; and an e-crime specialist from the Dunedin police e-crime lab.

50. The Authority also examined relevant documentation, including:
- police files and job sheets about the execution of the search warrant (including exhibit/property lists), Mr Van Essen's subsequent complaint, and Detective Sergeant Roberts' investigation into that complaint;
 - the search warrants and related affidavits;
 - the ACC fraud unit investigation file on Mr Van Essen;³
 - reports on comparable search warrants in Dunedin relating to cases of suspected ACC fraud;
 - an *Investigate* magazine article entitled 'King duped by bent cop', published in the magazine's July 2007 edition; and
 - a review of the ACC fraud unit, completed in July 2007.

3 The Authority sought to view the exact set of documents that Mr Gibbons showed to Constable Henderson. However, Mr Gibbons' fraud investigation file was amalgamated by the ACC Fraud Unit into the larger file they held on Van Essen, and no record was kept of precisely which documents Mr Gibbons showed to Constable Henderson. ACC has assured the Authority that in amalgamating the files only duplicate items were destroyed.

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The Authority's findings and recommendations

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OVERVIEW

51. A number of the issues considered during this investigation relate to police powers of search and seizure, and to police handling of real or apparent conflicts of interest.

Conduct of searches

52. Under normal circumstances, a person in his or her own home has a reasonable expectation of privacy, which includes protection against trespass, ability to control information about oneself, security of person and property, and a range of other values.⁴ The protection of privacy is implied in section 21 of the New Zealand Bill of Rights Act, which guarantees freedom from unreasonable search and seizure. A search, even when properly authorised and conducted for legitimate law enforcement purposes, cuts across expectations of privacy, and may also cut across property rights and other values.⁵
53. Applications for search warrants should therefore meet a high standard, as should police actions in conducting searches.

4 R v Jeffries [1994] 1 NZLR 290, 319 (CA) per Justice Thomas.

5 Law Commission (2007): *Search and Surveillance Powers*.

Conflicts of interest

54. In the public sector, a conflict of interest exists when a person's duties or responsibilities to a public entity could be affected by some other interest or duty that the person may have.⁶ The 'other interest or duty' might include a financial interest, a family or personal connection, membership of an organisation, something the person has done or said, or some other interest that might influence the person.
55. A conflict of interest may be actual or perceived. A perceived conflict of interest arises where a fair-minded observer might reasonably form the view that an individual might not bring an impartial mind to the exercise of his or her duties or responsibilities.⁷
56. A perceived conflict of interest could significantly undermine public trust and confidence in police work, even where there is no actual conflict or when an actual conflict is properly managed.⁸ As the Auditor-General noted in his June 2007 report *Managing conflicts of interest: Guidance for public entities*:

"When considering how to manage an identified conflict of interest... the question is not limited to whether the member or official concerned is likely to act improperly. Managing conflicts of interest also involves considering appearances – what an outside observer might reasonably perceive. Most often, what needs to be managed (and be seen to be managed)

6 Office of the Auditor-General, *Managing conflicts of interest: Guidance for public entities* (1 June 2007) at paragraph [2.1]. This report is available electronically at <http://www.oag.govt.nz/2007/conflicts-public-entities/docs/oag-conflicts-public-entities.pdf>.

7 See *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA) at paragraph [62], affirming this as the test for apparent bias.

8 *Diagnostic Medlab Ltd v Auckland District Health Board* HC AK CIV 2006-404-4724 20 March 2007 at paragraph [228]: "It is important from the point of view of public confidence in the integrity of public office holders that they are not perceived to have taken advantage of their office".

is the risk of the adverse public perception that could arise from the overlapping interests.

Sometimes there may be a perception of a conflict of interest where the interests come close but do not actually overlap, or where people might mistakenly believe that there is a conflict of interest. It may still be necessary to take some steps to manage these situations, because the perception of a conflict of interest can damage an entity's reputation or people's trust in it."⁹

57. This quote captures the underlying rationale for the rule against conflicts of interest – which is to uphold public confidence in public decision-making.¹⁰
58. In this respect, the existence of a conflict of interest does not necessarily mean that someone has done something wrong, or that the interests of the public entity have suffered.¹¹ The *perception* of conflict is enough in itself to undermine confidence in the integrity of police or any other public sector work.
59. In this case, apparent conflict of interest issues arise from Constable Henderson's relationship with Mr Gibbons, his father-in-law. These issues, which relate principally to the applications for the search warrants, are referred to in paragraphs 105 to 125.

