



ALLEGATIONS RAISED CONCERNING
THE ACTIVITIES OF THE
OPERATIONS INTELLIGENCE UNIT
AND OTHER RELATED ISSUES

INTERIM REPORT
of
THE OMBUDSMAN

MAY 1998

VICTORIA

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THE OMBUDSMAN
VICTORIA AUSTRALIA
& The Deputy Ombudsman (Police Complaints)

The Hon B A Chamberlain MLC
President
Legislative Council
Parliament House
Melbourne

The Hon S J Plowman MP
Speaker
Legislative Assembly
Parliament House
Melbourne

Mr President and Mr Speaker,

In October 1997 a series of articles were published in *The Age* concerning the activities in the late 1980's and early 1990's of a unit within the Victoria Police known as the Operations Intelligence Unit.

These articles prompted many complaints to the Ombudsman that the activities of the Operations Intelligence Unit as described in the articles in *The Age* were improper.

Several other issues have arisen in the course of my investigation, including the question of whether the records of the Special Branch of the Victoria Police, disbanded in 1983, were destroyed as claimed by police at that time.

This interim report deals with some of the issues which have arisen in the course of my investigation. My investigation is continuing and I will be making a final report upon its completion.

In accordance with Section 86I of the Police Regulation Act 1958, I now present my interim report.

Yours sincerely

B W PERRY
OMBUDSMAN

MAY 1998.

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1. INTRODUCTION

This interim report is published in an attempt to clarify certain issues which have been the subject of public comment by various parties since *The Age* first published its articles regarding the activities of the Operations Intelligence Unit (“the OIU”) in October 1997.

I wish to say at the outset that my investigation has revealed that, overwhelmingly, the public debate on this issue has been heavily influenced by expressions of poorly informed opinion dressed up as fact, by deliberate half-truths, and by individuals and groups pushing private agendas at the expense of reasoned argument.

In particular, I intend in this report to attempt to throw some light on the following issues.

- The nature and extent of the powers of the Ombudsman and the Deputy Ombudsman (Police Complaints).
- The insubstantial nature of many of the “facts” bandied about by the media in relation to the issues under investigation in this case, the unreliability of many of the sources of these “facts”, and the equally disturbing willingness of the media simply to repeat these unsupported allegations as fact without taking the most rudimentary of investigative steps.
- The manner in which the very serious issues at the heart of this investigation have been hijacked by a variety of people intent upon pursuing private agendas. This is not a new phenomenon, but one which has been more obvious in this case than most. It has added considerable cost and difficulty to this investigation.

I am not so naïve as to believe that this attempt to inject some rationality and, more importantly, some facts, into the debate will necessarily be well received by all.

Nevertheless, it is my belief that the interim conclusions I will reach in this report are fairly based on the evidence so far gathered in the course of my investigation. It is my hope that, having dealt in this report with the sensationalist side-shows that have characterised this matter so far, I can now turn my attention to what I see as the very serious issues at the heart of the matter. They are as follows.

- The propriety of past and present activities of the Victoria Police in the area of non-criminal intelligence gathering, and the management and retention of such intelligence. This will include an examination of some of the particular matters reported in The Age articles of October 1997, such as the alleged infiltration and bugging of meetings of community groups and searches without warrant.
- A further attempt at determining the truth or otherwise of recurring allegations that police improperly retained Special Branch files which were ordered to be destroyed and which it was claimed by police were destroyed.

2. THE SCOPE OF THIS REPORT

I regard the activities of the OIU, as revealed in the reports in *The Age*, as being a matter of legitimate and serious community concern. My investigators have devoted a considerable amount of time and effort to the investigation of this important issue, and I intend that this issue should remain central to this investigation.

However, as I have stated above, public debate on the subject matter of this investigation has been characterised by people pursuing their own private agendas. The purpose of this interim report is to attempt to deal with some of the more sensational allegations which have, for various reasons, arisen as a “side-show” to the main issues. In particular, my investigations to date have thrown some light on the Middleton allegations and the Selby allegations. By reporting on the developments to date, I hope to place these various related allegations into a context which will go some way towards explaining their origins and the reasons they have surfaced in the form in which they have.

The OIU was not a secret organisation. It consisted of overt operatives and covert operatives. The overt operatives liaised openly with the organisers of demonstrations and other events in order to ensure an appropriate police presence at the event. They went to demonstrations, introduced themselves to organisers as members of the OIU and handed out business cards. These cards had a William Street address rather than the West Brunswick address, but identified the overt member as a member of the OIU. The overt members invited organisers to contact them in regard to future events so that any assistance by way of traffic control or police attendance at the event could be organised.

The covert members assumed false identities and obtained information by covert means. I have taken the view that I will not name members of the OIU – overt or covert - in this interim report. I base this decision on the following factors.

- The names of the members are not relevant for the purposes of this report.

- It can be strongly argued that to reveal the names of these people, particularly covert operatives, may expose them to risk.
- The covert operatives were for the most part very junior members. They were doing their job as instructed. If fault is to be found, it should not lie with these people and I do not propose to make them the target of any consequences by identifying them in a public document which is, in any event, an interim report.

Members of the OIU will be referred to simply by a number (member 1, member 2, etc.). Although there were male and female covert operatives, all references to members of the OIU will be in the masculine gender.

All serving members were interviewed on tape and were advised that the interviews were being conducted under s. 86Q of the Police Regulation Act 1958.

All evidence given by civilian witnesses was given under oath.

3. POWERS OF THE OMBUDSMAN AND DEPUTY OMBUDSMAN (POLICE COMPLAINTS).

It should be explained at the outset that the Ombudsman and the Deputy Ombudsman (Police Complaints) are presently one and the same person. The Ombudsman is currently performing the duties of, and has the statutory powers of, the Deputy Ombudsman (see s. 6F Ombudsman Act 1973).

The matter of the adequacy of the powers of the Ombudsman and/or Deputy Ombudsman to conduct an enquiry such as the present investigation is a matter of frequent public comment. Much of that comment is poorly informed and some of it is deliberately incorrect.

For the record, the relevant powers are set out in s. 18 of the Ombudsman Act 1973 and s. 86P of the Police Regulation Act 1958.¹ These provisions confer upon the Ombudsman and Deputy Ombudsman (Police Complaints) the powers set out in sections 17, 18, 19, 20 and 20A of the Evidence Act 1958.² An examination of the relevant legislative provisions make it clear that the Ombudsman and the Deputy Ombudsman (Police Complaints) each have, among other powers, the power to compel the attendance of witnesses to produce documents and/or evidence under oath.

Stated simply, the Ombudsman and the Deputy Ombudsman (Police Complaints) are given all the powers that a Royal Commissioner is given under the Evidence Act. Indeed, in some respects, the Ombudsman and the Deputy Ombudsman have powers which go beyond those which are ordinarily conferred upon Royal Commissions. Unlike a Royal Commission, which has to be created for a particular purpose, the Ombudsman and the Deputy Ombudsman have these powers *at all times and may exercise them at any time*

¹ Copies of relevant provisions at Appendix 1.

² Copies of relevant provisions at Appendix 2.

without any recourse to any other person or authority. As I have stated publicly many times, the Ombudsman is, in effect, a standing Royal Commission.

It is possible for the Governor in Council to specify in Letters Patent establishing a Royal Commission that a particular Commission is a “special commission”. The effect of this is that certain secrecy provisions in other statutes are overridden.³ It is to be noted that, again, the Ombudsman has these additional powers *at all times* by virtue of s. 18 (3) of the Ombudsman Act.

Under Victorian law as it presently stands, it is not possible to appoint a Royal Commissioner who would have the power to compel witnesses to give self-incriminating evidence. So far as I can see, there is no constitutional impediment to the Parliament legislating to enable a particular Royal Commission or Royal Commissions generally from having such powers. To my knowledge, however, such powers have never been given in Victoria to a Royal Commission or a Board of Inquiry. This is not surprising given the importance accorded in law to the fundamental principle that a person cannot be compelled to give evidence which may tend to incriminate him/herself.

It is possible, however, for the Governor in Council to confer upon Royal Commissioners certain inquisitorial powers which exist under separate legislation. Such powers are not conferred upon Royal Commissioners in their capacity as such, but are appointments which are quite separate and which will in most cases require the cooperation of some other arm of executive government. In the recent Tricontinental Royal Commission, persons appointed as Royal Commissioners were also appointed by the Australian Securities Commission as inspectors under the relevant companies legislation in order to give the Commissioners certain powers in relation to companies. The Commissioners encountered difficulties in attempting to use the ASC powers and reported that they did not think it appropriate that they should use such powers. By contrast to the above

³ Evidence (Commissions) Act 1982.

position for Royal Commissioners, the Deputy Ombudsman (Police Complaints) *at all times* has the powers provided under s. 86Q of the Police Regulation Act 1958 to require police members to “furnish any relevant information, produce any relevant document or answer any relevant question”.

There are some other interesting aspects to the powers conferred upon the Ombudsman.

The Ombudsman has the advantage of being able to conduct enquiries in private. It is my experience that witnesses who are not prepared to give evidence in a public forum will often happily provide valuable evidence on a confidential basis. Moreover, it allows the Ombudsman to conduct investigations in an efficient manner, free from the sensationalist publicity which often attends public enquiries. The reporting of untested allegations as they are revealed day by day in evidence before public enquiries may make interesting breakfast reading and may even sell newspapers, but it is often unfairly destructive to innocent parties and is not conducive to efficient investigation. This principle has been recognised by the ICAC in NSW which has altered its procedures so that it now conducts private hearings to establish the veracity of allegations before publicly airing them.⁴

Section 16 of the Ombudsman Act 1973 adds considerable weight to the contention that the Ombudsman is a “standing Royal Commission”. It provides that the Legislative Assembly, the Legislative Council, a committee of either House or a joint committee of both Houses may refer to the Ombudsman for investigation and report “any matter, other than a matter concerning a judicial proceeding, which that House or Committee considers should be investigated by him.” It is apparent from the words of s.16 that the subject matter of such references need not be within the usual jurisdiction of the Ombudsman.

In spite of all of the above publicly available information, it has been said that I do not possess sufficient powers, skills or resources to investigate this matter. There have been

⁴ “ICAC tallies friends and foes as 10 year review nears”, *Weekend Australian*, 11 April 1998, p. 10.

various explanations given for such conclusions. Two examples, given by persons claiming that I should not conduct this investigation, are that I am not a judicial officer but a “mere statutory officer”, and that I do not have powers to compel attendance of witnesses and the production of documents and evidence. In regard to the latter point, it can be seen by anyone who has bothered to go to the source material - the legislation creating my powers - that such comments are simply wrong.

The ill-informed and sometimes mischievous nature of these comments is compounded by further ignorance and woolly thinking on the issue of the much called for “full judicial enquiry”. In this regard, I simply point to the following facts: Royal Commissions and Boards of Inquiry are established by the Governor in Council on the advice of the executive government. They are administrative inquiries and remain such even when they are chaired by a person who happens to be a judge. In Victoria, the judges of the Supreme Court have, since 1923, adopted a policy of not accepting appointments as royal commissioners or as members of boards of inquiry. This policy has been adhered to with only the rarest of exceptions. It is axiomatic that former judges are not judges, and the appointment of a former judge will not make an inquiry of any type into a judicial inquiry, let alone a “full” judicial inquiry.

If all Royal Commissions and Boards of Inquiry are administrative in nature, and there is no mechanism in Victoria to allow the Supreme Court itself to initiate a judicial inquiry, then I can only interpret calls for a full judicial enquiry to be criticisms of Ombudsman’s enquiries on the sole ground that the Ombudsman is not a judge or possibly a former judge. Anyone is free to criticise the performance of the Ombudsman, but the mere fact that he is not a judge cannot by any logic be a valid basis for criticism.

