

**A CRITICAL ANALYSIS OF THE FORMAT TO OBTAIN CELL PHONE RECORDS  
IN TERMS OF SECTION 205 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977**

by

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at the

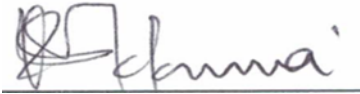
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DATE: SEPTEMBER 2021

## DECLARATION

I, Putiki Daniel Makuwa, declare that: **A critical analysis of the format to obtain cell phone records in terms of Section 205 of the Criminal Procedure Act 51 of 1977** is my own work, and that the sources I have used or quoted have been indicated and acknowledged by means of complete references.



Putiki Daniel Makuwa

26 September 2021

Date

## **DEDICATION**

This dissertation is dedicated to my mother, Selina Nnototsi Makuwa and my children who have been the driving force and my source of inspiration throughout my studies since 2013. This dissertation would not have been completed without their encouragement under extremely difficult circumstances.

## **ACKNOWLEDGEMENTS**

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**Thank you All, and God bless!!**

## **ABSTRACT**

In this study, the researcher critically analyses the format to obtain cell phone records in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977). The format to obtain cell phone records plays a vital role in the investigation of crime. To determine the importance of this format, the researcher has formulated the following research questions to address the research problem:

- What are the objectives of investigation?
- Which format should be used to obtain cell phone records in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977)?

A qualitative research design approach was adopted in this study. National and international sources of literature were consulted, in conjunction with semi-structured interviews conducted with Network Service Provider Forensic Personnel from Johannesburg and prosecutors from the Specialised Commercial Crime Unit in Pretoria.

The format to obtain cell phone records in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977) was formulated. A range of recommendations were proposed for more investigation on issues highlighted in the findings.

## **KEY TERMS**

Criminal investigation, cell phone, cell phone records, Section 205, subpoena, Criminal Procedure Act (No. 51 of 1977), evidence, digital evidence, statement, witness, investigating officer; prosecutor; magistrate; network service provider.

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## ABBREVIATIONS AND ACRONYMS USED

<b>CCID</b>	Crime Combating and Investigation Division
<b>CIA</b>	Central intelligence Agency
<b>CID</b>	Criminal Investigation Department
<b>CPA</b>	Criminal Procedure Act (No. 51 of 1977)
<b>DNA</b>	Deoxyribo-Nucleic Acid
<b>DPCI</b>	Directorate for Priority Crimes Investigations (Hawks)
<b>FBI</b>	Federal Bureau of Investigation
<b>GPRS</b>	General Packet Radio Service
<b>HLR</b>	Home Location Register
<b>IMEI</b>	International Mobile Equipment Identity
<b>IPID</b>	Independent Police Investigative Directorate
<b>LA</b>	Location Area
<b>LLB</b>	Bachelor of Laws
<b>MSSC</b>	Mobile Service Switching Centre
<b>NPA</b>	National Prosecutions Authority
<b>NSP</b>	Network Service Provider
<b>NYPD</b>	New York City Police Department
<b>PSTN</b>	Public Switched Telephone Network
<b>RICA</b>	Regulation of Interception of Communications and Provision of Communication-Related Information Act
<b>RSA</b>	Republic of South Africa
<b>SACB</b>	South African Criminal Bureau
<b>SAPF</b>	South African Police Force
<b>SAPS</b>	South African Police Service
<b>SIM</b>	Subscriber Identification Module
<b>TSU</b>	Technical Support Unit
<b>VLR</b>	Visitor Location Register
<b>UK</b>	United Kingdom
<b>UNISA</b>	University of South Africa
<b>USA</b>	United States of America

## CHAPTER ONE: GENERAL ORIENTATION

### 1.1 INTRODUCTION

The current chapter introduces the entire study in terms of a general orientation to the various critical units of analysis attendant to the research topic, its core tenets and the study as whole (Du Plooy, 2013:101; Mouton, 2014:11). While these critical variables are outlined briefly in the current chapter, they are elaborated further in various levels of detail in the ensuing chapters. In this regard, and to a larger extent, the general orientation provides an interstitial framework of the beginning and completion/ conclusion of the entire research process.

The menace of crime in South Africa manifests in different forms, including murders, robberies, rapes, burglaries and hijackings. Each of these crimes characteristically exhibits its own peculiar causal factors and modus operandi (Adams, Caddell & Krutsinger, 2012:12; Jackson & Jackson, 2016:22). Cell phones are ostensibly a large part of contemporary society, and have an immense impact on everyday life (Lochner, Benson & Horne, 2012:69). It is in this context that criminals have exploited and refined technology-driven crimes in recent times using cell phones as their instruments of choice in planning and executing their criminal activities.

The relevant serious and violent criminal investigation sectors of the South African Police Service (SAPS) have determined that a cell phone is a useful technological resource during investigations of serious and violent crimes (Lochner et al., 2012:69). Given the intense environment of cell phone-perpetrated crimes, it is then imperative for investigating officers to be thoroughly conversant with the value of cell phone information and the possible impact such information may have on an investigation. For instance, the probing of cell phone records is a useful investigative method for tracing suspects and placing them at the scene of a crime, as well as identifying their accomplices (Benson, Jones & Horne, 2015:9; Lochner & Zinn, 2014:162).

Notwithstanding the rampant spate and sophistication of crimes in which cell phones were instrumental, it is clear that *ad hoc* solutions have become untenable and diminish the trust of the public in the capacity of the police to address crime effectively

(Zinn & Dintwe, 2015:104). Therefore, investigating officers should be unequivocally conversant with, and knowledgeable about the prescribed laws and instructions within which cell phone information is obtainable as part of crime investigation. It is in this specific regard that the role of the Criminal Procedures Act (No. 51 of 1977 as amended) is of particular interest in this study insofar as the investigating officer's formatting or compilation guidelines of the document requesting the courts to authorise access to the suspect's or alleged perpetrator's cell phone records to link him/her to the crime.

While there is uncertainty concerning the formatting (compilation guidelines) of the application to obtain cell phone records as directed by Section 205 of the Criminal Procedure Act (No. 51 of 1977), paucity in the literature concerning such access has compounded the situation. Thus, the need for this study was prompted by the desire to ultimately identify and provide clear and unambiguous procedures to assist investigators when formatting or compiling an application to obtain the cell phone records of crime perpetrators or suspects as directed by Section 205 of the Criminal Procedure Act (No. 51 of 1977). Accordingly, the next section outlines the irrefutable need for clarification of Section 205 of the Criminal Procedure Act (No. 51 of 1977 as amended). Such clarity would lessen the onerous challenges experienced by investigators in their compilation or formatting of cell phone records as directed by Section 205 of the Criminal Procedure Act (No. 51 of 1977).