CONDUCT OF THE SEARCH

Issue 1: Why did police executing the search warrant at Mr Van Essen's home not formally introduce the ACC investigators to Mr Van Essen?

60. In his statement to Detective Sergeant Roberts, Sergeant Kindley explained that Mr Van Essen became "*irate and wound up*" when he saw Mr Gibbons, who he appeared to already know. Sergeant Kindley did not formally

9 Auditor-General (2007) at paragraphs [2.8]-[2.9].

10 *Diagnostic Medlab* at paragraphs [122] and [124].

11 Auditor-General (2007) at paragraph [1.9].

introduce the ACC investigators because he wanted to avoid further antagonising Mr Van Essen. Sergeant Kindley's account indicated that Mr Van Essen's behaviour hampered execution of the search, and other accounts confirm this.

61. Detective Sergeant Roberts noted in his report that there is no requirement for such an introduction. However, he also noted that, with hindsight, it may have been better for Mr Gibbons and the ACC examining officer to have been introduced. He commented that, when staff of agencies outside Police take part in searches, this should be made clear to residents unless there are exceptional circumstances such as concerns over personal safety.
62. The Authority accepts Detective Sergeant Roberts' conclusions, although not in their entirety. Clearly, Mr Van Essen knew Mr Gibbons and the ACC examining officer, and his behaviour made a formal introduction difficult. However, whilst the officers were not *required* to introduce Mr Gibbons and the ACC examining officer, the Authority is not persuaded that Mr Van Essen's behaviour entirely precluded introducing them as part of the search team. When a person's home is being searched, it can be expected that feelings will run high. Police officers carrying out a search must be prepared to manage such a situation.
63. There is currently no clear guidance for police on involvement of outside agencies in searches. In the Authority's view, a person whose home is being searched is entitled to be told who is carrying out the search, unless there are compelling reasons for them not being told. The issue of Police policy on involvement of outside agencies in searches is considered further in paragraphs 79 to 83.

FINDING

64. While there was no legal requirement for the ACC investigators to be formally introduced to Mr Van Essen, and Mr Van Essen already knew the investigators, such an introduction would have been prudent and

courteous even in the difficult circumstances that existed.

Issue 2: Did police executing the search warrant at Mr Van Essen's home show Mr Van Essen a signed copy of the warrant? If not, why not?

65. Under section 198 of the Summary Proceedings Act, anyone executing a search warrant must carry the warrant with him or her and produce it if asked to do so.
66. Police executing the warrant to search Mr Van Essen's home say they showed Mr Van Essen a signed copy of the warrant and left him with an unsigned copy. Mr Van Essen, in his complaint, said police did not show him a signed copy. Detective Sergeant Roberts concluded that a signed warrant had been shown, and, given Mr Van Essen's heightened state, the Authority considers that the officers' recollection that they adhered to the common practice of showing a signed warrant and leaving an unsigned copy is likely to be more accurate.
67. However, Mr Van Essen's complaint raises a question about Police policy. The *Police Manual of Best Practice* states that a copy of a search warrant should be left with the occupier, or left at the address if the occupier is not home. However, at the time Mr Van Essen's home was searched, there was no clear policy about what precisely was meant by the term 'copy' – whether it meant a signed copy, an unsigned but authenticated copy, or an unsigned and unauthenticated copy.
68. It appears that common practice is to leave an unsigned copy. This is apparently out of concern for the safety of the judge, registrar or justice of the peace who signs the warrant, and also out of concern that a signature could be misused – for example, the judge's or registrar's signature may be forged.
69. The lack of a clear policy has left room for uncertainty and variations in practice from district to district. Leaving an

unsigned warrant could also be confusing and unsettling for the occupier, who may doubt the legality of the search. In the Authority's view, a person whose home is being searched is entitled to certainty about the legitimacy of the search.¹²

70. After the Authority began its investigation, police adopted the practice of leaving occupiers with an unsigned copy of the warrant along with a 'notice to occupier' stating that the original, signed warrant is held by police.¹³ This goes some way towards assuring the occupier that the search is legitimate.