In relation to the extent of my powers and the use I choose to make of them, I offer the following comment. Some of my critics make attempts to establish a monopoly on the high moral ground as defenders of the community’s “civil liberties”. Among such people are those who are calling for the mysterious “full judicial enquiry”, saying that it is

necessary to have a body which can compel witnesses to give evidence on oath and generally rough up witnesses. Putting aside the fact that I already have these powers, I wish to state that I, too, respect the liberties of citizens and I will only exercise my considerable powers when it is necessary to do so. I do not often issue summonses to witnesses to attend to give evidence. Unlike courts and royal commissions, I have the advantage of easy mobility. I prefer to contact potential witnesses and meet with them at a mutually convenient time and place. It is my general experience that witnesses, when treated civilly, are more than happy to cooperate. Police witnesses, as those who have read the relevant legislation will know, have no choice but to cooperate. It is my experience that individual police who are to be interviewed by this office, and their legal advisers, recognise this and bow to the inevitable. In the present case, not one single witness, other than Mr Selby (I shall deal with Mr Selby's case elsewhere in this report), has declined to cooperate with my investigators. Two further witnesses, although happy to cooperate, have, for professional reasons, required that summonses be issued to them. I was happy to oblige.

4. THE INVESTIGATION.

4.1 BACKGROUND

Although this investigation was triggered by the appearance of a series of reports in *The Age* in October 1997 about the activities of the Operations Intelligence Unit in the 1980's and early 1990's, the general background to the matters covered by this investigation go back much further. Although this history is long and complicated, it is necessary to review it in order to place this investigation in its full context.

4.1.1 Disbandment of Special Branch.

In late 1977, Acting Justice White of the South Australian Supreme Court completed an enquiry into the record keeping activities of the Special Branch of the South Australian Police. The White Report reignited a long running controversy in Victoria about the role of Special Branch. As a consequence, a set of guidelines was devised by the Victoria Police in order to clarify the role and to define the activities of Special Branch. These guidelines were publicly released by the Minister for Police and Emergency Services, Mr L. Thompson, in October 1979. At the same time, the Minister announced that a former Supreme Court Judge, Mr F. Nelson QC, would be retained to report periodically on the observance of the guidelines. Mr Nelson's first report was made in June 1980. He produced eight such reports, the final report being dated 16 May 1983.

In the meantime, in October 1982, the Cain Labor government was elected. It was widely known that the new government was opposed to the continued existence of Special Branch. The Chief Commissioner of the time, Mr S. I. "Mick" Miller, has told my investigators that he had no desire to be in a position, potentially embarrassing to the government and to the Chief Commissioner, where the government of the day attempted

to dictate to the Chief Commissioner on operational matters. He decided to take the initiative in regard to the future of Special Branch.

Mr Miller directed Superintendent R. Anstee to conduct a review of the operations of the Special Branch to determine whether there was any justification for its continued existence. Superintendent Anstee was the officer in charge of a unit known as the "Inspectorate". This unit was concerned with internal reviews of organisational structure and other policy matters within the Force.

Mr Anstee conducted his review and reported to Mr Miller that the retention of Special Branch in its present form could not be justified. Mr Anstee recommended that the responsibility for maintaining a counter-terrorist capability and for providing VIP protection should devolve upon the Protective Security Group. He also advised that the responsibility for liaising with the organisers of demonstrations and for making operational resource assessments for public functions should devolve upon the Assistant Commissioner (Operations). Two new units were subsequently formed: the Operations Intelligence Unit ("OIU") and the Counter Terrorist and Explosives Information Section ("CTEIS"). Mr Anstee was the author of Executive Instruction 148, issued by Mr Miller on 25 July 1983, which officially abolished Special Branch.

The closure of Special Branch had already been announced publicly and was well under way by the time the Executive Instruction was issued. Mr Race Mathews, Minister for Police, made a public statement on 5 July 1983 of the intended closure of Special Branch. It was also announced that all Special Branch files, except those which were of continuing operational relevance, would be destroyed.

On the same day as the announcement of the intended closure and destruction of files was made, the Freedom of Information Act commenced operation. This seems to have been overlooked by police and by the Minister in preparing the public announcement of the closure of Special Branch. Questions were immediately raised about Freedom of Information access to the Special Branch files. It was stated by the Acting Freedom of Information officer for the Victoria Police, Chief Inspector Noel Newnham, that no file would be destroyed once an application for access to it had been received. The Minister clarified the situation on 8 July 1983 when he announced that, for the moment, Special Branch files would be retained to allow access under the Freedom of Information Act. There appears to have been no formal statement of precisely how long the destruction of

Special Branch files would be delayed pending the receipt of Freedom of Information requests.

It was always accepted by the Government of the day that those Special Branch files for which continuing operational relevance could be demonstrated were to be retained. Immediately upon the announcement of the closure of Special Branch, a process had begun whereby the files were sorted into two categories: those which were to be retained and transferred to the OIU or the CTEIS, and those which were to be destroyed.

This process of the sorting and destruction of files was performed by Special Branch staff under the supervision of the Assistant Commissioner (Crime), Mr P. Delianis. At the request of Minister Mathews, Mr Nelson QC, whose services had been engaged since 1979 to monitor compliance with the 1979 guidelines, was further engaged to examine those files which had been identified by police as being of continuing operational relevance. Mr Nelson's task was to ensure that they were in fact worthy of retention on those grounds. Mr Nelson's final report, dated 23 August 1983, records that he attended the offices of Special Branch on 8, 9, 11, 12, 15, 16, and 18 August 1983 for this purpose.

It is necessary at this point briefly to describe the "files" held by Special Branch. For the most part they were small cards on which was recorded the name and any other information about a person who had come to notice. It was only where the available space on the card had been filled, or where there was additional documentation of a type not suitable to be put onto a card, that a separate "file" was made up and stored in a filing cabinet. All cards, including those related to additional information held elsewhere on

files, were retained in what I shall call the “master card index”. The process of sorting the Special Branch records started with the cards. Where an index card and file existed, the card was to be physically removed from the master card index and stapled to the related file. The intention was to ensure that all available material in relation to individual file subjects would be gathered together in readiness for destruction or retention. For administrative reasons, it was decided that before removing any cards from the master card index, the entire master card index should be photocopied to facilitate the Freedom of Information process and to ensure that files did not get lost. It was proposed that this photocopy of the master card index would be destroyed at the end of the destruction process. There were thousands of index cards. They were photocopied, 6 – 8 to a page, over a period of some days or weeks. Only after the photocopy of the index cards was complete was the process of removing cards and stapling them to related files commenced.

The failure to anticipate the commencement of the Freedom of Information Act was not the only slightly embarrassing oversight which occurred in relation to the proposed fate of the Special Branch files. On 6 July 1983, the day after the Minister’s public announcement, the Keeper of Public Records, Mr C. Hurley, apparently having read of the Minister’s announcement in the newspapers, wrote to the Chief Commissioner and reminded him of the Force’s obligations under the Public Records Act 1973 regarding the destruction of public records. Mr Hurley advised the Chief Commissioner that no public record could be destroyed without the authority of the Keeper of Public Records. Mr Hurley suggested that “it may be advisable to compile a complete list of all files to show which have been passed on to ... [other areas of the Force] ... and which have been destroyed or culled”.

Assistant Commissioner Delianis replied by letter dated 8 July 1983 that “it would be an onerous task to describe each individual file as there are many thousands of them...”. In subsequent correspondence Mr Hurley gave details of the requirements for the destruction of the files, including the need to prepare a list of documents to be destroyed known as a

“Destruction Authority for Records in Public Offices”. In addition to the correspondence on file, there is evidence that the Public Records Office was actively involved in other ways in the process of the preparation of the files for destruction. Mr Nelson’s final report contains reference to the attendance at the offices of the Special Branch by representatives of the Public Records Office who “indicated the appropriate steps to be taken to obtain authority for such destruction”.

The result of the involvement of the Public Records Office appears to be the preparation of a six-page Destruction Authority for Records in Public Offices which was signed by Assistant Commissioner Delianis on 17 August 1983 and by Mr Hurley on 18 August 1983. Under the heading “Description and Date Range of Records” the following appears.

“Approximately 6,000 indexed cards of individual persons and organisations in alphabetical order from A to Z inclusive dating from 1934 to 1983 inclusive.

*Files for individuals and organizations as follows:-
(with associated index cards)”*

[The following five pages contain a list of 1225 file numbers.]

The final result of the process, approved in writing by Minister Mathews, was that a total of 918 files was retained, with 346 being transferred to the OIU and 572 being transferred to the CTEIS. The number of files reported to have been destroyed was 8,370 files and related index cards, and a further quantity of miscellaneous documents. Those files were reported to have been destroyed in two batches. The first destruction is claimed to have occurred on 18 August 1983, the day Mr Nelson finished his task of physically examining the files at the offices of Special Branch. The remainder of the files marked for destruction are claimed to have been destroyed one week later, on 25 August 1983.

It is crucial to note that the 918 files retained and forwarded to the OIU and the CTEIS appear not to have been catalogued anywhere, nor did the files themselves bear any mark or other visible sign that they had been approved for retention by Mr Nelson.

4.1.2 The 1983 Freedom of Information Fiasco.

Almost immediately after the closure of Special Branch, there appeared the first of several public outcries relating to the fate of the Special Branch files. People who had applied for access to their files began to be told that their files could not be located or had been destroyed. Significantly, some of these people had already been granted partial access to their files, thus receiving proof that the file had existed. They had then sought an internal review of the decision in an attempt to gain access to all documents on their file, only to be told that the file did not exist or had been destroyed.

Many of these people made complaints to the Ombudsman under s. 27 (1) (e) of the Freedom of Information Act. This section provides that where an applicant is told that the document “does not exist or cannot, after a thorough and diligent search be located”, the applicant may complain to the Ombudsman. The general thrust of the complaints were that there had been deliberate delays by police in the processing of Freedom of Information requests with the intent that the files would be destroyed prior to the completion of the process, or that police had deliberately frustrated the Freedom of Information process by destroying files so as to deny applicants access to documents.

For obvious reasons, the Ombudsman’s investigation of these complaints was not directed at whether any files had been improperly retained, but rather, as seemed more likely at the time, whether files had been improperly destroyed. Police publicly admitted to the destruction of files and claimed that it had inadvertently occurred as a result of the combined effects of a lack of familiarity with the Freedom of Information process, and a lack of communication between people in the Freedom of Information office and the people who were responsible for the destruction of the files.

The Ombudsman interviewed several witnesses including Assistant Commissioner Delianis, the Freedom of Information Officer, and the former officer in charge of Special Branch. The files were not located. In view of what seemed to be the embarrassing admission by police that they had in fact done exactly that of which they stood accused – destroying the files – it was accepted that this had indeed occurred. The Ombudsman was critical of police for the blunder to which they had admitted and it seemed the matter could be taken no further. With the exception of a letter to the editor of the *Moorabbin Standard* in September 1988 (referred to in detail elsewhere in this report), the issue of the Special Branch files remained a closed book until the eruption of further allegations in August 1989.

4.1.3 The 1989 allegations.

Following the publication of several articles in *The Age* on 21 August 1989 in which it was alleged that Special Branch records had not been destroyed in 1983 and were still in existence and being used by police, the Ombudsman was requested by the Minister for Police and Emergency Services, Mr Crabb, to investigate the matter.

The Ombudsman commenced his investigation by interviewing the journalists who had written the articles. In essence, they claimed that one of their sources had shown them photocopies of index cards which had been part of the records of Special Branch. From the description provided by the journalists, it was clear that the photocopies sighted by them were copies of the master card index, or part thereof.

The Ombudsman also interviewed a number of former Special Branch members who were at the Special Branch just prior to its closure. It was established that a copy had been made of the master card index on the instructions of the officer in charge of the Branch in order to facilitate the administrative processes involved with Freedom of Information requests, and as a means to ensure that files and/or index cards were not illegitimately removed from the Branch. Sworn evidence was given by the officer in charge that this photocopy of the index cards was destroyed together with the last lot of Special Branch files sent to the incinerator on 25 August 1983.