## **1.2 RATIONALE OF RESEARCH (PROBLEM STATEMENT)**

The research problem is the catalyst of the entire research enterprise since it situates the need for the study in the context of the difficulty with which the researcher is confronted (Berg & Lune, 2012:38; Leedy & Ormrod, 2015:45). The research problem also entails a reduction of the broad aspects of the investigated issues to specific details (Creswell, 2014:108). As a factor of both his work experience and professional background, the researcher has in several instances faced challenges concerning the formatting or compilation of a Section 205 subpoena to obtain cell phone records as required in Section 205 of the Criminal Procedure Act (No. 51 of 1977). In essence, then, the research problem is fundamentally located in **how** the investigating officers have to compile or format the Section 205 subpoena in terms of the Criminal

Procedures Act (No. 51 of 1977) for the cell phone records and information as cogent evidence for placing a suspect at the scene of the committed crime (Bennett & Hess, 2012:238; Santos, 2017:114).

The magnitude of crime in South Africa necessitates that the South African Police Service should galvanise every legally available and permissible mechanism to uproot these crimes. One of such mechanisms involves the use of cell phones as a means of tracing criminal behaviour during an investigative process. Upon request pursuant to Section 205 of the Criminal Procedure Act (No. 51 of 1977), network service providers can be subpoenaed to provide the cell phone records of a person in question in order to establish their whereabouts in relation to the crime that has been committed.

The researcher is currently a Captain attached to the Serious Corruption Investigation unit within the Directorate for Priority Crimes Investigation (DPCI), known also as 'Hawks'. Previously the researcher served as Senior Forensic Investigator at one of the network providers in Johannesburg from 2014 to 2017. The researcher's duties included holding daily discussions on cell phone screenings; that is, random screening of job applicants and employees. It was during this period whilst dealing with SAPS subpoenas, that the researcher observed that SAPS investigators were failing to provide the required information when compiling Section 205 subpoenas to the network service provider. These subpoenas were prone to rejection by a network provider due to various reasons. For example, date stamps of SAPS and/or court officials would not even be provided, or not correspond when provided. In addition, subpoenas may not have been authorised by magistrates; or where required, exact time frames were not provided.

The researcher also established that investigators were also often unaware that an entity such as a network provider could only legally retrieve information which was not older than 36 months as prescribed by the Regulation of Interception of Communications and Provision of Communication-Related Information Act (No. 70 of 2002), known also as 'RICA'. However, the Forensic Services of the network service provider would still continue to receive Section 205 subpoenas which required cell phone information of a period exceeding five years in copious instances. As a consequence of such subpoenas, the network service provider would be placed in an



awkward position that portends the danger of civil or criminal liability if such flawed subpoenas were complied with, based on misinformation. Such illegal compliance also leaves the door open to corruption within and outside of the network provider's domain. It was against the backdrop of such experiences and knowledge that the researcher developed interest in exploring the full spectrum of Section 205 requirements of the Criminal Procedure Act (No. 51 of 1977). Such exploration is viewed as a catalytic factor for better understanding and enhancement of the criminal justice system in the quest to apprehend criminals. The next section discusses the study's delimitation.

### **1.3 DELIMITATIONS OF THE STUDY**

The study's delimitations relate to its specific focus or confinement in relation to the problem being solved, the aim of the study, and the data collection and analysis processes employed (Bouma, Ling & Wilkinson, 2012:191; Du Plooy, 2013:109). The study has focused **only** on the Section 205 of the Criminal Procedure Act (No. 51 of 1977) format for the subpoena of cell phone records. Flowing from the research problem as articulated in Sub-section 1.3 above, the study necessarily confined itself to the extent to which Section 205 subpoena requirements were not complied with, both within the network provider's Forensic Services and the Specialised Commercial Crime Unit within the National Prosecutions Authority (NPA). Having established both the research problem and delimitations, the next section concomitantly outlines the aim of this research.

### **1.4 AIM OF THE RESEARCH**

The research aim premises on the researcher's general statement regarding *what* he intends achieving, and not necessarily *how* s/he intends to accomplish that (Denscombe, 2012:80-81; Wilson, 2014:43). *How* the researcher intends to accomplish his/her intentions, is actually a translation of the specific activities undertaken to accomplish the intention(s). In this study, the aim or general intention is to critically analyse the required format for obtaining cell phone records of crime suspects as prescribed in Section 205 of the Criminal Procedure Act (No. 51 of 1977). It is also the intention of the researcher to explore and describe the nature and implications of challenges experienced by both network service providers and law enforcement agencies and prosecution structures.

## **1.5 RESEARCH OBJECTIVES**

Whereas research aims are statements of a general declaration, research objectives detail the researcher's concrete or actual statements concerning activities to be performed in obtaining measurable results within a specified period (Gray, 2014:53; Mouton, 2014:101). Moreover, research objectives are a helpful mechanism for classifying social research in its various categorisations (Myeza, 2014:4). Accordingly, the objectives of this research are:

- To explore, describe and analyse the objectives of criminal investigations; and
- To explore, describe and analyse the format used to obtain cell phone records pursuant to Section 205 of the Criminal Procedure Act (No. 51 of 1977).

The ensuing section focuses on the research questions, which are juxtapositional to the objectives of research. Jointly, both these objectives and questions elevate the resolution of the identified research problem and the researcher's overall intentions in undertaking the study in the first place (Singleton & Straits, 2010:47; Welman, Kruger & Mitchell, 2012:23).

## **1.6 RESEARCH QUESTIONS**

Research questions are basically the interrogative version of the research objectives, and direct the study towards a resolution of the research problem (Salkind, 2012:44; Wagner, Kawulich & Garner, 2012:18). In that regard, the ensuing research questions addressed both the identified research problem and objectives of this study:

- What are the objectives of investigation?
- Which format should be used to obtain cell phone records in pursuance of Section 205 of the Criminal Procedure Act (No. 51 of 1977)?

The next section outlines the purpose of research. In this regard, both the general and specific contexts of the purpose of research are explicated.

## **1.7 PURPOSE OF THE RESEARCH**

Generally, the purpose of research is to explore, describe and explain phenomena and human behaviour and experiences with the intention to answer, explain or interpret specific questions and understanding these (phenomena, human behaviours and experiences) in all their possible manifestations and organisation in various contexts (Creswell & Plano-Clark, 2011:151; Wang, 2015:7; Welman et al., 2012:23). Regarding the present study, the purpose is to empower and educate the researched; evaluate and analyse the current situation; and describe the nature of the investigated problem. All of these three factors are highlighted below.