FINDING

71. Mr Van Essen and police disagree about whether police showed Mr Van Essen a signed copy of the warrant. On the balance of evidence, the Authority accepts that the officers showed Mr Van Essen the signed warrant.
72. This issue would not have arisen if Mr Van Essen had been left with a signed or authenticated copy of the warrant.

RECOMMENDATION

73. Police review their policy on leaving copies of search warrants with occupiers of searched properties, with a view to ensuring that there is consistency across all districts, and that the occupier of a searched property is clearly aware of the legitimacy of the search.

Issue 3: Were ACC investigators permitted to search Mr Van Essen's property unsupervised? If so, was this acceptable?

74. Mr Van Essen complained that Mr Gibbons and the ACC examining officer were allowed to search parts of the

12 As the Law Commission noted in its June 2007 report *Search and Surveillance Powers*, it is fundamental to the exercise of a power of search that the person who is the subject of the search 'is made aware of the executing officer's identity and the authority for his or her actions'.

13 The change in practice is reflected in updated 'notice to occupier' templates.

property without a police officer present. Police have confirmed that this was the case, at least in relation to Mr Van Essen's garage.

75. Sergeant Kindley told the Authority's investigators that, because Mr Van Essen became upset, Constable Henderson had to stay with him and there were therefore fewer police officers available to conduct the search. He said that, in hindsight, police should "*perhaps*" have taken more staff.
76. In his investigation of Mr Van Essen's complaint, Detective Sergeant Roberts noted that those assisting police in executing a search warrant are effectively agents of the police and can search and seize.¹⁴ He concluded that the level of supervision Mr Van Essen believed necessary (that is, that a police officer should accompany any ACC staff at all times) is not practicable and is not required by any law. Nor is there any policy governing supervision of non-police officers assisting in a search.
77. While it is correct that people from other agencies may assist police in executing a search warrant, there is authority in case law to suggest that those people ought to be under the "close control and supervision" of the officers executing the warrant.¹⁵ This is particularly important in situations where the people from other agencies might be seen to have an interest in the outcome of the search.¹⁶ In each case, it will be a question of fact as to what "close control and supervision" means.

14 See *R v Pickering* (1996) 3 HRNZ 499 (CA); *R v Mikhail* [1999] DCR 331 (DC) and section 198(3) Summary Proceedings Act 1957.

15 *R v B (J.E.)* (1989) 52 CCC (3d) 224, 235, citing Dickson CJC in *R v Strachan*.

16 *R v Munn (No. 1)* (1938) 71 CCC 139, 141 (P.E.I.S.C.).

FINDING

78. There is authority in case law to suggest that people assisting police with a search ought to be under the “close control and supervision” of police. Maintaining close control and supervision would also be good practice. It is not clear that close control and supervision was always maintained during the search of Mr Van Essen’s property.

Issue 4: Do police have standard procedures for situations where ACC and other agencies seek assistance with securing and executing search warrants? If so, were the procedures followed in this case?

79. There are no standard procedures and practice varies considerably from district to district.
80. There is a 1998 policy pointer: *Action in respect of privately obtained search warrants*.¹⁷ However, this covers police actions in relation to search warrants that have already been obtained, not warrants obtained by police on the basis of information provided for the purpose as in this case. It is also unclear whether the policy note is intended to cover search warrants sought by agencies such as ACC, or members of the public seeking search warrants.
81. Police policy should provide clear guidance on:
- the circumstances in which police should work with another agency to obtain a search warrant;
 - how applications for warrants should be validated, and which agency should have responsibility for preparing and submitting an affidavit;
 - who should represent the agency that is asking police to secure and execute a warrant;
 - what roles police and personnel from other agencies should take in the execution of a search warrant;

17 A policy pointer is an advisory note in the Police magazine *Ten-One*. A policy pointer is not a formal instruction.

- the level of “control and supervision” required for people from outside agencies assisting with a search;
- identification and management of risks to the integrity of the search (such as supervision of personnel and treatment of exhibits); and
- protocols for ensuring that personal information is not disclosed to third parties unless it is relevant to the offences specified in the search warrant.

FINDING

82. There are no standard procedures for situations where ACC and other agencies seek assistance with securing and executing search warrants, and practice varies considerably from district to district.