However, a later interview with the *Age* journalists revealed evidence that their source had told them that the index cards had been legitimately copied, but that a second copy had been made which had not been destroyed. In addition, one of the reporters stated that it was not necessarily police officers who had the list of index cards, but that police had access to it. For professional reasons the journalists would not reveal the identity of the source, and the source indicated via the journalists that he did not wish to be interviewed or to provide any documents to the Ombudsman.

At the completion of his enquiries, the Ombudsman reached the following conclusions:

- *The Age* reporters had in fact seen a photocopy of at least some of the index cards of Special Branch.
- The material sighted by the *Age* reporters was a photocopy of the copy of the index cards prepared for the officer in charge of Special Branch.
- Only a copy of the index cards was sighted - actual 'files' were not involved.
- The whereabouts of the photocopy of the index cards seen by the *Age* journalists was unable to be established.
- There was no official direction given that a secret photocopy of the index cards should be retained.
- There was no official knowledge or belief, and indeed no evidence at all to support the allegation that the illegitimate photocopy was accessible to members in the course of police investigations.
- No 'official' copy of the index cards of the Special Branch existed.
- Information contained in the index cards would have been of little value to the Force.

4.1.4 The present allegations.

On 6 October 1997, *The Age* commenced a series of reports which contained many examples and detailed descriptions of the type of activities conducted by the Operations Intelligence Unit. *The Age* reported that it had seen “confidential records and files” of the OIU. These documents were extensively quoted throughout the articles, as was a former member of the OIU.

The articles very clearly raised the general issue of whether a civil police force should be involved in the gathering of intelligence other than ordinary criminal intelligence and, if so, how should such activities be regulated and controlled. This was the issue which was central to many of the letters of complaint this office received in the days and weeks following the *Age* articles. I saw this question as being a very important issue and a matter of very legitimate public concern. It was, and remains, a central issue in my investigation.

In addition to the general issue of the propriety of the activities of the OIU, the October 1997 articles also contained allegations by the unnamed former member that members of the OIU had hidden documentary evidence from the Ombudsman’s 1989 investigation. It was alleged that files had been loaded into unmarked police cars and taken away from the West Brunswick offices of the OIU for the duration of the Ombudsman’s investigation. I saw this as an important issue to be investigated. These claims, if substantiated, would reveal what I would regard as misconduct of the most serious order and would also raise questions about the accuracy of the result of the 1989 investigation.

I announced that I would be investigating the above issues and commenced my investigation.

4.2 EARLY DEVELOPMENTS IN THE INVESTIGATION.

Within a very short time of the appearance of the reports in *The Age*, my investigators had secured the remaining records of the OIU which were held by the current day successor of the OIU, including the diaries of members who had served in the OIU since its inception. My investigators also had a very strong belief that they had identified the unnamed member who had been quoted extensively in *The Age*.

My investigators contacted this person with the intention of making arrangements for an interview. The only request made by the witness during that initial contact was that his diaries should be made available at the interview to assist his recollection of events. On inspection of the diaries which had been secured, it was found that some of the diaries of the witness in question were missing. For reasons which will be outlined elsewhere, my investigators were already suspicious of the witness and felt that further enquiries should be made before an interview was arranged. The witness had stated that he was happy to cooperate with the investigation and no further contact was made with the witness for the moment.

On 26 November 1997, my investigator received a call from the witness who said that he had a “window of opportunity” to take some leave and to come to Melbourne. He proposed that this office should fly him to Melbourne for an interview and that he could take the opportunity to spend a few days with his family in Melbourne. Although the witness was clearly attempting to manipulate the situation to his personal advantage, this office agreed to pay 50% of his airfare. It was during this conversation that my investigator informed the witness that he had not been able to locate all of his diaries. My investigators told nobody else that the diaries were missing.

On 9 December 1997, it was revealed on the front page of *The Age* that “sources close to the investigation” had told *The Age* that certain police diaries, which it was claimed were vital to the investigation, had gone missing. This matter was reported amid a chorus of

calls for a royal commission or a “full judicial enquiry”. My belief regarding the source of the information to *The Age* had been confirmed.

The witness duly appeared at the appointed time for interview. He cooperated and answered the questions put to him by my investigators. The interview lasted several hours and was tape recorded. Just before concluding the interview, my investigators put to the witness that it was he who had been providing information to *The Age*. To my investigators’ surprise, the witness became visibly stressed at the realisation that my investigators could have reached this conclusion. My investigators were left with the clear impression that the witness had not anticipated that such a conclusion would be reached, even though it was so obvious as to be unavoidable. The witness admitted that he had indeed spoken to *The Age*. As is my usual practice, the witness was given a copy of the tape of the interview.

In the course of the abovementioned interview, the witness made detailed allegations regarding, among other things, the bugging of a meeting conducted by a community group concerned with the issue of shootings by police, and the concealing of documents from the 1989 Ombudsman’s investigation by members of the OIU at the direction of a very senior member of the Force. An edited transcript of the tape of the interview as it related to each of these matters was later published in *The Age* on 9 February 1998.

A further development in the investigation occurred with the appearance of an article in *The Age* on 16 December 1997 reporting claims by Mr Hugh Selby, former head of the Police Complaints Authority, that he had been told at a lunch with “two very senior police officers” that one of the officers had defied orders to destroy Special Branch files and that the files had been loaded into cars and taken to suburban police stations where they could be accessed at any time. “They may have got near to the furnace, but none of them went in”, Mr Selby was reported as saying.

On Tuesday 27 January 1998, *The Age* reported that it had obtained Special Branch files which were to be destroyed in 1983 and which had been hidden from a later Ombudsman's enquiry. *The Age* subsequently produced six files to the Ombudsman. These files remain in my possession.

Two further developments occurred on 9 February 1998. The first was the publication in *The Age* of an edited transcript of certain parts of the interview conducted by my investigators with the abovementioned witness. The second was an ABC *Four Corners* report which, although it had a wider focus than the subject matter of this investigation, touched upon issues relevant to this matter when it aired allegations by a former member of the OIU. Those allegations were that a very senior member of the Force attended the offices of the OIU and directed that files be loaded into cars and taken away from the premises of the OIU in order to mislead an Ombudsman's investigation. The member was named in the *Four Corners* report and it is for this reason only that I will use his name in this report. He is Alan Middleton. Mr Middleton is, without doubt, one source of the information published in *The Age* in its initial series of articles in October 1997. He is the witness who was told by my investigator that his diary was missing, and he was the person who made the detailed allegations in an interview with my investigators, the transcript of which subsequently appeared in *The Age* on 9 February 1998.

It can be seen that, at this point, the scope of my investigation had been considerably widened by these various developments to now embrace all of the following issues.

- The broad issue of whether the past and present conduct of police in the gathering and retention of non-criminal intelligence has gone beyond the boundaries of what is reasonable for a civil police force.
- The allegation that members of the OIU, acting on the instructions of a very senior member of the Force, loaded files into cars and took them away from the offices of

the OIU in order to prevent the Ombudsman from gaining access to them in the course of his 1989 investigation (“the Middleton allegations”). The deliberate concealing of evidence is bad enough, but the allegations also imply that there was evidence which required concealment. The context suggests that it was most probably Special Branch files.

- The allegation that a senior member of the police force had, in defiance of orders, saved Special Branch files from destruction and had arranged to have them stored at suburban police stations where they could be accessed at any time (“the Selby allegations”).
- The reopening of the issue at the heart of the Ombudsman’s 1989 investigation: that Special Branch files were not destroyed.
- The appearance, via *The Age*, of files which it is claimed are files which should have been destroyed in 1983 and which were improperly retained by police.

It can be seen that there is a great deal of overlap between the issues, and, with the exception of the first, there is a common thread which runs through them all: the recurring question of the destruction or otherwise of Special Branch files in 1983.

4.3 HIDING OF FILES FROM THE OMBUDSMAN IN 1989 – “The Middleton allegations”

4.3.1 The allegations

The claim that members of the OIU hid files at the time of the Ombudsman’s 1989 investigation first appeared in *The Age* on 9 October 1997.

It was reported that a former member of the OIU had said that more than 100 files had been removed from the unit's premises, hastily loaded into the back seat of a car and driven to private addresses. The former member was reported to have told *The Age* that it was feared that the Ombudsman would find that former Special Branch files, which were supposed to have been destroyed in 1983, were still being used. The former member was reported to have said that the files were removed several times when it was judged likely that someone from the Ombudsman's office was going to come to the offices of the OIU. The member was quoted as saying, "They existed, they weren't destroyed, and we had them."

The former member was reported to have said that the files were also hidden from the then Assistant Police Commissioner in charge of the unit, Mr Frank Green, who had been asked by the Ombudsman to help establish whether they were still in use.

The former member told *The Age* that the unit's covert operatives were told to stay away from the unit's offices at times when the Ombudsman's investigators were expected.

The Age reported that the removal of the records during the Ombudsman's investigation had been confirmed by *The Age* with separate sources within the Victoria Police.

As I have recorded above, I have the strongest of grounds to believe that the unnamed former member quoted in the article is Alan Middleton. My investigators interviewed Mr Middleton at length. In regard to the allegations that files were hidden from the Ombudsman in 1989 he gave the following evidence.

- a) There was an Ombudsman's investigation arising from articles in *The Age* alleging that Special Branch files had not been destroyed.

- b) When the articles appeared in *The Age*, Member 12, the sergeant in charge of the unit, produced a small pile of index cards and said to other members present, "Here they are. I knew this would happen one day. Let's get rid of these."
- c) Files which had filled four steel cabinets were put in the unit's vehicles and taken away. The vehicles were driven by the "overt" team.
- d) Assistant Commissioner Frank Green was present at the West Brunswick premises of the OIU to supervise this operation.
- e) The files were removed virtually immediately after the story broke in *The Age* that Special Branch files had not been destroyed. This situation lasted for two or three weeks. The files came back a week or so after the Ombudsman's investigation when the threat had passed.
- f) When the files were gone, the work of the unit came to a standstill. The members stayed at home and floated into the office now and then to have a cup of coffee with public service administrative staff.

It is immediately apparent that there are several discrepancies between the account given by *The Age* and the account given to my investigators. The most striking of these discrepancies is the role of Assistant Commissioner Green. In the first version the files are hidden from him, in the second he attends the offices of the OIU and directs the members of the OIU to remove the files from the premises. This discrepancy, striking though it is, appears to have slipped unnoticed past *The Age's* investigative reporters when, on 9 February 1998, they published an edited transcript of the relevant part of a tape of my investigators' interview with Mr Middleton without any reference to the discrepancy between their two reports.

A third account of the incident was made by Mr Middleton on *Four Corners* on the evening of 9 February 1998. It was very brief, and was not inconsistent with the account given to my investigators (i.e. the second version) in any material respect.

It is my view that there are some very strong impediments to the acceptance of these allegations by Mr Middleton as being a statement of fact. My reservations regarding the allegations come from three areas. **The first** relates to the nature of the allegations and the evidence relating directly to them. **The second** concerns the existence of a body of evidence which suggests that an event which has striking similarities to the event described by Mr Middleton did in fact occur, and that this event is the basis for Mr Middleton's allegations, but has been distorted in the retelling for various reasons. **The third** relates to the credibility and motives of Mr Middleton.

4.3.2 The allegations and the evidence.

Apart from the very serious inconsistencies between successive accounts of the incident, there are several other difficulties with the allegations as they were related to my investigators by Mr Middleton. I shall refer to each element of the allegations set out in paragraphs a) – f) above.

a) There was an ombudsman's investigation arising from articles in *The Age* alleging that Special Branch files had not been destroyed.