### **1.7.1 Empowering and educating the researched**

By empowering and educating the researched, the research is basically intended to improve the professional welfare of the research participants in the course of their duties. Accordingly, crime investigators working in the SAPS organisation will be better served by a well-structured format in obtaining cell phone records in accordance with the requirements of Section 205 of the Criminal Procedure Act (No. 51 of 1977). Other 'beneficiaries' also to be empowered and educated by this research are investigators working for network service providers. These investigators will broaden their experience and gather new knowledge concerning technology generated evidence as part of crime investigation and preparation of prosecutable cases (Jackson & Jackson, 2016:22).

In addition, this study will be of benefit to the researcher's colleagues and fellow commanders in the Directorate for Priority Crime Investigation. The researcher envisages that by reporting the findings and ultimately developing the framework of recommendations, this research undertaking will influence policy regarding current practices. As such, fellow colleagues and investigators within the Directorate for Priority Crime Investigation will be capacitated and empowered to address practical difficulties and enhance current processes and procedures when preparing subpoenas for cell phone records of crime suspects as demanded in Section 205 of the Criminal Procedure Act (No. 51 of 1977).

### **1.7.2 Evaluating and analysing the current situation**

When evaluating and analysing a prevalent situation, the intention is to ascertain inherent weaknesses and strengths in a policy or programme and possible opportunities or mechanisms for the improvement thereof (Denscombe, 2014:141; Hammond & Wellington, 2013:81). In this regard, the researcher has determined a prevailing state of affairs congenial to the research problem as articulated in Section 1.2. Therefore, the format used to obtain cell phone records as prescribed in Section 205 of the Criminal Procedure Act (No. 51 of 1977) will be evaluated and analysed.

Based on his professional background and work experience, the researcher has investigated the afore-cited Section 205 applications and guidelines to particularly evaluate areas of achievements and deficiencies, and also considering possible improvements in the current format used to obtain cell phone records of crime suspects. On the strength of the newfound data, a framework of recommendations will be developed to address the research problem, while also making a contribution to develop good practice within the Directorate for Priority Crime Investigation organisational structure.

### **1.7.3 Exploration and description**

Exploration and description entail extensive in-depth enquiry to obtain more information and details regarding a subject matter about which little is known, and fully explaining these details in the process (Hammond & Wellington, 2013:81; Leedy & Ormrod, 2010:116). In Section 2.1 of this chapter, the researcher has outlined the range of commonly occurring practices and challenges regarding formatting of Section 205 subpoena requests. However, studies in this regard are disproportionate to the magnitude of challenges, which the researcher considers as paradoxical to the extant scale and scope of crime in the country.

In addressing this ostensible paucity, local and international literature sources from multiple scholarly perspectives were explored and reviewed for current and new information regarding formatting of subpoenas for the purpose of gaining access to cell phone records of suspected perpetrators of crime. Gaps in literature and real-life occurrences were explored, described and addressed, while also obtaining new information by interviewing knowledgeable individuals with experience on compilation

formats used to obtain cell phone records in accordance with Section 205 of the Criminal Procedure Act (No. 51 of 1977).

The following section addresses the definition of key concepts in the study. To a larger extent, these definitions form a linkage with the broader parameters of the problem of the study and its attendant aim, objectives, questions and purpose.

## **1.8 DEFINITION OF KEY CONCEPTS**

The reason for defining key concepts is to prevent any conceptual, lexical or contextual misunderstanding regarding the manner in which these concepts or terms have been applied in the study (Leedy & Ormrod, 2010:119). The definition of the following concepts does not necessarily imply their importance of others not mentioned. Most importantly, the key concepts below depict a degree of thematic affinity and symmetry with the core subject matter of the study, namely: criminal investigations in the context of Section 205 of the Criminal Procedure Act (No. 51 of 1977).

### **1.8.1 Criminal investigation**

A systematic and methodical process intended to search, examine and analyse the truth, according to which a thorough inquiry is conducted for all forms of crimes and acts of unlawfulness (Benson et al., 2015:19).

### **1.8.2 Cell phone**

A cell phone's functionality premises on a similar notion of a two-way radio and allows for wireless communication via the radio-frequency spectrum with the assistance of cell towers (Daniel & Daniel, 2012:231).

### **1.8.3 Cell phone records**

These are the call data's detailed information logged by a network service provider (Lochner & Zinn, 2014:162). In this study, cell phone records are an essential component and requirement for subpoena applications as prescribed in Section 205 of the Criminal Procedure Act (No. 51 of 1977). In this study, cell phone records to be obtained are pivotal case factors for establishing the probable time of the crime and activities or movements of both the perpetrator and victim before, during, and/or after an alleged crime was committed. It is on the basis of such technology-assisted factors

that a credible investigation would be conducted, as well as evidence against which irrefutable decisions would be taken for a prosecutable case.

#### **1.8.4 Section 205 Subpoena**

A Section 205 subpoena is directed to the person or institution with specific information that may be relevant to the commission of a crime or crime incident (Van Niekerk, Lochner, Naidoo & Zinn, 2015:223). In this study, the correct implementation of a Section 205 subpoena constitutes a fundamental tenet of the research problem as challenges are experienced by both network providers and law enforcement applicants. The situation is then susceptible to corruption as the tendency to by-pass the correct procedures becomes pervasive.

#### **1.8.5 Evidence**

Evidence is described as all congenial facts regarded to be admissible when presented in court as part of preparation for the successful prosecution and conviction of criminals or wrongdoers (Van Rooyen, 2012:17).

#### **1.8.6 Digital evidence**

Any form of evidence that is technologically reproducible and can be obtained in digital form (Ward & Heerema, 2013:4; Zinn & Dintwe, 2015:441). Examples of such evidence includes computer-generated and audio-visual materials, cellular phones, digital photos or fax machines. The proliferation of technological devices has also improved the development of digital evidence, such as the situation in forensic investigations (Osterburg & Ward, 2012:112).

The next section addresses the methodological framework entailed in this research. The fundamental intention in this regard is to detail the pre-investigative or pre-implementation processes and procedures that guided and informed the study before its actual undertaking.

### **1.9 METHODOLOGICAL FRAMEWORK OF THE STUDY**

Creswell (2013:3) and Maneli (2018:5) posit that the study's methodological framework is a systematic process encompassing the rationality of the various steps and procedures undertaken by the researcher to allocate a context for resolving the

investigated problem and attain the study aim in conjunction with applicable data collection and analysis approaches. In essence, then, the methodological framework incorporates some basic philosophical assumptions or principles to allocate a degree of rationality or scientific authenticity to plan, manage and guide the entire research process, including the specific data acquisition instruments and the researcher's preferred methods of analysis (Leedy & Ormrod, 2015:98; Silverman, 2013:113).