RECOMMENDATION

83. Police develop policy and guidelines on assisting other agencies with applications for search warrants, and on the involvement of other agencies in execution of search warrants. These guidelines should clearly define the working relationship and each agency’s responsibilities.

CONFLICTS OF
INTEREST AND
THE WARRANT
APPLICATIONS

Issue 5: Did the affidavit used to support the search warrant applications meet an acceptable professional standard?

84. The affidavit was prepared by Constable Henderson, after Mr Gibbons showed him the ACC investigation file.
85. The affidavit stated that Mr Van Essen had “committed criminal offences punishable by imprisonment” which included “making a false statutory declaration, using a document for pecuniary gain”. It further stated that “Making a false statutory declaration using a document for pecuniary gain” is an offence punishable by imprisonment under the Crimes Act 1961.
86. Under the Crimes Act 1961, ‘making a false statutory declaration’ and ‘using a document for pecuniary gain’ are

separate offences (sections 111 and 228 respectively). It is not clear from the affidavit whether Constable Henderson regarded the two as separate offences or as elements of the same offence.

87. Mr Van Essen complained that the affidavit was based on false information.
88. The affidavit does not contain a detailed description of any statutory declaration made by Mr Van Essen, nor of any document Mr Van Essen could have used for pecuniary gain. Nor is any such document attached to the affidavit as an exhibit, and neither of the alleged documents exist in the police file.
89. Constable Henderson initially told the Authority's investigators that he saw a statutory declaration in the documentation Mr Gibbons showed him. Mr Gibbons denied this. He told the Authority's investigators that he had *"no knowledge of Mr Van Essen supplying a false statutory declaration"*, and Mr Van Essen's ACC file contains no such declaration.
90. Constable Henderson later told the Authority's investigators that the reference in the affidavit to a false statutory declaration may have been a *"cut and paste error"*. He made a similar statement to Inspector Lane Todd, who reinvestigated Mr Van Essen's complaint for police.¹⁸ That 'error' was crucial to the allegation that Mr Van Essen made a false statutory declaration.
91. Without that 'error', the warrants might still have been sought on the basis of Mr Van Essen allegedly using a document for pecuniary gain. Indeed, it was Mr Gibbons' view that Mr Van Essen had committed this offence by using a medical certificate stating he was *"fully unfit"* to work, when in fact he was carrying on business activities. When

18 In the reinvestigation of Mr Van Essen's complaint by Inspector Lane Todd, this was referred to as a 'typing error'.

asked by the Authority's investigators what grounds there were to suspect a Crimes Act offence, Mr Gibbons said:

"The Crimes Act offending comes in when ACC claimants are able to work or carry on business whilst purporting to remain fully unfit then do this by medical certificates to the Corporation declaring they remain fully unfit whilst in fact working/operating a business."

92. However, as noted above, the affidavit did not refer to a medical certificate, nor to any other document that might have been used for pecuniary gain. Nor was a copy of any such document in the police file. Furthermore, the medical certificates in Mr Van Essen's ACC file did not state that he was fully unfit to work. Rather, they stated that he was fit to work part-time and that he was working as a volunteer for a local school.
93. Constable Henderson did not seek advice from supervising officers or legal advisers. Nor is there any indication that either Detective Senior Sergeant Croudin or Sergeant Kindley reviewed the final affidavit.
94. After his reinvestigation, Inspector Lane Todd emailed Southern District area commanders noting (among other things) that any outside agency seeking a search warrant should be *"required to satisfy police that there is sufficient evidence to justify the application"* and making it policy for relevant evidence to be photocopied and placed in the police file.
95. Subsequently, in 2007, the Court of Appeal in *R v Williams* set out clear guidance on New Zealand Bill of Rights Act protections against unreasonable search and seizure.¹⁹ The Court summarised the material that should be provided in an application for a search warrant, including (among other things) an accurate description of the

19 See the guidelines now required following *R v Williams* [2007] 3 NZLR 207 (CA) and the Shaheed balancing test.

offence, detailed information about informants and any information they provide, and the basis for belief in the state of affairs justifying the warrant, along with any other relevant information whether favourable or unfavourable to the application.