It is very clear that Mr Middleton is referring to the articles which appeared in *The Age* on 21 August 1989 and to the Ombudsman's investigation which was commenced on the following day as a result of a complaint to the Ombudsman by the Minister for Police, Mr Steve Crabb. It follows that the incident described by Mr Middleton occurred on or about 21 August 1989.

- b) When the articles appeared in *The Age*, Member 12, the sergeant in charge of the unit, produced a small pile of index cards and said to other members present, “Here they are. I knew this would happen one day. Let’s get rid of these.”**

The problem with this recollection is that Member 12 had left the OIU seventeen months earlier, in March 1988. The vacant sergeant’s position was filled by an Acting Sergeant, Member 7, for nine months until the position was filled by Member 10 in January of 1989. Member 10 was the sergeant in charge of the OIU in August 1989. It is extraordinary that Mr Middleton could have confused the two in his recollection. Middleton told my investigators that he got on well with Member 12 but had a very difficult relationship with Member 10 to the point where Middleton was removed from the OIU. Such a striking error of fact raises questions about the accuracy of Mr Middleton’s recollection. Indeed, if this was evidence upon which one was to rely in a court case, the case would most probably fail.

There is also a problem with Middleton’s description of the offending cards. This is the first time that there has ever been any suggestion that index cards themselves, as distinct from photocopies of the Special Branch master card index, were improperly retained. This claim flies directly in the face of all the allegations and all evidence obtained up to this time regarding the retention of Special Branch files.

- c) Files which had filled four steel cabinets were put in the unit's vehicles and taken away. The vehicles were driven by the “overt” team.**

It seems odd that, according to Middleton’s account, the index cards held by Member 12 were only a small pile, but the decision was made to remove *all files* from the OIU premises, to “clean the joint out”. If the Ombudsman did arrive to inspect documents, the

almost total absence of any records would surely have been very incriminating, thus defeating the whole purpose of the exercise.

d) Assistant Commissioner Frank Green and his staff officer, Chief Inspector Alan Roberts, were present at the West Brunswick premises of the OIU to supervise this operation.

There is no doubt that Mr Green and his then staff officer, Mr Roberts, did visit the offices of the OIU on 22 August 1989. The visit is recorded in the diaries of four members who were present at the time; Members 10, 2, 4, and 1. The diaries, however, give no indication of anything occurring along the lines of Mr Middleton's description. Members 10 and 2 record the time of the visit to have been of an hour's duration between 10.45 and 11.45 am. Members 2 and 4 record the visit to have been "re unit role and function". Member 1 has described the visit as: "Interviewed at office by A/C Green re duties at OIU. Also present C/I Roberts...A/C confer [Member 10] and [Member 2] re files held at OIU". Apart from the four members already mentioned, there were only two other members on the staff of the OIU at the relevant time, Mr Middleton and Member 3. The diary of Member 3 indicates that he was present at the office from 9.15 am but makes no mention of the visit of Messrs Roberts and Green. Middleton's diaries, of course, have not been found.

It is not only members' diaries which give no corroboration of Mr Middleton's account. My investigators have spoken to every person who is known to have been at the premises at the time of the 22 August 1989 visit by Mr Green and Mr Roberts, with the exception of one, who died in November 1989. There is very little support for the Middleton account of events.

Mr Green visited the West Brunswick premises on a number of occasions and specifically recalled the visit in question. He agreed that it had been prompted by the articles in *The Age*. He stated that he went to the West Brunswick premises to look for the index cards referred to in *The Age* but did not find any. He then sat down with the members and had a cup of tea and a chat. Mr Roberts also recalled going to the offices of the OIU. His recollection of the visit corroborated Mr Green's. Mr Roberts stated that this was the only time he had ever been to the premises. This claim is strongly supported by the failure of any member interviewed by my investigators to recall any other visit by Roberts, thus reinforcing the conclusion that Middleton's allegations can only refer to the visit of 22 August 1989. Both Mr Green and Mr Roberts were able to recall speaking to

the sergeant in charge. Mr Green named Member 10 as the sergeant, Mr Roberts could not recall Member 10's name but was able to say that it was not Member 12, as claimed by Middleton. Both Mr Green and Mr Roberts deny any action of the kind described by Middleton being taken in relation to files during the time they were at the premises. Each was quite firm in their belief that the type of activity described by Middleton could not have occurred at the time of their visit without their knowledge.

Member 10, who is no longer a member of the Force, has given sworn evidence which corroborates the recollection of Green and Roberts. He recalled that they briefly inspected the cell block where the files were kept, had a cup of tea with the members present and then left. He denied that Mr Green ever took any files from the premises. He stated that there was never an occasion during his time at the OIU in which files were cleared out of the premises as described by Middleton, and stated that it would be impossible for this to occur without his knowledge.

Member 2 claimed to have no specific recollection of the visit by Green and Roberts. His memory was not revived by reference to his diary entry recording the event. He stated that Mr Green was an infrequent visitor to the office. He was very firm in his opinion that car loads of files were not removed and that this could not have happened without his knowledge. Similarly, Member 4 claimed to have no specific recollection of the 22 August visit by Green and Roberts. Member 3 recalled the visit by Green and Roberts even though it was not recorded in his diary, but his recollection of the visit took the matter no further.

Another member, Member 11, has also stated to my investigators that he recalls Mr Green visiting the office, but has no memory of a visit by Mr Green and Mr Roberts. He stated that it was “possible” that Mr Green was at the OIU when they were culling files but could not put a time on this. He could not remember Mr Green conducting a search of the files.

The only member present who in any way suggested that there may have been some action taken in regard to files on that day was Member 1, who stated that he was aware of an occasion when files were removed from the premises but he was not there at the time and knew of it only indirectly. *[As will be detailed below, I have no doubt that there was at least one occasion when files were removed from the OIU office. This was at an earlier time than 22 August 1989. The question in issue here is whether Member 1 remembered more than one such event and whether such an event occurred in relation to Mr Green’s visit on 22 August 1989.]* He stated that he thought that it may have happened more than once and he associated one of the occasions with Mr Green “because everything we did would have to have been instructions ultimately from the Assistant Commissioner.”

Member 1 recalled the visit by Mr Green and Mr Roberts. He believed that they were in uniform and that he mentioned to them that this was not appreciated as the premises was supposed to be a covert location. His recollections of the visit were that “... Green gave a lecture on the usual thing, you know, ‘Have you got any files on individuals? We don’t keep files on individuals.’” Member 1 went on to state that Green did all the talking, “you know, he went through his usual palaver and rah-rah stuff and motivation and all that sort of thing.”

When the Middleton allegations were put directly to Member 1 by my investigator, Member 1 said that he thought that this “was probably accurate”. When asked if he had an actual recollection of this event, he replied, “Yeah, I think I’ve got a vague ... Jeez, it’s difficult.” The tone of the response suggested strongly that his difficulty was in

recollecting and not in recounting any recollection he may have had. It was clear to my investigators that Member 1 did not have an independent recollection of the event. This view was strengthened by Member 1's subsequent responses.

He agreed that the incident described by Middleton would be something he would be likely to remember. He stated that he did not remember Green actually saying, "Clean the joint out", but that he thought it "highly likely" that the event had occurred. My investigator pointed out to him that his answers were "would have been, could have been answers", and asked if he remembered files being taken away or not. He replied, "Yes. I don't, I don't ... I remember Frank Green saying words to the effect that if you've got any files on individuals, get rid of them. I think that's pretty clear that one. Whether that's the time he came out in uniform or not, I don't wholly recall." Asked again whether he remembered the files being removed on an occasion separate from the earlier occasion, he replied, "Yes. Where they were removed, or the exact details, I don't recollect at this moment. But yes, either removed or destroyed or whatever. It's possible."

It is clear that the recollection of Member 1 in regard to the event described by Middleton is very confused and unreliable. He claims to have knowledge of the removal of files but was not a witness to it, and did not himself assist to load documents into vehicles. He believes that this occurred more than once and associates one of the occasions with an Ombudsman's investigation and with Frank Green, but this connection is on the basis that "everything we did *would have to have been* instructions ultimately from the Assistant Commissioner." This is a deduction rather than a recollection. His final word is that, "It's possible". Member 1 recalls Assistant Commissioner Green being very strong on the issue of not keeping files on individuals. He recalls Green advising them that, if they had such files, they should get rid of them. He cannot recall if this advice was offered on the 22 August 1989 visit of Green and Roberts. The conclusion is unavoidable that Member 1 has no clear and actual recollection which supports the allegation made by Middleton in regard to the Green visit.

In my view the evidence of Member 1 is so equivocal as to be of no value at all. In so doing, I do not suggest that Member 1 was untruthful. For reasons which will become clear later in this report, it is my belief that Member 1 has an imperfect recollection of an event which he may or may not have witnessed and which he is confusing with the event described in the Middleton allegations

Finally, one cannot conclude a consideration of this aspect of the allegations without observing that the likelihood of an Assistant Commissioner and his staff officer so openly involving themselves in such an enterprise in full view of so many witnesses, particularly very junior constables, is a powerful reason to doubt the veracity of the allegation involving Mr Green. The fact that this version is in direct contradiction to the first version appearing in *The Age* on October 9 1997 – and I have little doubt both are from the same source – only strengthens my reservations, as does the lack of supporting evidence from those also present at the time.

e) The files were removed virtually immediately after the story broke in *The Age* that Special Branch files had not been destroyed. This situation lasted for two or three weeks. The files came back a week or so after the Ombudsman's investigation when the threat had passed.

Mr Middleton has said that the files were taken away for a period of two to three weeks and that they were brought back after the Ombudsman had completed his investigation. In fact, the Ombudsman's investigation was not completed until he reported to Parliament in March 1990, some five months after the articles appeared. If Mr Middleton's allegations are correct, the files were removed to prevent the Ombudsman having access to them, but were returned at a time when the investigation was still on foot and the possibility of a visit from the Ombudsman remained.

If the files were removed in August 1989, they were apparently returned by January 1990 when Chief Inspector Rod Lambert of the Internal Investigations Department visited the offices of the OIU to inspect the files to see if any trace could be found of any illicit Special Branch material. In a report to the Assistant Commissioner (IID) dated 16 January 1990, Mr Lambert stated that he had examined the files held at the West Brunswick offices of the OIU and had found some Special Branch files. He found no index cards as described in the articles in *The Age* other than those which were stapled to the files. Mr Lambert believed, and I accept that he believed, that this was an indication that the files were legitimately retained by police with the approval of Mr Nelson.

In fact, the presence of the index cards did not mean this at all. As I have stated above, there is no way, merely by looking at a Special Branch file, that one can tell whether it is legitimately retained or whether it has improperly been saved from destruction. There is no indication in Mr Lambert's report that the number of files examined by him in January 1990 is inconsistent with the number of files (346) which it is known legitimately went to the OIU in 1983. However, the fact that the Ombudsman's investigation was still active in January 1990, and the fact that the files were there and were clearly Special Branch files, is in direct contradiction to the claims of Mr Middleton.

Finally on this point, it is again noteworthy that Mr Middleton claimed to my investigators that he witnessed the return of the files and that the car was driven by Member 12. As discussed above, Member 12 had left the unit more than a year earlier.

f) When the files were gone, the work of the unit came to a standstill. The members stayed at home and floated into the office now and then to have a cup of coffee with public service administrative staff.

There is simply no evidence to support this claim. The diaries of members of the OIU, both overts and covert, are full of references to attendance at the office over the following days and weeks.

In the course of conducting interviews with members of the OIU my investigators have been made aware that there were several occasions when coverts were instructed not to attend the office and to operate from home. These events were usually caused by some security concern. For example, on one occasion it was believed that a car was conducting surveillance on the unit's premises. It was feared that this may be the press, and coverts were instructed not to come to the office. Enquiries revealed that the vehicle was an unmarked police vehicle conducting surveillance in an unrelated criminal investigation.