Irrespective of the intellectual or academic predisposition and perspective from which a methodological framework or methodology is viewed, three critical factors have been noted to be indispensable (Kumar, 2015:5). These are: the philosophical tradition/s or scientific principles on which the study is grounded; the research approach; including research methods designed to facilitate the availability of data contingent with the type and requirements of the study. Given that research studies generally pursue constructivist, positivist or pragmatic philosophical inclinations, the present study has pursued the constructivist-phenomenological research design approach. This is largely due to the centrality of participants' perspectives as the primary source of the study's data (Creswell, 2014:86; Kumar, 2015:5).

### **1.9.1 Research design**

A case study research design approach has been adopted in this qualitative study, the use of which is well recognised as an intensive research strategy for exploring and investigating a situation from diverse views concerning a particular policy, programme, project, system or institution in a realistic setting (Bryman, 2012:66; Demetriou, 2013:257; Thomas, 2016:10). In the same vein, Yin (2017:44) states that in case studies, detailed information is accumulated with the usage of varying data gathering procedures and cases of "decisions" as the major focus of case studies. For Kumar (2014:155), a case is situated in a group, an occurrence, an instance, an individual, a community, an episode, or a smaller group in a community, town or city.

In the context of this study, participants from a particular network provider's Forensic Services and the National Prosecuting Authority are considered to be the "cases" or reference points that are investigated to gain an incisive understanding of the format for obtaining cell phone records in relation to Section 205 of the Criminal Procedure

Act (No. 51 of 1977). Accordingly, the participants from the two entities (a network provider's Forensic Services and the NPA) serve as "cases" for the *post facto* scenario planning or recreation of the scene and context of the format used to obtain records of a cell phone from the network provider's Forensic Services through the NPA (in addition to investigating the crime location for physical evidence) with the aim of placing the criminal/s or alleged perpetrator/s at, or in the vicinity of the crime scene. Possible accomplices could also be traced in the event the criminal or alleged perpetrator communicated with others before, during, or after the crime (Benson et al., 2015:19; Osterburg & Ward, 2012:112).

### **1.9.2 Research approach**

The researcher preferred the qualitative research approach as it facilitated the constructivist philosophical paradigm in terms of which a phenomenon and its meaning are explored, described and ultimately understood as ascribed by those who experience it daily in their lived ecological settings (Babbie, 2013:24; Creswell, 2014:86). Qualitative research enables participants' reconstruction of their undiluted life stories in their own natural environments, which authentically reflects and records their' statements and not the researcher's own preferences and predilections (Creswell, 2013:4).

In the current research study, the researcher engaged with participants from a particular network provider's Forensic Services and the NPA's Specialised Commercial Crime Unit. Both these categories of participants are involved in Section 205 subpoenas, and will provide verbatim accounts of real-life problems attendant to the required procedures for the format of these subpoenas.

### **1.10 STUDY POPULATION**

The study population relates to the whole set of people, objects, units or cases on which the researcher focuses on account of their possession of some characteristics in which the researcher is interested (Bless, Higson-Smith & Sithole, 2013:162; Dantzker, Hunter & Quinn, 2018:210). De Vos, Strydom and Fouche (2011:222) demarcate the study population, referring to individuals in the universe (larger group) with specific qualities or attributes.



The current study is firmly located within the formatting of Section 205 subpoenas. In this regard, the study population encompasses all stakeholders involved in the legal pursuance of the cell phone records of individuals suspected in the commission of various criminal offences. Accordingly, the broader study population in this regard includes: investigating officers working within the SAPS; network service providers as custodians of the much sought-after cell phone records; prosecutors working within the ambit of the NPA; and magistrates without whose signatures the Section 205 subpoena application would be declared null and void.

The next section addresses the target population. It was important to differentiate between the general population of interest and the specific (targeted or sampled) population. The former (study population) is uninvolved in the study but only referred to on account of possessing the main reference points or qualities needed to select the actual participants. The latter (target group), meanwhile, are referred to as an ideal category of prospective participants because it is logistically impossible to involve every member of the study population in the empirical data collection (Christensen, Johnson & Turner, 2011:150; Kumar, 2015:6).

#### **1.10.1 Target population**

The target population describes an ideally suited group within the larger study population, and from which the researcher can select a representative sample. In fact, Du Plooy (2013:109) and Welman et al. (2012:126), submit categorically that the numbers involved (in the broader population) and the limited time available are the principal factors that necessitate the existence of a target population; which is ultimately the very population on whom the researcher would ideally make inferences based on its inherent qualities or features. Such features should necessarily be homogeneously comparable to those of the numerically larger study population. Therefore, the target population could also be construed as the product of the researcher's systematic narrowing down (reduction or paring) of the initial study population. Meanwhile, the target population in the research consisted of 24 Forensic Service Personnel and 1 (one) manager from the telecommunications network in Johannesburg as well as 23 prosecutors from Specialised Commercial Crime Unit in Pretoria. Both categories of the representative samples are directly involved in the

implementation of Section 205 subpoenas in terms of the Criminal Procedure Act (No. 51 of 1977).

The selected network provider is not the only network service provider in the country. Notwithstanding, other providers were excluded for reasons beyond the control of the researcher. These providers could neither be 'subpoenaed' nor legally persuaded since the researcher is only engaged in this exegetic exercise (research study) purely for the researcher's academic requirements. Therefore, the availability of the selected network provider is advantaged by the researcher's previous professional engagement with the self-same provider. Other network providers could not be involved for various reasons. The latter's participation could not be coerced because this study is undertaken only for the researcher's academic purposes. Logically, the study does not necessarily assume the function of an execution of a court order; which could only apply in the case of the researcher acting in his official capacity as a current employee of the Directorate for Priority Crimes Investigation (DPCI) pursuing any specific crime committed by any specific crime suspect.

Whereas the current section highlights the different categories of participants, the next section outlines the specific mechanisms or strategies according to which these participants were involved in the study. Their involvement is presaged in the context of the broader terrain of probability and non-probability sampling.

### **1.11 SAMPLING**

Sampling is defined as the process or decisions according to which a representative group or sub-unit of the larger group is selected on the basis of standards or qualities determined by the researcher before the commencement of the data collection (Christensen et al., 2011:150; Kumar, 2011:193). There are basically two distinct categories of sampling, namely, probability and non-probability sampling (Babbie, 2010:191; Leedy & Ormrod, 2015:177). In addition to these two sampling categories, simple random and purposive sampling were used as the actual methods applied in this study.