FINDING

96. The affidavit did not meet an acceptable professional standard. It lacked detail about the nature of the alleged offences, and about the documents that were supposed to support the allegations. The affidavit should have described these documents in detail, and copies should have been kept in the police file.
97. Though the affidavit was *prima facie* lawful, in that it was issued by a Court registrar, the failings in the affidavit opened up the possibility of a challenge to the legality of the search if Mr Van Essen had been charged.
98. It would have been prudent for Constable Henderson's supervising officers to review the final affidavit.

RECOMMENDATION

99. Police take steps to ensure that any member involved in drafting an application for a search warrant is aware of the general principles set out in *R v Williams*, and the guidance therein on New Zealand Bill of Rights Act protections against unreasonable search and seizure.
100. Police ensure that the offence(s) specified in a warrant application are accurately stated and are supported by cogent and relevant evidence.

Issue 6: What independent scrutiny did Constable Henderson apply to the evidence presented to him, and was he influenced by Mr Gibbons when preparing and presenting the affidavit?

101. Constable Henderson asserted that he came to an independent view of the justification for the search warrants, on the basis of documentation on the ACC file Mr Gibbons showed him. The affidavit identifies

Mr Gibbons as the source of the information, but goes on to refer to a police “*belief*” in the justification for the warrants, without suggesting that Constable Henderson independently verified Mr Gibbons’ information, which would have been prudent under the circumstances.

102. The absence of key evidential documents on the police file or described in detail in the affidavit gives the impression that Constable Henderson did not sufficiently understand the evidence in the ACC file.

FINDING

103. Whilst Constable Henderson might well have scrutinised the evidence presented to him, it is not known how much weight he afforded Mr Gibbons’ belief that a search warrant was justified, nor the extent to which he applied independent scrutiny to the evidence.
104. Furthermore, there was insufficient independent supervision of Constable Henderson’s decision-making.

Issue 7: Are there Police procedures for addressing conflicts of interest of this nature, and were those procedures followed?

105. At the time the warrant to search Mr Van Essen’s home was issued, there was no national policy on conflicts of interest.²⁰ This increased the risk of conflicts of interest or apparent conflicts of interest not being appropriately managed.
106. Despite the lack of policy, the Authority’s investigation found that Dunedin police were aware of the importance of managing potential conflicts of interest, and of the need to ensure that such conflicts did not threaten the integrity of investigations.
107. Constable Henderson himself raised with his superiors the fact that his appointment to the ‘ACC desk’ would

20 Conflicts of interest were covered under section 9(12) of the Police Regulations 1992, which related to ‘disgraceful conduct or conduct tending to bring discredit on police’.

most likely involve direct dealings with his father-in-law, Mr Gibbons. He told the Authority's investigators he was concerned about the perception of a conflict of interest.

"When I was given the portfolio I was uncomfortable with it at the time purely because people can perceive that he is doing dodgy warrants for his father-in-law."

108. On raising these concerns with Detective Senior Sergeant Croudis, Constable Henderson received assurances that the relationship was noted and did not prevent him fulfilling the 'ACC desk' role.
109. Police did take some steps to manage apparent conflicts of interest in Mr Van Essen's case. These included:
- Detective Inspector Pinkham deciding that Constable Henderson should take no further part in the Van Essen case; and
 - Detective Sergeant Inglis declining to undertake the internal police investigation into Mr Van Essen's complaint.
110. However, in other respects, police did not prudently manage apparent conflicts of interest. These included:
- assigning Constable Henderson to the 'ACC desk', and failing to put in place additional oversight or reporting requirements to ensure that any conflict or apparent conflict was mitigated;
 - assigning Constable Henderson to take part in the search of Mr Van Essen's home, when Mr Gibbons was also taking part in that search;
 - assigning Constable Henderson to handle Mr Van Essen's Official Information Act request (see paragraphs 147 and 148 below); and
 - assigning Detective Sergeant Inglis to investigate the theft complaint.

