In this case, Mr Jarod McLean (the **Plaintiff**) sought a determination on whether Victoria Police (the **Defendant**) owed him a duty of confidentiality in respect of items seized under warrant, and whether there was any limitation on the use by police of information derived from those seized items.

On 18 October 2019, the Supreme Court of Victoria (**the Court**) found the Defendant owed the Plaintiff a duty of confidentiality in respect of the seized items. However, it held this duty did not extend to the use of information derived from the seized items which could be disclosed in accordance with the common law and Information Privacy Principle (**IPP**) 2.1(e) of Schedule 1 of the *Privacy and Data Protection Act 2014* (Vic) (the **PDP Act**). You can read the decision [here](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2019/690.html).

## Lessons

This is a noteworthy decision for Victorian public sector agencies subject to Part 3 of the PDP Act for the following reasons:

1. The duty not to disclose items seized pursuant to a search warrant issued under section 465 of the *Crimes Act 1958* (Vic) (the **Crimes Act**) does not extend to information about or derived from items seized under a warrant.
2. The meaning of ‘unlawful activity’ in IPP 2.1(e) is not limited to criminal activity and encompasses activity contrary to rules and laws whether criminal or civil.
3. IPP 2.1(e) is not confined in its application to law enforcement agencies and instead contemplates that any organisation to which the PDP Act applies may investigate suspected unlawful activity or refer its concerns to a relevant person or authority.

## Background

The Plaintiff is a licenced racehorse trainer, subject to the Rules of Racing of Racing Victoria.

On 30 January 2019, the Defendant executed a search warrant at the Plaintiff’s home, which was issued by a Magistrate under section 465 of the Crimes Act. The Defendant seized from the Plaintiff’s home 6 syringes labelled ‘Eprex 1000’, among other items. On return of the warrant, a Magistrate authorised the forensic analysis of the syringes. The syringes were subsequently found to contain a substance called ‘EPO’. It is an offence to possess EPO without a prescription, and EPO is a prohibited substance under the Rules of Racing of Racing Victoria.

The Defendant then wrote to Racing Victoria, enclosing information about the syringes. The Defendant said that it referred the information to Racing Victoria because ‘offences may have been committed against the Rules of Racing involving licenced trainer [the Plaintiff]’.

Following the receipt of this information, Racing Victoria formed the view that there were reasonable grounds to suspect the Plaintiff breached the Rules of Racing and notified the Plaintiff of its intention to lay charges. Racing Victoria asked the Plaintiff to show cause why he ought not be suspended pending a hearing and determination of the charges. Later that day, the Plaintiff sought an order restraining Racing Victoria from acting on the information received from the Defendant.

The Plaintiff submitted that the information obtained as a consequence of the exercise of a coercive power could only be used for the purpose for which the power was conferred and not otherwise. He argued that the Defendant had a positive duty of confidentiality in relation to the items seized under warrant and that that duty also applied to any information derived from those items. The Plaintiff submitted the only use that could lawfully be made of the information derived from the things seized under warrant was for the investigation and prosecution of indictable offences.

## The Decision

The Court found the Crimes Act does not make express provision for the use or disclosure of things seized under a search warrant and instead requires that these things seized be brought before the Magistrates’ Court ‘to be dealt with according to law’. It held that ‘to be dealt with according to law’ simply requires the police officer who executes a search warrant to take anything seized under warrant to the Magistrates’ Court for the court to determine what is to be done with the seized things. In this case, directions were made that the seized things be retained in the possession of the police and directions were made for the analysis of some items including syringes.

The Court held that there is a limitation on the use that may be made by police of things seized under a search warrant issued under section 465 of the Crimes Act, and that those things must be taken before the magistrate ‘to be dealt with under law’. Police may then deal with the things as directed by the Magistrates’ Court, and it follows that there is a corresponding duty not to disclose seized things other than in accordance with a direction of the Magistrates’ Court.

The Court did not accept that evidence of observations made during the execution of a search warrant under section 465 of the Crimes Act, or information derived from things seized under the warrant, were subject to any limitation or duty of implied confidentiality. The Court held that although the Defendant is not free to disclose the information to the world at large, it could use and disclose this information for the limited purposes defined by common law and legislation.

##### ****IPP 2 and disclosure of information derived from material seized under warrant****

The Court considered section 465 Crimes Act deals with how seized things under a search warrant are to be handled while the PDP Act is concerned with the much broader notion of personal information. As a result, it held section 465 of the Crimes Act does not limit the use and disclosure of information about or derived from things seized under warrant.

The Court also considered the meaning and scope of IPP 2.1(e). It held that ‘unlawful activity’ is not limited to criminal activity and instead encompasses any activity contrary to rules and laws whether criminal or civil, and that any organisation to which the PDP Act applies may investigate the suspected unlawful activity itself or refer its concerns to a relevant person or authority.

The Court highlighted that by enacting the PDP Act, Parliament has provided that the right to privacy may be limited by law in a way that is proportionate to a legitimate aim and, as a result, the right to privacy under the Charter of Human Rights and Responsibilities cannot be said to be ‘paramount’. Having reason to suspect that criminal activity was being engaged in, IPP 2.1(e) authorised the Defendant to disclose personal information about the Plaintiff in reporting its concerns to the relevant persons or authorities and it was not necessary that the concerns reported correspond exactly with the crimes suspected.

In light of the above considerations, the Court held disclosure was authorised under IPP 2.1(e) and so it was not necessary to consider whether the disclosure was also authorised by IPP 2.1 (f) or (g).

The Court ordered that the proceeding be dismissed, and the confidentiality orders issued at the commencement of the trial be vacated.

Further Information

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