### **1.11.1 Probability sampling**

Probability sampling premises on the randomisation of the equal chance each person or sample unit has for selection as a prospective participant in the study (Durrheim, 2014:49; Leedy & Ormrod, 2015:177). In this regard, random sampling predicts or ensures that any prospective population member's chance or probability for inclusion in a sample is equal. Examples of probability sampling include proportional stratified sampling, simple random sampling, cluster sampling, stratified random sampling and systematic sampling. The researcher opted for the simple random sampling strategy for both the Forensic Services personnel and NPA prosecutors. Leedy and Ormrod (2013:97) opine that for qualitative investigation, only few participants are chosen who were most likely to give the most trusted information on the investigated phenomenon.

The sampling frame consisted of the 24 Forensic Services Personnel from the selected network provider's office. Each name was allocated a number from the sampling frame. Thereafter, the researcher then wrote each member's name separately on pieces of paper, then inserted the names in a bowl, after which 8 (eight) names were drawn to form Sample A. The researcher used the same method with 23 prosecutors from the Specialised Commercial Crime Unit from the NPA's Pretoria Head Office, where 5 (five) prosecutors were selected as Sample B. This ensured that all forensic services personnel from the selected network provider and each prosecutor were equally opportuned for selection. The researcher upholds that these fairly selected participants fitted the criteria of the researcher.

### **1.11.2 Non-probability Sampling**

Non-probability sampling posits that the chances of each participant's selection in a sample are not guaranteed (David & Sutton, 2011:232; Leedy & Ormrod, 2015:179). Examples of non-probability sampling techniques include: convenience sampling, quota sampling and purposive sampling. Regarding non-probability sampling, the researcher is not able to predict or guarantee that any of the population's elements will actually be represented or sampled. Some population members have very minimal opportunity to be sampled due to their heterogenous (dissimilar) traits; thus, disqualifying or rendering them excluded or ineligible from any possible selection (Fraenkel, Wallen & Hyun, 2012:7; Humbulani, 2016:15).

The researcher also utilised purposive/judgement sampling, the most commonly used non-probability sampling strategy. In such instances, the researcher chooses the units to be observed in respect of his/her own judgement and experience about the most suitable participant in relation to the required information (David & Sutton, 2011:232). The purposive sampling strategy's categorical intention is not the formal representativity. Rather, the choice of individuals and settings is influenced by meeting certain criteria for inclusion in a study. Accordingly, 1 (one) manager from the network provider was handpicked as result of the purposive sampling method and to answer sample 'A' interview schedule. This manager was interviewed at the selected network provider's office. Sub-section 1.12.3 explicates the interviews in detail in respect of the sampled participant as well.

## **1.12 DATA COLLECTION**

Pieces of raw information or material are not yet conceived as data unless they have been systematically and methodically processed and converted into intelligible patterns and categories from which certain conclusions could be drawn about some issues or phenomena (Walliman, 2011:65; Wagner et al., 2012:132). It is against this backdrop that data collection is understood as a methodically structured process for gathering, synthesising and identifying information that is pertinent to the research problem or phenomenon being investigated. Data (i.e. processed information) exists in either secondary or primary form.

Primary data is essentially the product of direct engagements of the researcher with his/her human participants as the original source of that same data (Blaikie, 2003:18; Kumar, 2015:133). For Leedy and Ormrod (2015:94), primary data is mostly considered to be valid, illuminating, and ultimate manifestation of truth. Human subjects are considered primary data sources mainly due to the fact that most, if not all research, is undertaken for the benefit of human beings; including when animals are used as experimental subjects to alleviate humankind's material condition and circumstances. Arguably, science does not exist for its own sake.

Secondary data premises on the information from individuals, institutions or agencies who are not the researcher (Bouma et al., 2012:191). Categories of such data include

examples mentioned in the ensuing sub-section 1.12.1. In the context of this research, the differentiation of the two types of data is that primary data involved interviews, while secondary data is obtainable from a review of studies already conducted in journal articles, documents, websites, books, and texts (Babbie & Mouton, 2010:76). The researcher undertook a review of literature and document-based sources, personal experience and interviews for obtaining information about the research problem.

### **1.12.1 Literature review**

The review of literature is a process involving a protracted search, consulting, processing, and evaluating available literature relating to a selected research topic (Du Plooy-Cilliers, Davis & Bezuidenhout, 2014:101). An in-depth literature study was undertaken for the purpose of obtaining information on the investigated topic. Kumar (2011:34) submits that an effective literature in any specific field of enquiry is facilitated by some notion of the overall subject area and the investigated problem, which demarcates the search. Thereafter, a bibliography of this broad area should then be detailed. However, no literature of the exact topic was found after embarking on this protracted exercise.

The researcher also visited UNISA libraries, e-resources and community libraries in an attempt to find relevant literature from academic books, published and unpublished dissertations, conference proceedings, peer reviewed journals, databases and search engines such as Google Scholar to search for sources bearing any verisimilitudes of the current research topic internationally and locally. At this stage, the focus of the search strategy was on the scholarship in the area of cell phone records as a source of evidence to support prosecutorial initiatives against criminals. This implies a significant shift from the mere bibliographic listing of a compendium of literature sources. The researcher dissected the research topic further into its attendant categories to acquire material considered useful to the study. On hindsight, the researcher considers the fortuitous absence of a similarly worded research topic as favourable, since the verisimilitude of the current study accumulating a high degree of plagiarism could have occurred. Nonetheless, the literature search strategy was of great value insofar as exposing the researcher to multiple scholarship perspectives on

the subject of technology assisted evidence in general, and cell phone records in particular.

### **1.12.2 Documentary sources**

While literature sources are academically and/or intellectually predisposed and systematically developed on research-based methodologies and studies, documentary sources mostly occur in particular standardised formats, such as artefacts and notes (Flick, 2011:124). Moreover, such sources could also be in the form of case reports, diaries, contracts, statistical reports, death certificates, judgements of courts, or expert opinion letters (Flick, 2011:124). As applying to this study, documentary sources enabled triangulation of data, especially in developing a framework of policy-related recommendations accruing from the range of documentary sources that include government policy documents and reports (De Vos et al., 2011:379). However, the nature of stored cell phone information could be classified as private; therefore, inaccessible through regular protocols.