111. Because of the personal relationship between Constable Henderson and Mr Gibbons, a fair-minded observer might reasonably question whether Constable Henderson would bring an impartial mind to the applications for the search warrants,²¹ given his relationship with his father-in-law.²²
112. It is important to emphasise that there is no evidence of an actual conflict of interest or that Constable Henderson had any financial interest in the outcome of the search warrant applications. Nor is there any evidence of impropriety.
113. Perceived conflict of interest questions may also arise when former police officers – such as Mr Gibbons – deal on a professional basis with former close colleagues who still work for police. In simple terms, the risk is that members of the public might perceive that the former officers are being ‘looked after by their mates’.
114. This case highlights the lack of guidance provided for police about conflicts of interest and perceived conflicts of interest at the time police applied for the warrant to search Mr Van Essen’s home and carried out the search.
115. The 2007 Commission of Inquiry into Police Conduct addressed this issue in relation to police investigations of complaints against police officers and police associates. It recommended that Police develop a policy on independence of such investigations, including guidelines and procedures for managing conflicts of interest in such situations.
116. The Auditor-General’s 2007 report *Managing Conflicts of Interest: Guidance for Public Entities* notes that proper management of conflicts of interest and apparent conflicts of interest is not only good practice but also protects the people and organisation concerned.

21 The words quoted are from *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA) at paragraph [62]. They reflect New Zealand’s current test for perceived bias.

22 The decision of the English Employment Appeals Tribunal in *University College of Swansea v Cornelius* [1988] ICR 735 supports a conclusion that a relationship through marriage can lead to a perception of bias.

“A conflict of interest that is hidden, or that is poorly managed, creates a risk of allegations or perceptions of misconduct, or of other adverse consequences such as litigation.”²³

117. The Auditor-General states that there are two aspects to dealing with conflicts of interest: identifying and disclosing the conflict; and deciding what action is needed to avoid or mitigate it.²⁴
118. In respect of disclosure, the Auditor-General states that the person with a conflict of interest is obliged to identify it and disclose it to the relevant people in a timely and effective manner, and that it is *“better to err on the side of openness”* when deciding whether something should be disclosed.
119. In respect of managing conflicts of interest, the Auditor-General’s advice is that the appropriate approach would depend on the options available under the circumstances and on the seriousness of the conflict (including risks to the public entity’s ability to make fair decisions and risks to the public entity’s reputation).
120. The Auditor-General outlines a wide range of possible options for managing conflicts of interest. One of those options is imposing additional oversight. Another option is removing the person from the duties that involve a conflict. Both options might have been appropriate in this case.
121. In his reinvestigation, Inspector Todd noted the Commission of Inquiry’s recommendations and also noted that police district directives had been updated to reflect the importance of police investigations being genuinely independent. Inspector Todd recommended that police review the relevant General Instructions A294 *Arrest without warrant – Members, relatives or friends of complainants* and S052 *Policy Guidelines – Search Warrants – execution by*

23 Auditor-General (2007) at paragraph [1.22].

24 Auditor-General (2007) at pages 7-8.

other organisations to “have a wider context” including conflict of interest issues.

122. In February 2008, a new police Code of Conduct came into effect. The Code contains a section on ‘fairness and impartiality’, which requires that:

All employees have a responsibility to act with fairness and impartiality in all dealings with their colleagues and the public, and to be seen to do so, avoiding any potential or perceived conflicts of interest.

123. It also requires that:

Employees avoid situations that might compromise, directly or indirectly, their impartiality or otherwise call into question an employee’s ability to deal with a matter in a fair and unbiased manner. Employees inform their managers where any actual or perceived conflict of interest could arise.

124. Police are also working to develop the more detailed conflict of interest guidelines recommended by the Commission of Inquiry.

125. Finally, the Authority observes that the duties in relation to conflicts of interest are not fixed in point of time. In particular, the fact that a relationship does not at the outset give rise to a conflict of interest does not prevent that relationship maturing into one of conflict.²⁵

FINDING

126. At the time the warrant to search Mr Van Essen’s home was issued, there was no clear national guidance for police on handling conflicts of interest.

127. However, police management in Dunedin knew of the relationship between Constable Henderson and Mr Gibbons and should have more actively managed

25 *Duke Group (in liq.) v Pilmer & Ors* [2001] SASC 215 at paragraph [55]. There Doyle CJ stresses that his rejection of an apparent bias argument “is not made on a ‘now or never’ basis”. If the situation changed in material respects “I could then reconsider the question of disqualification”.

that relationship to avoid any perception of a conflict of interest. Either Constable Henderson should have been assigned to duties that would not involve professional dealings with Mr Gibbons, or any professional dealings he had with Mr Gibbons should have attracted additional oversight and reporting requirements. This did not happen.