My investigators have also been told by more than one member of the OIU that covert operatives were instructed not to come to the office in connection with a belief that the Ombudsman may come to the office. The evidence suggests that it was only for a day or two and was a security measure for the covert operatives. If one is a covert operative, the whole idea is that one takes all necessary steps to avoid being identified as being such by anyone. It is interesting to note, for example, that no covert operatives were in attendance at the time Chief Inspector Lambert went to the offices in January 1990, nor were any covert operatives present when one of my investigators recently visited the premises of the current day successor of the OIU.

In short, I have no difficulty with such an order being made to covert operatives. If the Ombudsman was to attend the offices of the OIU, the presence of coverts would not have been a requirement. If the Ombudsman wished to interview a covert operative, it could have, and would have, been arranged as it has on other occasions.

4.3.3 Another "clearing out" of files.

Despite all of the above evidence which suggests that Middleton's allegation is inaccurate, I do not entirely dismiss the allegation as having no basis at all. Other witnesses have described an event which has several striking similarities.

Member 3 told my investigators that he remembered a time when files were removed from the OIU offices. He was unable to give a reason for the removal, explaining that he was "not the type of person who was always involved in what was going on between the sergeants". He did recall that there was concern at the possibility of files being found at the OIU when they should not have been there. The files in question were Special Branch files which were kept in the cells at the OIU offices. They were older files and had a different numbering system. He recalled that the files were removed because there was

talk of an Ombudsman's investigation and there might be a search. He described his impression of the situation as being a "frenzy" and a "big commotion", and gave the clear impression that there was something of a panic. He described how the files were loaded into the unit's vehicles and the members took them home. He took a box home himself. The files stayed there for a short time, possibly a day or two. He believes that during this time decisions were made about what was to be done with the files. A decision appears to have been made to get rid of the files and they were returned to the OIU offices where they were burned in an incinerator in the backyard. He described the files which were burned as being old green drop files from the 1970's which were not used.

It was clear that Member 3 had no understanding of the circumstances or the date of the closure of Special Branch. He described to my investigators that when he joined the OIU in early 1988 there was an air of excitement because they were starting from scratch again. He said that they were aware that they were similar to the Special Branch which had been closed down, but there were to be some changes and they were "the new model". He was clearly surprised when told by my investigators that OIU had been operating since 1983. Nor did Member 3 have any concept that at least some Special Branch files could legitimately be held by the OIU. He told my investigators that he believed that none of the Special Branch files which the OIU possessed should have been there.

Describing the burning of the files, Member 3 recalled that Member 7 had been present, and that another former member of the OIU, Member 5 had also been there. He believed

that Member 5, who had left the unit some time earlier, was visiting the unit and making enquiries about the possibility of rejoining the unit. Member 3 also recalled, but was not sure, that Mr Middleton was present. Member 3 has stated to my investigators that he can recall no other time when files were removed from the premises of the OIU.

When asked if any senior member of the Force was present at any time during this incident, Member 3 said that he had this impression but could not recall who it was. When asked how senior this person might have been, he replied, "It would have been the Assistant Commissioner. I think somebody did come out and have a chat to the Sergeant at the time, who was ... I can't ... yeah. That did happen." Asked if it was Mr Green, the response was: "(long pause)... Yes, but I also have to say that I think it was, because I can't be certain." It was very clear that this member had no actual recollection of Mr Green being present at the time of the incident he had described to my investigators. It was also clear that Member 3 was familiar with the Middleton allegation that Mr Green was present and was having some difficulty reconciling his own vague recollection and that claimed by Middleton.

Member 3 was quite clear that he could not remember any other time when files were taken away from the premises of the OIU.

Member 7 also gave evidence of an occasion when files were destroyed, although his version differed somewhat from Member 3's recollections. In response to a question of whether he recalled a time when files were culled, Member 7 stated that he knew of only one occasion. He recalled an article in *The Age* which said that Special Branch still exists. He recalled there was a wide angle shot of the Fitzroy Town Hall (where Special Branch offices had been). This was at a time when Member 7 was acting as the officer in charge of the unit. It rang alarm bells in him and he rang William Street (Police Headquarters) and sought instructions. He recalled he spoke to a particular officer who he named to my investigators. This officer was NOT Mr Green. Member 7's recollection of the conversation was that he told the officer that there was an article saying that Special Branch still exists and there are some files held.

He was asked, "Have you got stuff that shouldn't be there?"

Member 7 stated that he replied, "There's all sorts of old stuff that goes back long before I was here and its locked away in the safes. Make a judgment."

The officer said, "If there's old stuff there you better get rid of it."

Member 7 told my investigators, "And that's as formal as it was." He began to get the files out and to go through them. Although Member 7 indicated to my investigators that he had a good understanding of the circumstances under which some Special Branch files had come to be legitimately held by the OIU, it appears that he had no faith in the process when the crunch came. As I have noted above, there is simply no way merely by examining a former Special Branch file that one can tell whether it is one of the 918 files which were cleared for retention by Mr Nelson in 1983. No doubt this played a part in the action which was taken by Member 7. He stated to my investigators that he applied no particular criteria other than if it seemed old or irrelevant, he began shredding it. He stated that it was then that he saw the whole operation was impractical because of the inadequacy of the shredder and the great volume of material.

It was put to Member 7 that it was entirely consistent with this situation that he then decided to get the files off the premises until they could be more effectively dealt with. He agreed, and stated that he had no problem with this as a course of action in the circumstances at the time, and that he would not deny that it occurred, but that this was not his recollection. Similarly, he claimed not to recollect that files were burned, but could not be definite about this. He indicated that he had no objection in principle to this action in the circumstances as they were then, stating that if it happened it would be for the same purpose as he was shredding them. His belief is that the files were shredded.

He did not make a list of the files destroyed. He acknowledged that this would not be acceptable practice today commenting, “that was the time we were in then, as opposed to the information accountable times we are in now”.

Member 7 was very definite that the action taken to destroy the files had nothing to do with an Ombudsman’s investigation, actual or anticipated.

Member 11 also recalled an incident in which files were removed from the offices of the OIU. He recalled an incident when files were placed into boxes, put into cars and taken away to private addresses. He did not know what prompted this incident but associated it with a visit from the Ombudsman. He recalled that Member 7 was there and that he was one of the organisers. Member 11 believed that some of the files went to Member 7’s home. Member 11 did not see the files come back and was not aware of any burning of the files, although this could have happened without his knowledge. He recalled Mr Green visiting the premises but did not place him in the premises at the time the files were taken away in the car. He recalled only one occasion when files were taken away from the premises of the OIU.

The evidence of Member 1 was, again, so equivocal as to be useless. He stated that he was not there and did not witness the removal of files, but he believed it was more than possible that it happened. In regard to the shredding of the files he said, “A vague recollection of that, yes. I don’t think...you know, not being part of the management at that time, you know, you might have been told to do this or told to do that. I might have done some shredding or I might not have.” His evidence continued in this vein. Despite his earlier claim that he was not there to witness the event, in response to a question of whether he took any files home he said that he didn’t recall that he had but said he might have. He went on to say that he didn’t remember loading cars for others to take files away but it is “highly likely that I did. More than possible.”

It can be seen that there are many similarities between the descriptions given by members 3, 7 and 11 of an event in which there was a panic about whether certain files should have been in the possession of the OIU, and the subsequent action which was taken. It can also be seen that some of the elements of this event can be found reproduced in the event described by Mr Middleton.

In my view there is an explanation for all of the above evidence. It begins with the publication in the Moorabbin Standard on 14 September 1988 of a letter to the editor from a person who claimed that Special Branch had been closed in name only. The letter claimed that all of the files of Special Branch had been taken from its Fitzroy offices and given to a new branch created in its place, the CTEIS. The letter claims that the files were maintained by the former Special Branch administrative staff who were transferred with the files. The letter went on to say that, "intelligence gathering (spying on the people of Victoria) is undertaken by members of the OIU which has reasonably secret headquarters and comes under the control of the CTEIS. The OIU maintains surveillance of dissident individuals and groups. Members attend demonstrations with cameras and take photographs and movies of demonstrators." The letter went on in a similar vein and was signed by a person who was at that time a member of the Victoria Police and who was on sick leave. My investigators have spoken to the author of the letter.

Mr Green remembered the letter when interviewed by my investigators, as have some members of the OIU. Some members recalled the letter provoking a response, others did not. It is clear that the letter provoked a response at Police Headquarters. There is evidence that Mr Green called for a number of files relating to the OIU and Special Branch on 14 September 1988. No doubt there was some sensitivity at senior levels in the Force regarding the issue of Special Branch. It must be remembered that a State election campaign was underway at the time, and Special Branch and its functions had been a political issue in the past. The incumbent government had clearly indicated its distaste for the former Special Branch and its activities.

Member 7, who was acting officer in charge of the OIU in September 1988 had the clearest recollection of the Moorabbin Standard letter. As I have detailed above, he stated that his recollection of the article which caused him concern, and which in his recollection led to the shredding of files, had a picture of the Fitzroy Town Hall. He is undoubtedly mistaken in this recollection. The description given by Member 7 fits the articles which appeared in *The Age* in August 1989, but by that time Member 7 had left the OIU. The description of the content of the letter recalled by Member 7 – “Special Branch lives on” – accurately describes the content of the Moorabbin Standard letter. My investigators have examined the newspapers of the time and have found no other articles which might have excited such a reaction. I have no doubt whatsoever that the OIU was made aware of the letter.

It is noteworthy that Member 7 recalls that his first action was to attempt to shred the files but that he soon came to the realisation that the whole exercise was impractical. He believes that this was late in the day because he stated that he recalls telephoning William Street to get approval for overtime for Member 11 to work late. Member 11 always worked 7.00 am to 3.00 pm. He claims that his recollection stops at this point. Although in some ways it is hard to accept this as being the truth, Member 7 has stated that he cannot deny that the files were removed, and that he has no problem with such an action being taken in the circumstances. He has made similar comments in regard to the burning of the files. There seems to be no benefit to him to deny that the files were removed or burned, having already made the admission that he destroyed at least some files. That they were removed to his own home, as suggested by Member 11, or the means by which they were destroyed hardly seems important.

My investigators have discovered documentary evidence that the unit’s shredder was taken to an address in South Melbourne by Member 3 and Member 8 for repair on 15 September 1988, the day after the publication of the Moorabbin Standard letter. The shredder was picked up, presumably repaired, on 30 September 1988. The obvious implication of this is that the evidence of Member 7 seems to be correct as far as it goes.

There may have been some shredding underway in the afternoon of 14 September 1988 until the shredder became overworked and broke down. Member 7 has stated that he has no recollection of the shredder breaking down, but there is clear evidence that it did. The problem then facing Member 7 was what should be done with the files. The solution adopted appears in the evidence of Member 3 and Member 11 which takes over where Member 7's recollection appears to fail him. The files were taken away from the office for a short time just to get them off the premises. Member 3 says that he took some to his home and Member 11 believes that Member 7 also took some home. Although Member 11 does not recall the burning of the files, Member 3 completes the picture by stating that he was present and helped to burn the files.

All members of the OIU interviewed by my investigators have stated that there was an incinerator in the backyard of the premises. The work of coverts involved visiting various places and collecting leaflets and flyers advertising coming events of interest, such as public meetings and marches. It has been stated to my investigators by more than one member of the OIU that there was a great deal of such material collected and that this was periodically burned in the incinerator. It seems very likely that the solution to Member 7's problem was found in his own backyard in the form of the incinerator.

There is some further evidence which suggests that the event described in the evidence of Members 3, 7, and 11 occurred on or about 15 September 1988. Member 3 recalled that Member 5 was also present at the time the files were being burned. Member 3 recalled that Member 5 had left the unit but had returned to the office to discuss the possibility of returning to the Unit. Other members, in particular Member 1, also remember Member 5 visiting the unit for this purpose.