The researcher benefited from document sources such as forensic policies of a particular network provider. Furthermore, legal documents such as the Constitution of the Republic of South Africa (Act No. 108 of 1996), the Promotion of Access to Information Act (No. 2 of 2000), and the Criminal Procedure Act (No. 51 of 1977); as well as internal circulars received from the South African Police Service Act (No. 68 of 1995).

The next section details the interviews as main data acquisition method applied in this study. Whereas the literature and documentary sources did not involve human participants, the interview mode was the only form of data collection in this study that involved human engagement and interaction with the researcher.

### **1.12.3 Interviews**

An interview is a focused means of conversation or dialogue of the researcher and his participants whose aim is to elicit helpful information on some aspects concerning the researcher's concerns (Hammond & Wellington, 2013:91; Kumar, 2011:389). Interviews also involve making explicit rules regarding the dialogue based on the subject issues, length of the dialogue, and the envisaged nature of interaction between

the parties. In semi-structured face-to-face individual interviews with an in-depth focus on issues discussed, the researcher shapes the conversation, but allows flexibility to the participants to determine the direction of the discussions (Babbie & Benaquisto, 2010:342). In this regard, researchers may prefer semi-structured interviews for their consistency and flexibility for further probing (Salmons, 2014:205).

In this study, the semi-structured individual interview was employed with questions extracted from both the research aim and objectives. Two separate interview schedules of questions were eventually compiled in this regard (see Annexure A and Annexure B). One interview schedule was for the sampled network provider's forensic services personnel (Sample A), and the other for prosecutors (Sample B). For Sample A, the initial interview arrangements (prepared before the advent of COVID-19) were changed in the light of the current COVID 19 circumstances. As a result, the researcher made use of online interviews conducted on the computer-based Microsoft Teams since the participants are working from home and not available at their offices.

For the individual one-on-one (individual) semi-structured interviews involving Sample B, an audio recorder was used at the Specialised Commercial Crime Unit Head Office in Pretoria, which is the participants' place of employment as well. The researcher ensured strict adherence to the National Prosecuting Authority's COVID-19 policy and procedures by upholding social distancing, washing hands, wearing of masks and periodically sanitising the interview venue. Consistent with acceptable research ethics, verbal and/or written permission to record the participants was sought and obtained from the participants themselves.

Prior to the actual implementation of the interviews with the above-mentioned Sample A and Sample B, the researcher pre-tested the measurability and accuracy of the various interview questions and the extent of efficacy of the researcher's interview skills (Bernard, 2013:165; Leedy & Ormrod, 2015:128). Two samples were involved in the pilot study, one from the network service provider and the other from the National Prosecuting Authority. The two sampled members of the pre-interviews did not form part of the final samples referred to earlier.

The researcher adopted the below-cited procedures proposed by Leedy and Ormrod (2015:283) in conducting the final Sample A and Sample B interviews:

- **Prior identification of interview questions:** The research aim and questions were instrumentalised to guide the open- and closed-ended questions;
- **Considering participants' cultural background and influence on responses:** The researcher did not include any culturally sensitive questions in the interview schedule;
- **Ensuring involvement of key informants:** Only the network provider's Forensic Services personnel in Johannesburg and Prosecutors from the Specialised Commercial Crime Unit in Pretoria were involved due to their extensive knowledge and involvement in Section 205 subpoenas;
- **Finding a suitable location:** For the Forensic Service personnel (Sample A), interviews were conducted online since participants were working from the comfort of their homes due to the COVID-19 health risk adjusted strategies. For the prosecutors in the NPA's Specialised Commercial Crime Unit (Sample B), they were interviewed in the comfort of a boardroom at their Pretoria Head Office;
- **Obtaining written permission:** Following approval for ethical clearance to the researcher by the UNISA Research Ethics Committee, the researcher formally sought, and was subsequently granted permission to conduct the research by the network provider and the National Prosecuting Authority;
- **Establishing and maintaining rapport:** An ice-breaker exercise was undertaken to allow the participants time to adjust to the ambience of the interviews without feeling threatened. The researcher was respectful throughout the interviews and did not assume any superiority or unequal power relations, which in itself enhanced the levels of trust between researcher and participant;
- **Allowing participants' own versions:** The researcher did not assume that he was more knowledgeable than the participants by 'putting words' in their mouths. Participants were allowed to express their views without any undue constraints or interruptions. The participants' responses were treated as their perceptions, and not as facts, until proven otherwise.
- **Recording responses verbatim:** An audio recorder was utilised to obviate any misrepresentation of the participants' actual words, after which these statements were transcribed unaltered.



- **Remaining unemotional throughout:** No emotional reaction or attachment was shown to participants' responses (e.g. any signs of surprise, agreement or disapproval) as it would suggest partisan preference of certain responses only.

In addition to the literature, documentary and interview sources of information, the researcher's personal experiences also augmented to the array of data collection methods in this study. The next section outlines these personal experiences.

#### **1.12.4 Personal experience**

The researcher's professional background was briefly highlighted in Section 1.2. Personal experience, on the other hand, incorporates the researcher's own knowledge, observations and experience amassed during the period of his employment in the same field. The researcher is currently a Captain attached to the Serious Corruption Investigation Unit within the Directorate for Priority Crime Investigations and was previously a Senior Forensic Investigator at a reputable cell phone network provider. Prior to that, the researcher was a Warrant Officer attached to the Serious Economic Offences Unit within the Directorate for Priority Crime Investigations. Throughout this career journey, the researcher has extensive experience in collecting evidence as a result of more than 15 years spent working as a crime investigator. In addition, the researcher qualified as a certified fraud examiner and received the certificates of achievement for Best DPCI investigator of the year, 2018/2019 and Best DPCI investigator of the year, 2019/2020 for major project investigations. It was during the course of his work both as Senior Forensic Investigator at the cell phone network provider and at the Directorate for Priority Crime Investigations that the researcher realised the extent of the problem as articulated in Section 2.1 as well.

The next section focuses on data analysis, which is the logical step consequent to data collection. The study adopted qualitative analytic modes consonant with its research approach.