128. The Authority stresses that, in making this finding, it has found no evidence of actual bias on the part of Constable Henderson, whether in the form of corruption or attempting to pervert the course of justice. Nor is there any evidence of misconduct or neglect of duty by Constable Henderson. It is notable that Constable Henderson himself raised with his superiors the fact that his appointment to the 'ACC desk' would involve direct dealings with his father-in-law. He received assurances that the relationship did not prevent him fulfilling that role.

129. Finally, the Authority acknowledges that the Code of Conduct adopted early in 2008 now provides general guidance for police on dealing with conflicts of interest.

RECOMMENDATION

130. In developing detailed guidance on managing conflicts of interest, Police take into account the Auditor-General's guidance on managing conflicts of interest in public entities.

POLICE
INVESTIGATION
INTO MR VAN
ESSEN'S COMPLAINT

Issue 8: Why did Detective Sergeant Roberts' report not mention the relationship between Constable Henderson and Mr Gibbons?

131. In interviews with the Authority's investigators, Detective Sergeant Roberts said he did not mention the relationship between Constable Henderson and Mr Gibbons in his report because he did not see it as an issue. He also said Constable Henderson's involvement in the ACC portfolio had been sanctioned by his superiors, and indicated that he did not see it as his role to second-guess their decision.

FINDING

132. Detective Sergeant Roberts should have reported the close family relationship between the two men. Although the Authority has found no evidence of actual bias, misconduct or neglect of duty on the part of Constable Henderson, his relationship with Mr Gibbons did involve an apparent conflict of interest and was relevant to the investigation. It should have been noted in Detective Sergeant Roberts' report.

Issue 9: Was the allegation of theft properly investigated?

133. As noted in paragraph 29, there was a discrepancy between police property record sheets and job sheets over the number of memory sticks seized during the search of Mr Van Essen's home. The record of items seized during the search, which was compiled at the time by Sergeant Kindley, stated that two memory sticks were taken. However, in his later job sheet, the sergeant recorded that:

- at 11am he seized two memory sticks found by Mr Gibbons and the police e-crime specialist in Mr Van Essen's lounge; and
- at 11.40am he received "a blue DS memory stick which was produced by Mr Van Essen from a jacket pocket".

134. Mr Van Essen alleged that the third memory stick had been stolen.

135. Although Detective Sergeant Inglis declined to investigate the initial Van Essen complaint because of a conflict of interest, he undertook the investigation into the theft allegation which originated from the same search and involved the same personnel.
136. Unlike Detective Sergeant Roberts, Detective Sergeant Inglis did interview Mr Gibbons and the ACC examining officer, as well as the police e-crime specialist and others involved in the search.
137. Detective Sergeant Inglis concluded that Sergeant Kindley kept *"good records of all exhibits seized"*, and that, based on interviews with all involved in the search, only two memory sticks had been seized and both had been returned to Mr Van Essen. He also commented that *"there is no evidence to indicate that anything additional than what was recorded on Sergeant KINDLEY's property sheets, were taken from the property"*.
138. His report did not refer to the discrepancy between the record of items seized, which stated that two memory sticks were taken, and the job sheet, which stated that three were taken.
139. He concluded that there was no evidence of theft.
140. Inspector Todd, in his reinvestigation of Mr Van Essen's complaints, also found that the evidence was dealt with according to normal procedures and there was no evidence to support a theft complaint.

FINDING

141. In most respects the theft complaint was properly investigated. The Authority accepts that there is no evidence of theft in respect of any individual, and therefore Detective Sergeant Inglis' decision to take no further action on the theft complaint was appropriate.
142. However, the investigation should have frankly addressed the discrepancy between the record of items seized and the job sheet.
143. This discrepancy also highlights the care that must be taken in recording exhibits.²⁶
144. Finally, whilst it is surprising that Detective Sergeant Inglis undertook the theft investigation having declined to investigate the original complaint on the grounds of a conflict of interest, there is no evidence of misconduct on his part.
145. Under section 15 of the Police Complaints Authority Act, police were required to notify the Authority of all complaints as soon as practicable after the complaint was received.²⁷ In this case, the Authority was not notified of the theft allegation when police received it, and only became aware of it upon receipt of Detective Sergeant Roberts' report, which was completed in November 2006.
-
- 26 The Authority notes the decision in *R v Spirak* (unrep., Ontario County Court, 11 May 1978; quoted in Fontana *The Law of Search and Seizure in Canada* (3ed 1992) at pages 169-170). County Court Judge Marin stressed in that case that where searches are conducted and material removed: it would be "*eminently prudent and indeed exceedingly wise for their own protection and the protection of the public*" that police leave behind a precise list of what was taken, "*hopefully*" initialled by those present at the time of the search.
- 27 The Act was amended in 2007 to require that the Authority is notified no more than five working days after a complaint is received. Previously, the requirement was notification 'as soon as practicable' without a specified time limit.