My investigators have established that Member 5 left the unit on 6 March 1988. He remained on leave until 10 April 1988 and then commenced six months long service leave which was to be completed on 10 October 1988. During this time he left Victoria to

pursue a business opportunity interstate. My investigators have interviewed Member 5. He has stated that he was not in Victoria in September 1988.

My investigators have reason to believe that this is not a true statement and that Member 5 was in Victoria on or about 15 September 1988. Member 5's letter of resignation is on Victoria Police letterhead and is dated 10 September 1988. In the top right hand corner are the initials of the unit's typist and the initials of Member 5. The typist has stated that this indicates to her that she typed a handwritten draft of the letter in Member 5's hand. She does not recall typing a blank letter of resignation to be forwarded interstate for Member 5's signature. The letter of resignation is attached to a covering letter from Member 7 who does not recall preparing the letter, but does not believe that he prepared it and sent it interstate for Member 5's signature. All of the above suggests that Member 5 was indeed in Melbourne at the relevant time and that he visited the OIU offices at that time. There is some evidence to suggest that member 5 was an habitual visitor and it seems very likely that he visited more than once during the week in question.

There is another reason for my investigators' reluctance to accept the word of Member 5 that he was not present. Member 5 was less than frank with my investigators on a number of matters. For example, he denied that he had been in touch with anybody else from the OIU prior to the interview. In fact, he had twice attempted to make contact with another member but the other member, wisely, had not returned his call. He also denied burning any files, even though there had been no mention of this allegation to him by my investigators.

Apart from those mentioned above (ie Members 1, 3, 5, 7, & 11), there were three other members on the staff of the OIU in September 1988. They were Members 2, 4, and 8. Members 2 and 4 have both stated that they have no knowledge of any removal of files or any action to destroy files as described by Mr Middleton. Neither has been mentioned by any other witness to the removal of files as being present (with the exception of Member 3 who thought that Member 2 may have been present when the files were burned, but this was not a strong recollection).

In each case their claim to ignorance of the event is supported by other evidence. My investigators have established that Member 2 was on leave from September 1988 until 3 October 1988, and that Member 4 was absent on a training course and on leave from 27 August 1988 until 24 October 1988. It seems clear that neither of these members was present to witness the incident, but it takes some effort to accept that they were not aware of the event. I have little doubt that they would have been informed of the event upon their return to work at the unit.

Member 8 is currently travelling overseas and has not been contacted by my investigators. Member 8 was on the staff of the OIU in September 1988, but not in August 1989.

This leaves only Mr Middleton. Mr Middleton's leave records indicate that he was on leave from 10 September 1988 to 15 October 1988. This very strongly suggests that Middleton was not present to witness the carrying away and subsequent burning of files. This may also explain why Middleton has not mentioned the burning of the files in the course of making the allegations. It may also explain some errors of fact in Middleton's account of the event to which he claims to have been an eye witness. For example, Middleton said that the overt team had driven the cars away and that he saw Member 12 bring the files back. The latter is most unlikely, Member 12 having left the unit more than 12 months earlier, and the claim that the overt team took the files home is at least partly contradicted by the evidence of Member 3, a covert operative, who stated that he took files home.

4.3.4 Motives and credibility of Mr Middleton.

One final matter which cannot be ignored is the motives and credibility of Mr Middleton. Whilst the following matters do not weigh heavily in my assessment of the evidence, they are nevertheless relevant matters. There are two issues which I shall briefly touch upon.

The first is that in the course of 1996, Mr Middleton made certain serious allegations of impropriety and poor management by police. These allegations received extensive news coverage. These allegations were examined by a reputable and well qualified independent authority and were unsubstantiated.

The second is that prior to the commencement of this investigation, and again in the course of this investigation, evidence has emerged that Mr Middleton is very embittered about the circumstances in which he parted ways with the Victoria Police.

4.3.5 Conclusions regarding the Middleton allegations.

It seems to me that the evidence outlined above supports the following propositions.

- There is a strong body of evidence to suggest that files were removed in the manner described by Middleton and Members 3 and 11. However, the weight of the evidence suggests that such an action occurred on only one occasion, and that this occurred on or about 14 September 1988 in response to the publication of a letter in the Moorabbin Standard. The weight of the evidence does not support the proposition that Mr Green was present when the files were removed in September 1988. The weight of the evidence does not support the claim that files were removed when Mr Green undoubtedly was present on 22 August 1989. In short, the evidence does not support the proposition that a link exists between Mr Green and the removal of files as has been alleged by Mr Middleton.

- There was little or no understanding on the part of OIU members that some Special Branch files were legitimately held by the OIU. This lack of understanding was shared by Mr Middleton. The exception to this was Member 7 who, when faced with

something of a crisis, was unable to determine if the former Special Branch files which were in the possession of the OIU were legitimately held or not. Accordingly, there is no evidence to support or to disprove the possibility that the files which were destroyed in the wake of the Moorabbin Standard letter were Special Branch files which were legitimately held by the OIU.

- The evidence of a link between the removal of files and an Ombudsman's investigation is mixed. Some witnesses have stated their beliefs or impressions that such a link existed, but no witness has claimed a clear recollection of this link. Member 7, who played a leading role in the removal/destruction of the files has denied such a link. The removal of files in 1988 was not related to an Ombudsman's enquiry, nor was there any contemplation of an enquiry, although there may have been some apprehension of such an enquiry on the part of police. This may explain the connection drawn by some witnesses between the removal of the files and an Ombudsman's enquiry. The Ombudsman did conduct an enquiry as a result of the allegations published in *The Age* in August 1989. If, however, as the evidence suggests, files were not removed as described by Mr Middleton in August 1989, there can be no link between the removal of the files and the commencement of an Ombudsman's enquiry.

Despite all of the above, I hesitate to rule out entirely the possibility that files were removed more than once and that the second occasion was in August 1989 for the purpose of frustrating an investigation by the Ombudsman. What I can say with some certainty is that it did not happen in the way described by Mr Middleton. There are serious discrepancies between successive accounts of the alleged incident, and there are errors of fact in the account given by Middleton to my investigators. The only available "evidence" in support of the allegation is the allegation itself.

It is my view that the evidence suggests that Mr Middleton's allegations may well be a cocktail of fantasy, folklore, hearsay, a desire to hit back, and some element of observed

fact. The evidence overwhelmingly suggests that events did not occur in the way Mr Middleton described them. The evidence also suggests that one would need to be very charitable to accept that the allegations made by Mr Middleton are the result of an innocent confusion of facts.

The evidence does reveal that files were destroyed in a manner which, at the very least, did not comply with the various requirements for the destruction of public records. This aspect of my investigation is continuing and will be dealt with in my final report.

I will conclude my comments on this issue by saying that not all evidence available to me in regard to this issue has been revealed in this interim report. I will continue to seek further evidence to confirm or to cause me to reconsider the above conclusions.

4.4 ADMISSION BY A VERY SENIOR POLICE OFFICER THAT HE CAUSED SPECIAL BRANCH FILES TO BE SAVED FROM DESTRUCTION – “The Selby allegations”.

4.4.1 The allegations.

In an article which appeared in *The Age* on 16 December 1997, Mr Selby was quoted as saying that he had been told at a lunch with “two very senior police officers” that one of the officers had defied orders to destroy Special Branch files, and that the files had been loaded into cars and taken to suburban police stations where they could be accessed at any time.

It was reported that Mr Selby declined to reveal to *The Age* the identity of the two very senior officers, but would name the officers and give a full account of the meeting to an “independent judicial enquiry”.

Mr Selby was subsequently interviewed on radio where he directly attacked this office, saying that it lacks independence, powers, resources and competence. Mr Selby also expressed, with some obvious bitterness, his theories about how he had been “set up” and then dismissed as head of the Police Complaints Authority (“the PCA”) in 1988. Following the abolition of the PCA, its functions were picked up by the newly created office of Deputy Ombudsman (Police Complaints) in May 1988.

It can be seen that Mr Selby’s allegations are closely related to those made by Mr Middleton. Mr Middleton’s allegations necessarily imply that there were documents which needed to be hidden from the 1989 investigation into allegations that Special Branch files had not been destroyed as claimed – that is to say, that the OIU possessed such documents. Mr Selby’s allegations, however, are more particular and, if proven, would not only settle the question of *if* Special Branch files were improperly kept, but would most probably settle the equally important question of who was responsible.

4.4.2 Analysis.

When the Selby allegations were published on 16 December 1997, two matters were immediately apparent to me.

The **first** matter was the likely identity of the two “very senior officers”. Mr Paul Delianis was, at the date of the lunch referred to by Mr Selby, Deputy Commissioner (Administration). Because the Assistant Commissioner (Internal Investigations) reported to him and he was ultimately responsible for dealing with police complaints, because of his seniority, and because of his position of authority six years earlier in relation to the destruction or otherwise of Special Branch files, it seemed to me that Mr Delianis was

very likely to be one of the officers referred to by Mr Selby. Also, because Mr Selby was the head of the PCA and was therefore likely to have had more day to day contact with the officer in charge of the Internal Investigations Department (as it then was) than any other “very senior officer”, it seemed likely that the other officer would be the Assistant Commissioner (Internal Investigations) at the relevant time, Mr Ron Anstee. My view was considerably strengthened when I considered Mr Anstee’s role in the closure of Special Branch.

The **second** matter which was apparent to me was that Mr Selby was intent on using the allegations to pursue some private agenda. Mr Selby’s refusal to reveal the identity of the two officers to anybody other than “an independent judicial enquiry” made it clear to me that Mr Selby was interested only in making a public statement of his opinions about the powers and the independence of the Ombudsman rather than to assist in getting to the truth or otherwise of the long standing allegations that Special Branch files had been improperly retained by police.

I had no intention of becoming embroiled in such an irrelevant debate which would only be a side-show to my main purpose and therefore damaging to the investigation. On the issue of power and independence, however, it is interesting to note that an examination of the relevant statutory provisions reveals that the powers vested in the Deputy Ombudsman are at least equivalent to those which were vested in the PCA, and that the Deputy Ombudsman undeniably has greater independence than the PCA could claim to have had during its existence. The PCA, before exercising any of its powers under the Evidence Act (summonsing witnesses, taking evidence under oath etc) was required to obtain the approval of the Minister for Police. The Deputy Ombudsman is free from this serious fetter on independence, having complete freedom in the exercise of these wide powers. To be consistent, Mr Selby’s recent criticisms of the Deputy Ombudsman as lacking the necessary powers and independence should also have applied – with even greater force - to the PCA. But it appears that Mr Selby does not see it this way, having publicly rejected on at least one occasion claims identical to those that he now makes

regarding the Deputy Ombudsman - that the PCA lacked sufficient independence and powers to perform its function.⁵

My investigators pursued certain lines of enquiry, and it was only when these lines of enquiry were well advanced that I made any attempt to contact Mr Selby to ask him if he would care to reveal the identity of the two officers, even though he had already indicated his intention not to do so.

A remarkable exchange of correspondence ensued (copies at appendix 3).

As it turned out, Mr Selby's statement that he would reveal the identity of the two officers only to an independent judicial enquiry seems to have been a short term strategy rather than a statement of high principle. A journalist, in evidence given to me under oath, has stated that Mr Selby said to him, only a short time after the appearance of the article in question, that the two "very senior officers" were (as I had deduced) Messrs Delianis and Anstee. Mr Selby told the journalist that at the expiry of two weeks he could do with this information as he pleased.