### **1.13 DATA ANALYSIS**

Data analysis premises on organising, ordering and structuring data with the intention to make sense and allocate meaning to the mass of collected text and its associated

images (Creswell, 2014:195; De Vos et al., 2011:397). Furthermore, data analysis involves the categorisation and synthesis of data into convenient, recognisable trends and patterns based on frequently emerging individual or categories of statements elicited from the participants during the individual semi-structured interviews. In the case of the current study, Creswell's spiral data analysis technique was implemented as propounded by Leedy and Ormrod (2015:315) below:

- Organising and preparing data by typing field notes and transcribing audio recorded interviews for reading, editing, comments and analysis (Welman et al., 2012:211).
- Data was read and re-read in order to obtain a general sense of the information. The researcher is then immersed in the collected data to reflect on the entire range of data and its categorisation (Bless et al., 2013:342);
- Data was further reduced into fragments or categories sharing some common characteristics. This process involves disassembling the original transcripts and organising them into segments; thereafter fragmenting themes and categories according to identifiable patterns within the data (Bless et al., 2013:342); and
- The researcher integrated the coded themes and categories and interpreted them in conjunction with the reviewed literature, the research problem and aim of the study. At this stage, themes were summarised and presented as the findings of the study (Leedy & Ormrod, 2015:315).

Based on the Sample "A" (Network Forensic Services) interviews, the background information gathered from the nine participants shows that three participants were Senior Forensic Investigators, three were Specialists, two were Supervisors and one a Manager at the Network Forensic Services of the network provider. The three Senior Forensic Investigators have been in their current positions for a period of 05-10 years, while the three Specialists were in their current positions for 10-15 years. Meanwhile, the two Supervisors and the Manager were in their current positions for more than 15 years.

When asked about the extent of their involvement in Section 205 subpoenas in terms of the Criminal Procedure Act (No. 51 of 1977), all the participants responded affirmatively "yes". They confirmed undergoing in-service training for cell phone related

courses which encompassed processes for providing third party information in line with the Constitution and any other legislation in place. Most of the participants have police background and know the Section 205 subpoena process in terms of the Criminal Procedure Act (No. 51 of 1977) as a result of their police experience.

The background of Sample “B” (5 Prosecutors) shows that one is a Regional Court Public Prosecutor for a period of five and ten years, another a Senior Public Prosecutor for a period of ten to fifteen years. Meanwhile, the other three participants are Senior State Prosecutors with more than fifteen years’ work experience. All five participants are in possession of a Bachelor of Laws (LLB) degree, and some have internationally reputable specialist credentials in computer forensics. The next section focuses on the trustworthiness of the study. In the case of this qualitative study, four main aspects or criteria of trustworthiness are presented.

#### **1.14 TRUSTWORTHINESS OF THE STUDY**

According to Bless et al. (2013:236) and Du Plooy-Cilliers et al. (2014:258), trustworthiness is a depiction of the extent of the scientific rigour and quality in the study, such that its findings generate trust among researchers and readers in general. The researcher ensured the trustworthiness by adopting the credibility, transferability, dependability and confirmability criteria; all of which are highlighted below.

##### **1.14.1 Credibility**

Credibility is based on the extent of conceptual accuracy, measurability and adequacy of the findings in relation to the situation being studied (Babbie, 2011:131; Denscombe, 2014:143). In addition, credibility is concerned with the precision of the questions being asked, data being collected, as well as explanations being offered. The researcher compiled interview schedules to ensure that the participants answered similar questions on different interview schedules. The interview schedule was further tested through a pilot study and scrutinised by the researcher’s academic supervisor. Moreover, the participants’ online interviews were audio recorded in order to authenticate the responses.

Three strategies were applied in this study to ensure credibility of the study and its findings. These are: prolonged engagement and persistent observation, triangulation

and negative case analysis. These strategies do not necessarily denote any specific chronological importance.

#### **1.14.1.1 Prolonged engagement and persistent observation**

This includes learning the culture, building trust and addressing possible researcher- or informant-based misinformation and/or distortions. The researcher decides on what is salient to study in the field, congruent with the purpose of the study (Creswell, 2013:250). The researcher devoted more time with the participants beyond the usual interview engagements. Such engagement ensured that the researcher clearly understood the worldview of these participants and the context of their responses.

#### **1.14.1.2 Triangulation**

Triangulation involves using multiple sources of data in order to obtain maximum input against which to frame the findings of the study (Bless et al., 2013:343). Moreover, triangulation entails evidentiary corroboration from diverse sources to shed more light on the research questions. The researcher employed literature and documentary sources, interviews and personal experience to triangulate the data collection initiatives in the study.

#### **1.14.2 Transferability**

Transferability refers to the extent of the original study's results also applying to other contexts under, similar conditions, but with different participants (Bless et al., 2013:237). While qualitative designs do not necessarily produce findings for the sake of transferability or generalisability, the interpretation-based perspectives or consequences of a single action could apply to other contexts (Hammond & Wellington, 2013:80; Kelly, 2014:381). The researcher used rich or dense descriptions during the different stages of the research, including detailed explanation of decisions taken and reasons for such decisions. Such a course of action was intended to enable interested researchers in the field of study to understand and identify the means by which they could test the study's findings in other settings.

### **1.14.3 Dependability**

Dependability is the stability or extent of consistently withstanding changing circumstances (Bernard, 2013:163). Dependability requires that the researcher should pursue a clear research strategy indicating how each step was completed (Bless et al., 2013:237). In ensuring dependability, a pre-test of the interviews was undertaken with a different audience of two sampled participants who were not in the final study. Following refinement of this preliminary exercise, the researcher was then convinced of the dependability of the research instrument's efficacy in different environments or contexts. In addition, a detailed record (audit trail) was kept for others interested in the study to follow.

### **1.14.4 Conformability**

Conformability refers to the research instrument's and study findings' capacity to withstand external scrutiny by their degree of corroboration or conformability by independent experts in the field of investigation (Welman et al., 2012:57). The conformability standard requires that objectivity be maintained at all times during the study. As such, the researcher ensured that his views, perceptions and predilections were not prejudicial to those of the study participants. Accordingly, the researcher allowed a degree of flexibility during the interviews, such that their views superseded those of the researcher, if any. Moreover, the researcher consulted the participants prior to the finalisation of the research report. Such a measure enabled the participants to either confirm or dispute the researcher's interpretation of their own input and contributions to the study through their involvement in the interviews (Bless et al., 2013:237).

The next section addresses the ethical considerations of the study. To some degree or extent, these considerations could also be viewed as enhancing the essential aspect of trustworthiness in the quality of the research processes and its outcomes.

## **1.15 ETHICAL CONSIDERATION**

Where human beings are the focus of an investigation, researchers are obliged to scrutinise the ethical implications of their undertaking (Leedy & Ormrod, 2013:104). Research ethics are not only about the correctness of research methodology

considerations, but also emphasise that research is undertaken in an ethically defensible and accountable manner (Gray, 2014:68; Strydom, 2015:113). There needs to be cooperation, acceptance, kept promises, mutual trust, and well accepted expectations and convention between the involved parties in the research study. Research conventions or protocols derive from the understanding of ethics as a set of widely accepted moral principles, rules and behavioural protocols that guide proper conduct between researchers and their research subjects (Leedy & Ormrod, 2014:111; Strydom, 2015:114). The ethical guidelines to which the researcher adhered in this study are: protection from harm; informed consent; the right to privacy; honesty with professional colleagues; and approval to conduct the study. These are discussed below.