FINDING

146. The Authority should have been notified of the theft allegation as soon as practicable after Mr Van Essen made the allegation.

HANDLING OF
MR VAN ESSEN'S
OIA REQUEST

Issue 10: Was it appropriate for Constable Henderson to be the officer responsible for handling Mr Van Essen's request under the Official Information Act?

FINDING

147. In light of Mr Van Essen's complaint about Constable Henderson's actions and his removal from the investigation by Detective Inspector Pinkham, it was imprudent for Constable Henderson to handle Mr Van Essen's Official Information Act request.

148. The Authority accepts that Constable Henderson sought advice before refusing Mr Van Essen's request. However, his involvement simply added to Mr Van Essen's sense of frustration and his feeling that he was being treated unfairly.

RELEASE OF
PERSONAL
INFORMATION

Issue 11: What steps were taken to give effect to Detective Inspector Pinkham's assurances to ACClaim that personal information unrelated to the Van Essen case would not be made available to ACC or its representatives?

149. Detective Inspector Pinkham assured members of ACClaim that, aside from information relating to the two offences alleged against Mr Van Essen, no personal information from the computers seized during the search would be made available to ACC or its private investigators.

Detective Inspector Pinkham's assurance was consistent with the Privacy Act 1993.²⁸

150. Detective Inspector Pinkham discussed ACClaim's concerns during a meeting with Sergeant Kindley, Constable Henderson and Detective Senior Sergeant Croudís.
151. Mr Gibbons and an associate subsequently spent a day working with an e-crime specialist at Dunedin, viewing and copying material from the computers. The cloned hard drives stayed in police possession. However, no record was made of what Mr Gibbons and his associate viewed or copied. Therefore, it cannot be said with certainty whether information unrelated to the investigation was accessed.

FINDING

152. It is not clear that steps were taken to give effect to assurances that ACC investigators would not be given access to personal information unrelated to the allegations against Mr Van Essen.

RECOMMENDATION

153. Police develop guidelines to protect, and prevent disclosure to other parties of, information on computers seized under warrant, except when that information is relevant to the matter under investigation and is specified in the warrant.

28 Under Privacy Act Principle 11, an agency must not disclose personal information except in specified circumstances, such as when disclosure is one of the purposes the information was obtained for, the information is publicly available, the disclosure is to the person concerned or authorised by the person concerned, disclosure is necessary for law enforcement or tax purposes or legal proceedings, or disclosure is necessary to reduce serious and imminent threat to health and safety.

Independence
trustworthiness
accountability
vigilance
integrity

Summary of recommendations

REPORT ON THE COMPLAINT OF BRUCE VAN ESSEN

September 2008

1. Police review their policy on leaving copies of search warrants with occupiers of searched properties, with a view to ensuring that there is consistency across all districts, and that the occupier of a searched property is clearly aware of the legitimacy of the search.
2. Police develop policy and guidelines on assisting other agencies with applications for search warrants, and on the involvement of other agencies in execution of search warrants. These guidelines should clearly define the working relationship and each agency's responsibilities.
3. Police take steps to ensure that any member involved in drafting an application for a search warrant is aware of the general principles set out in *R v Williams*, and the guidance therein on New Zealand Bill of Rights Act protections against unreasonable search and seizure.
4. Police ensure that the offence(s) specified in a warrant application are accurately stated and are supported by cogent and relevant evidence.
5. In developing detailed guidance on managing conflicts of interest, Police take into account the Auditor-General's guidance on managing conflicts of interest in public entities.

6. Police develop guidelines to protect, and prevent disclosure to other parties of, information on computers seized under warrant, except when that information is relevant to the matter under investigation and is specified in the warrant.



The Hon. Justice Goddard

INDEPENDENT POLICE CONDUCT AUTHORITY

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