Whatever the reasoning on Mr Selby's part, my investigators had independently identified and subsequently spoken to the witnesses concerned. Mr Delianis had no recollection of the luncheon but did not deny the possibility that he had taken Mr Selby to lunch at his golf club. Mr Anstee freely admitted his presence at such a luncheon. Delianis and Anstee are unanimous in their evidence that they recollect no such conversation as that claimed by Mr Selby. Each is emphatic in his opinion that no such conversation would ever have taken place for two reasons. First, the content of the alleged admission are, they each claim, untrue. Second, they have each referred to the unlikelihood of making such admissions to, of all people, Mr Selby, given the position occupied by Mr Selby.

⁵ The Age, 17 September 1987, p. 17.

It is my opinion that the overwhelming weight of the evidence suggests that Mr Selby's claims are, to say the very least, implausible. My conclusion is based on the following considerations.

a. Inherent unlikelihood.

I find the proposition that a "very senior" policeman would admit to the head of the Police Complaints Authority that he had been the architect of such an enterprise to be nothing short of unbelievable. Even without regard to the openly antagonistic relationship between police and the Police Complaints Authority, it is such an inherently unlikely situation that one could dismiss it on this basis alone.

b. Against self-interest.

The Chief Commissioner at the relevant time was Mr Miller. Both Mr Anstee and Mr Delianis have stated their belief that, had they made such a statement to Mr Selby and it had subsequently become known to Mr Miller, they would both have been sacked. Not surprisingly, Mr Miller has said the same thing to my investigators. Indeed, any objective observer could only conclude that Mr Miller would have had no choice but to take the most severe action available to him. Delianis, Anstee and Miller have all made the obvious point to my investigators: each has stated that it simply beggars belief that two very senior police would expose themselves to such a risk.

It might be said that, if Mr Selby's claims are true, the apparent cockiness of the two officers in making such a disclosure to Mr Selby may be explained by the possible complicity of Mr Miller in the saving of the Special Branch files from destruction. Indeed, sworn evidence was received by my investigators from a journalist who stated that it had been put to him by unnamed sources that Mr

Miller was involved. Putting aside for the moment Mr Miller's formidable and unblemished reputation, it is my view that simple logic dictates that this is an extremely unlikely possibility. If it were so, Mr Miller would have put himself in a position where an unknown number of his subordinates would be fully aware that he had wilfully deceived the Minister, the Government and the public. It is said that the "brotherhood" is strong, but only a fool would put himself in such a position. This conclusion can only be strengthened when one considers the nature and quality of the material in the Special Branch files. Mr Miller has described the contents of the files to my investigators as "rubbish". Many witnesses have concurred with this assessment of the files. My own knowledge of the contents of the files supports this view. I cannot imagine a man in Mr Miller's position taking such risks for so little advantage.

c. Mr Selby's failure to act.

Whether or not the meeting occurred as claimed by Mr Selby, it is apparent that Mr Selby did nothing about pursuing these startling allegations. It must be emphasised that Mr Selby was the head of the Police Complaints Authority at the time these admissions were allegedly made to him. There were many possible courses of action open to Mr Selby whereby he could have, and should have, taken immediate action to have these matters investigated.

In August 1989, the Ombudsman commenced an investigation into the very matters which Mr Selby claimed had been admitted to him in September 1987 by the "very senior" police officer. This investigation was commenced in a blaze of publicity. Again, it is apparent that Mr Selby did not act to bring the information forward.

Mr Selby's silence for over ten years is a most perplexing point, and is starkly at odds with his publicly expressed concerns that the Ombudsman does not have the necessary means satisfactorily to investigate the matter. To my mind, Mr Selby's prolonged silence is a powerful reason for doubting the accuracy of his claims. When one considers this factor together with the abovementioned desire of Mr Selby to pursue his own agenda, serious questions emerge regarding the motives and credibility of Mr Selby.

d. An alternative possibility.

There is an alternative explanation which may explain Mr Selby's allegations. I readily concede that it is theoretical and involves conjecture on my part. I advance it only as a possible explanation for the claims made by Mr Selby. To understand this possible explanation, one needs to go back to examine the circumstances set out above which led up to the decision to close Special Branch.

The relevance of these historical circumstances to the emergence of Mr Selby's allegations rests in the roles played by Messrs Delianis and Anstee, and the confusion caused by the interposing of the entirely new concept of the Freedom of Information Act into the process of dealing with the Special Branch files.

There is clear evidence that the imminent commencement of the Freedom of Information Act was overlooked by police when they planned and announced the closure of Special Branch and the proposed destruction of files. When the matter of the Freedom of Information Act was raised immediately after the Minister's announcement, the planned destruction of files was deferred to allow for the making of applications. There is clear evidence from a variety of sources, including the final report of Mr Nelson QC and evidence given under oath to the

Ombudsman's 1983 and 1989 investigations, that in the course of sorting Special Branch files into the two categories of those to be destroyed and those to be retained, it became necessary to identify and process those files which were the subject of Freedom of Information requests.

The officer in charge of the Special Branch at the time of its closure was Detective Inspector McIver. In evidence given to the Ombudsman's 1983 investigation, Mr McIver stated that he was not aware of any announcement by the Minister or the Chief Commissioner that files would not be destroyed pending Freedom of Information requests. He stated, however, that he had spoken to Mr Anstee and Mr Delianis regarding the retention of files which were subject to Freedom of Information requests. He went on to say that in this regard he was working under the instructions of Mr Delianis. This suggests to me that Mr Delianis instructed McIver that Freedom of Information files were not to be destroyed. McIver's evidence also suggests that Mr Anstee may have played a part in conveying this instruction to McIver.

As has been described elsewhere in this report, the Freedom of Information files could not subsequently be located and it was believed that they had inadvertently been destroyed. Nevertheless, Mr Delianis, and perhaps Mr Anstee, could, with some justification, lay claim to having made efforts to have delayed or prevented the destruction of Special Branch files for Freedom of Information purposes.

The subsequent admission by police to applicants that their files had inadvertently been destroyed was a cause of major embarrassment to the Victoria Police. The police explanation was met with widespread scepticism and triggered the complaints which led to the Ombudsman's 1983 investigations.

Indeed, Freedom of Information, and the attitude of the police to releasing documents under the Act, was a topic receiving very close public scrutiny at about

the time of the 21 September 1987 golf club lunch attended by Messrs Delianis, Anstee and Selby. From 26 August 1987 through to 11 September 1987 an appeal by a journalist against the refusal of police and others to release documents under the Freedom of Information Act had been receiving considerable media attention. Mr Geoffrey Easdown, a reporter from the Melbourne Herald had been refused access by police to documents relating to an investigation into what has become known as the Continental Airlines Affair. There were daily reports of the evidence given in the case and there was a grievance debate in the Parliament in which it was alleged that the government was attempting to prevent information from becoming public.⁶ The Continental Airlines matter was not the only widely reported appeal in the Administrative Appeals Tribunal against a refusal by police to give access to documents. There had also been the Nunawading by-election matter earlier in 1987. Mr Delianis, as Deputy Commissioner (Administration) was ultimately responsible for the Freedom of Information matters within the Force and was, by virtue of that position, at the eye of this Freedom of Information storm.

Having regard to these issues which were current in September 1987, it is entirely possible that the attitude of police to the Freedom of Information Act was a topic of conversation at the lunch. Mr Delianis may well have attempted to defend his record by referring to his efforts to save the Special Branch files which were subject to Freedom of Information requests. Accordingly, there may well be a grain of truth in the claims made by Mr Selby, albeit somewhat distorted in the retelling. Acceptance of such a possibility does not require one to conclude that Mr Selby has been careless with the truth – only that he is a little confused regarding the facts.

⁶ The Age, 18 September 1987, p. 10.

4.4.3 Conclusions regarding the Selby allegations.

For all of the above reasons I am of the view, that Mr Selby's claims are implausible.

I have not sought to compel Mr Selby's attendance under summons to give evidence in this investigation. Although I have not yet ruled out the possibility that I might do so, my present view is that it would be an unproductive expenditure of taxpayer's money. My investigators have interviewed the two "very senior officers". They deny the allegations and their denials are, for the reasons set out above, plausible. Mr Selby's allegations are clear enough and it seems that there is little likelihood of obtaining any further useful information. In my view, given that Mr Selby was the holder of a statutory office funded by the Victorian taxpayer at the time the alleged admissions were made to him, he has a continuing duty to provide any further information he may have. Time will tell if Mr Selby produces anything which could be described as evidence.

Finally, it is worthy of note that Mr Selby is in the vanguard of those who argue that the powers of the Ombudsman are inadequate, and yet to date in this investigation he is the only potential witness against whom the use of my powers of compulsion was considered. All other witnesses have been happy to cooperate and to provide evidence on oath upon request.

5. CONCLUSIONS REGARDING THE INVESTIGATION TO DATE.

There is one common thread running through the Middleton allegations and the Selby allegations, and which is echoed in some of the evidence by various witnesses in this investigation. It is that there is a perception that Special Branch files were not destroyed as was claimed by police in 1983. The actual fate of the Special Branch files is a matter which I am continuing to investigate and will address in my final report.

It seems to me, however, that the many allegations which have been made over the years which can be shown to be wildly inaccurate, conflicting and/or factually impossible are mutations of this central and recurring theme. It seems to me that many of these mutations have their genesis in the very poor administrative procedures adopted at the time of the destruction of the Special Branch files. They have been conceived in ignorance of the circumstances of the closure of Special Branch and the disposal/retention of the files. They have been fed by rumour and have flourished in the secretive and mistrustful atmosphere which exists in the environment of covert intelligence gathering, finally reaching expression, in some cases, through the distorting effect of bitterness and a willingness to twist the facts to pursue a different agenda.

In my view, the Selby allegations and the Middleton allegations, along with the confused and often conflicting evidence given by witnesses regarding Special Branch files and the OIU files, are examples of such mutations.

6. FURTHER INVESTIGATION.

As I stated at the outset, this interim report has been an attempt to clarify certain issues which have been the subject of public comment by various parties. Its main aim has been to allow these issues which have been put into the public arena to be dealt with so that I can concentrate on the important issues at the heart of this investigation. They are as follows.

- The propriety of past and present activities of the Victoria Police in the area of non-criminal intelligence gathering, and the management and retention of such intelligence. This will include an examination of some of the particular matters reported in The Age articles of October 1997, such as the alleged infiltration and bugging of meetings of community groups and searches without warrant.

- A further attempt at determining the truth or otherwise of recurring allegations that police improperly retained Special Branch files which were ordered to be destroyed and which it was claimed by police were destroyed.

Considerable progress has been made in the investigation of the first issue. The second issue is one which I have only very peripherally touched upon in this interim report but which I am continuing to investigate very actively.

I hope to report positively on both issues in my final report.

A handwritten signature in black ink, appearing to read 'B W Perry', with a stylized flourish at the end.

B W Perry
OMBUDSMAN

APPENDIX 1

LEGISLATION REGARDING POWERS OF THE OMBUDSMAN AND DEPUTY OMBUDSMAN.

- s. 18 Ombudsman Act 1973
- s. 86P Police Regulation Act 1958

Ombudsman Act 1973
Act No. 8414/1973

18. Evidence

S.18 (1)
amended by
No. 15/1989
s. 28 (2)

(1) The provisions of sections 17, 18, 19, 20 and 20A of the **Evidence Act 1958** shall apply to and in relation to any investigation which the Ombudsman is authorized to conduct under this Act as if he were the sole Commissioner issued with a commission by the Governor in Council.

(2) For the purpose of any such investigation the Ombudsman may take a statutory declaration from any witness or other person.

S.18 (3)
amended by
No. 8884 s.5

(3) No obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to persons in the service of the Crown or authority, where imposed by any enactment or any rule of law, shall apply to the disclosure of information for the purposes of an investigation under this Act.

(4) The Crown shall not, in relation to an investigation under this Act, be entitled to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.

(5) Subject to sub-sections (3) and (4) a person shall not be compelled for the purposes of an investigation under this Act to produce any document or give any evidence which he could not be compelled to produce or give in proceedings before a court.

86P. Investigations by the Deputy Ombudsman

S.86P
inserted by
No. 10250
s. 10.

(1) Sections 17, 18, 19, 20 and 20A of the **Evidence Act 1958** apply to and in relation to investigations by the Deputy Ombudsman.

S.86P(1)
amended by
No. 14/1988
s. 18, 15/1989
s. 17(1)(a)(b)

(1A) For the purpose of an investigation under this Part, the Deputy Ombudsman may take a statutory declaration from any witness or other person.

S.86P(1A)
amended by
No. 15/1989
s. 17(2)

(1B) Subject to section 86Q, a person may not be compelled, for the purposes of an investigation under this Part, to produce any document or give any evidence that he or she could not be compelled to produce or give in proceedings before a court.

S.86P(1B)
amended by
No. 15/1989
s. 17(2)

(2) The Deputy Ombudsman may attempt to resolve a complaint by conciliation and must—

S.86P(2)
amended by
No. 14/1988
s. 18

(a) before commencing to conciliate, notify the Chief Commissioner of the proposed attempt; and

(b) notify the Chief Commissioner of the results of the attempt.

(3) The Chief Commissioner must upon the request of the Deputy Ombudsman make available to the Deputy Ombudsman such members of the force as the Chief Commissioner thinks necessary to assist the Deputy Ombudsman in the conduct of an investigation.

S.86P (3)
amended by
No. 14/1988
s. 18

(4) Every member of the force made available to the Deputy Ombudsman remains under the direction and control of the Chief Commissioner but must in assisting the Deputy Ombudsman have regard to the wishes of the Deputy Ombudsman concerning the conduct of an investigation.

S.86P (4)
amended by
No. 14/1988
s. 18

(5) After completing an investigation the Deputy Ombudsman must in writing report to the Chief Commissioner on the results of the investigation and may in the report request the taking of any action which the Deputy Ombudsman considers should be taken.

S.86P (5)
amended by
No. 14/1988
s. 18

APPENDIX 2

LEGISLATION REGARDING POWERS OF THE OMBUDSMAN AND DEPUTY OMBUDSMAN.

- ss. 17, 18, 19, 20 & 20A Evidence Act 1958

17. Power to send for witnesses and documents

Where a commission has been heretofore or is hereafter issued by the Governor in Council to any persons to make any inquiry the president or chairman of the commission or the sole commissioner (as the case may be) may by writing under his hand summon any person to attend the commission at a time and place named in the summons, and then and there to give evidence or to produce any document in his custody possession or control material to the subject-matter of inquiry or to give evidence and produce any such document: Provided that no person shall be compelled to answer any question or to produce any document that he would not be compellable to answer or produce at the trial of an action in the Supreme Court. Such summons may be served by delivering the same to the person required to attend or by leaving the same at his usual place of abode.

Power of commissioner to examine upon oath etc³

No.3674 s. 18.

Any commissioner may administer an oath to and may examine upon oath any person so summoned or who happens to be present before the commission and may call upon any such person to give evidence or to produce any specified documents or to give evidence and produce such documents.

Penalty for non-attendance, refusing to give evidence

No.3674 s. 19.
S. 19
amended by
No.7933
s. 2(c)

Every person who—

- (a) being served as aforesaid with a summons to attend the commission fails without reasonable excuse to attend or to produce any documents in his custody possession or control which he is required by the summons to produce; or
- (b) happening to be present before the commission and being required so to do refuses to be sworn or without lawful excuse refuses or fails to answer any question touching the subject-matter of inquiry or to produce any document—

shall be guilty of an offence against this Act and liable to be dealt with in accordance with section 20.

No. 3674 s. 20

20. Chairman to report to law officer if witness fails to attend etc.

S.20(1)
substituted by
No. 7933
s. 2(d)

(1) Whenever in the opinion of the board or commission any person has been guilty of an offence against section 16 or section 19 the chairman or sole member of the board or the president or chairman of the commission or the sole commissioner (as the case may be) may certify the facts to a law officer.

S.20(2)
amended by
No. 110/1986
s. 140(2)

(2) Upon receipt of such certificate the law officer may apply or cause an application to be made to the Supreme Court for an order calling upon such person to show cause why he should not be dealt with for an offence against this Act which order such court is hereby empowered to make.

S.20(3)
amended by
Nos. 7933
s. 2(e),9554
s. 2(2),
110/1986
s. 140(2)

(3) Upon the return of such order if the Supreme Court is satisfied that such person has been guilty of an offence against this Act such person may for such offence be by such court fined a sum of not more than 15 penalty units or imprisoned for a term of not more than three months.

S.20(4)
repealed by
No.110/1986
s. 140(2)

* * * * *

S.20(5)
inserted by
No.7993
s. 2(f),
amended by
No. 9554
s. 2(2)

(5) Where a person is convicted of an offence against section 16 or section 19, that person shall be guilty of a further offence against this Act if the offence continues after he is so convicted and liable to an additional penalty for each day during which the offence so continues of not more than 15 penalty units or imprisonment for a term of not more than three months.

(6) Where any offence against section 16 or section 19 is committed by a person by reason of his failure to do anything which he is under this Act required or directed to do at a particular time, that offence for the purposes of sub-section (5) shall be deemed to continue so long as the thing so required or directed to be done by him remains undone notwithstanding that such time has passed.

S.20(6)
inserted by
No.7993
s. 2(f).

20A. Summons to require continuous attendance

A person whose attendance has been required by summons served under section 14 or section 17 is required to attend at the time and place to which the inquiry is adjourned or postponed without the issue or service of any further summons.

S.20(A)
inserted by
No.7993
s. 2(g)

APPENDIX 3

CORRESPONDENCE BETWEEN THE
OMBUDSMAN AND MR HUGH SELBY.

JANUARY - FEBRUARY 1998



THE OMBUDSMAN
VICTORIA AUSTRALIA
& The Deputy Ombudsman (Police Complaints)

Your Ref:

Contact: Greg Carroll
Telephone: 9613-6213

29 January 1998

Mr Hugh Selby
[REDACTED]
[REDACTED]

Dear Mr Selby

As you are aware, I am currently conducting an investigation into the gathering and retention of intelligence by the Victoria Police. As part of this investigation I am enquiring into allegations that files held by the Special Branch were improperly retained by police.

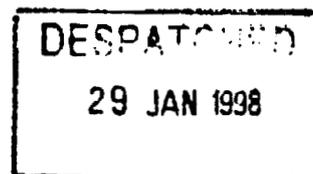
On 16 December 1997, it was reported in "The Age" that you claim that on 21 September 1987 you were taken to lunch at a golf club in the northern suburbs by two "very senior" police officers, one of whom told you that Special Branch files which were to be destroyed were, at his direction, saved from destruction and taken to suburban police stations.

This is a matter which is obviously relevant to the central issue of this aspect of my investigation.

I would be grateful if you could contact me to identify the two officers concerned so that I may investigate the matter to its conclusion.

Yours sincerely

B W Perry
OMBUDSMAN



067497_1102500 039

22ND FLOOR, 459 COLLINS STREET MELBOURNE 3000

TELEPHONE 9613 6222, 1800 806 314

FACSIMILE 9614 0246 DX 210174

Email: ombudvic@ombudsman.vic.gov.au

Web: www.ombudsman.vic.gov.au

Ombudsman

From: Hugh Selby <Hugh.Selby@anu.edu.au>
To: ombudvic@ombudsman.vic.gov.au
Subject: Your ref: GP/067497/gc
Date: Thursday, 12 February 1998 13:45

Dear Ombudsman,

Unfortunately your office is inadequately resourced to carry out the type and scope of investigation which is required to explain how Vicpol maintained files for more than a decade after 'destroying' them.

I note that the former Ombudsman was hoodwinked on this same issue in the late 80's and that it has taken from 16 December '97 until 29 January '98 for you to attempt to contact me. This does not inspire confidence that you think the matter is of much importance or that your officers are equipped with the necessary skills to elicit relevant information.

Meanwhile 'The Age' has found the files and the ABC seems to be hard at work exposing other matters to shake the decade of comfortable complacency since May 1988.

So I have made other arrangements for the names of the two senior officers to be provided to a properly resourced independent inquiry as soon as it is established. They may, things being as they are, predecease any such inquiry. So be it.

Yours faithfully.

'You don't approach a case with the philosophy of applying abstract justice - you go in to win' Percy Foreman.1969.

HUGH M. SELBY, barrister - expert evidence, also administrative, coronial, disciplinary, family, and industrial law areas.

Hugh.Selby@anu.edu.au
+61-2-6249 5720; fax /3518
Post to: Legal Workshop, Law Faculty
ANU ACT 0200.



THE OMBUDSMAN
VICTORIA AUSTRALIA

& The Deputy Ombudsman (Police Complaints)

Our Ref:
Your Ref: GP/067497gc

Contact: Dr Perry
Telephone: 9613-6204

5 March 1998

Mr Hugh Selby
[REDACTED]
[REDACTED]

Dear Mr Selby,

Thank you for your letter dated 12 February 1998.

I have examined your letter very closely. Although it is full of opinions, I have been unable to detect anything which could be described as evidence or reasoned argument to support these opinions.

You are correct in noting that I did not attempt to contact you until 29 January 1998 in relation to the article which appeared in 'The Age' on 16 December 1997. You are mistaken, however, in your apparent belief that this is somehow related to what you have argued is a lack of resources, powers or competence on the part of this office. I can assure you that the time was productively used to follow up alternative avenues of enquiry before I made any approach to you, the source of the claims. This is a fairly standard investigative practice.

Indeed, your criticism of me and of this office for an alleged failure to contact you immediately are starkly at odds with your own silence on the matter for over ten years. It is apparent that upon receipt of the information you took no steps to have the matter investigated, nor did you raise the matter at the time of Mr Geschke's investigation in 1989. I note also that you are reported to have said to 'The Age', and have repeated in your letter to me, that you will only reveal the names of the two senior officers to a "properly resourced independent enquiry as soon as it is established", and that, "they [*i.e. the two officers*] may, things being as they are, predecease any such enquiry. So be it."

The clear implication of all of the above is that you remain indifferent to the question of whether the substance of the matter is properly investigated, and prefer to use the allegations as a tool in the public pursuit of some private agenda.

You are, of course, entitled to hold any views you may wish to hold regarding me and this office. I can only say that I sincerely hope that the contents of your letter, and your attempts to use your claims to pursue your own purposes rather than attempting to assist in the investigation of a matter of legitimate public concern, are not the product of some

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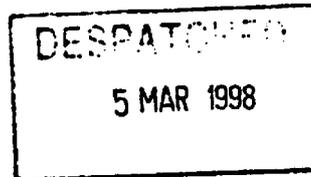
residual bitterness about the circumstances of the abolition of the PCA and the associated criticism of the Authority.

You can be assured that I will continue to investigate the important issues before me in this case, and that I will continue to use the statutory powers available to me and the investigative strategies which I judge to be the most likely to effect a result, no matter how imperfect your understanding of these matters may be.

Yours sincerely

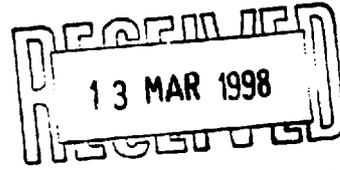
B W Perry
Ombudsman

067497.westmh.033



Ombudsman

From: Hugh Selby <Hugh.Selby@anu.edu.au>
To: ombudvic@ombudsman.vic.gov.au
Subject: You
Date: Saturday, 14 March 1998 6:32



Dear Sir,

I have read your letter. Its contents confirm my fears - please resign or retire.

'You don't approach a case with the philosophy of applying abstract justice - you go in to win' Percy Foreman.1969.

HUGH M. SELBY, barrister - expert evidence, also administrative, coronial, disciplinary, family, and industrial law areas.

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