#### **1.15.1 Protection from harm**

Researchers are not to expose those participating in a study to unnecessary emotional, physical or psychological harm. Where there is potential risk of any harm, however negligible, researchers should openly disclose such to their participants. Therefore, the risk involved should not be greater than the normal risks of everyday living (UNISA, 2012:16). As applied in the study, participants were not subjected to any kind of harm. To this end, the researcher ensured that none of the interview questions encroached into the participants' personal lives such that they would even feel their job security was threatened by their involvement in the study. Moreover, the researcher emailed a participant information sheet to participants before the online interviews and face to face interviews and undertook to protect their human dignity.

#### **1.15.2 Informed consent**

When people are specifically recruited for research participation, they should be adequately informed and familiarised with the study and afforded the chance to decide whether or not to participate, without expecting any special incentives or rewards (Flick, 2016:126). The participants were fully informed about the purpose of the study and the use of the findings. The participants were also made aware of their right to withdraw from the research at any moment should they perceive any form of unfair treatment by the researcher. Following all the above-cited disclosures, the participants then duly signed a consent form to indicate that they were agreeable with participating

voluntarily in this study as autonomous beings, and that they fully understood the expected nature of their participation and the implications thereof.

### **1.15.3 Right to privacy**

This right is sacrosanct, and emblematic of the respect of the participants' human dignity (Bless, Higson-Smith & Sithole, 2015:28). None of the participants' personal information or identifiers was disclosed to any third parties; nor was any participant's contribution discussed with others during or after the interviews; except with the supervisor of this research. Also, no participant was to indicate or mention their names, both during the interviews and the reporting. Instead, they were mentioned by means of pseudonyms created by the researcher.

### **1.15.4 Honesty with professional colleagues**

Honesty with professional colleagues enhances the scientific worth and integrity of a research study (Babbie, 2010:67). Researchers should report their findings honestly, with no intention to mislead or misrepresent any aspect of their findings. Furthermore, researchers should not fabricate data to support their version of facts and conclusions, regardless of the plausibility of their own viewpoints as this would constitute professional/intellectual dishonesty or even scientific fraud (Babbie, 2010:67). The researcher ensured that the participant responses were interpreted correctly and confirmed/corroborated during prolonged engagements prior to the finalisation of the research report. The researcher further made sure that all the in-text sources of literature were duly acknowledged with complete bibliographic reference in the list of references as well.

### **1.15.5 Approval to conduct research**

The researcher studied and adhered to the University of South Africa's (UNISA's) research ethics policy as articulated in UNISA (2012:16). In addition to emphasising the need for the researcher's respect of the participants' human dignity, the policy also emphasises the need for researchers to obtain ethical clearance. Without such clearance or approval, there is no study. Therefore, approval to conduct research hinges on the official granting of permission to do so through the issuance of an ethical clearance certificate, after which the researcher wrote formal request letters to the

gatekeepers at the respective research sites. The approval letter from the Unisa Ethics Committee formally allows the researcher to undertake the research (see Annexure C).

The official letter of request to conduct the research with the selected cell phone network service provider's employees is attached as Annexure D. Similarly, the researcher's request letter to the National Prosecuting Authority is attached as Annexure E. These letters were the precursors to the researcher 'descending' on the research Johannesburg and Pretoria sites respectively to conduct his interviews. Annexure I contain the editor's letter and Annexure J has the turn-it-in-digital receipt.

The next section outlines the research structure in terms of the four chapters in this study. The sequence of chapters is most notable for its centralisation of criminal investigations and formatting of Section 205 subpoenas.

## **1.16 RESEARCH STRUCTURE**

A chapter layout depicts a comprehensive 'road map' of the study, which has been organised as indicated below:

### **CHAPTER 1: GENERAL ORIENTATION**

The chapter provides a general orientation to the various salient aspects entailed in the study. The different research variables addressed in this chapter are also discussed in the following chapters.

### **CHAPTER 2: CRIME INVESTIGATION**

The chapter encompasses the history, meaning and objectives of criminal investigation. This chapter includes a description of the evidence gathering process and the process of collecting cell phone records as an integral component of criminal investigation. Furthermore, the chapter expands on the concept of cell phone records as real, documentary and electronic or computer-generated evidence, and how such evidence should be presented in court uncontaminated. Lastly, the chapter also presents the use of cell phone records as evidence which may lead to identifying the perpetrator.



### **CHAPTER 3: THE FORMAT TO OBTAIN CELL PHONE RECORDS IN TERMS OF SECTION 205 SUBPOENA OF THE CRIMINAL PROCEDURE ACT (NO. 51 OF 1977)**

This chapter provides explanations of the cell phone and cell phone records, the legislative framework applicable to obtain cell phone records, the role players involved in obtaining cell phone records from network service providers, the format to obtain cell phone records, as well as an example of a Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977). The chapter also covers the value of the cell phone records obtained through a Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977).

### **CHAPTER 4: FINDINGS AND RECOMMENDATIONS**

The chapter discusses the findings and recommendations of the research, based on the interviews and supported by the reviewed literature. The chapter concludes the study with some remarks by the researcher.

## **CHAPTER TWO: CRIME INVESTIGATION**

### **2.1 INTRODUCTION**

Whereas the previous chapter provided a general overview of the study, the current chapter focuses entirely on crime investigation. Meanwhile, the current chapter is segmented into three focal areas for purposes of thematic coherence and logical integration. These interrelated focal areas are: a historical perspective, the nature and objectives of criminal investigations. In the case of this study, the United Kingdom (UK), United States of America (USA) and Republic of South Africa (RSA) are referred to, in order to detail the historical aspects and contexts of criminal investigation.

The fundamental aim of a criminal investigation is to gather relevant information pertaining to the commission of an unlawful act and subsequently apprehend the suspected perpetrator for his/ her ultimate prosecution and conviction (Becker & Dutelle, 2013:17). The range of committed crimes includes (but not limited to) armed robberies, murders, rapes, hijackings and burglaries. Every case has its own merits and requires its own investigative approaches and strategies (Orthmann & Hess, 2013:8). Is particularly for such reasons that the South African Police Service has institutionalised various methods, techniques and procedures to resolve different forms of crimes as part of its mandate to protect the lives and property of all citizens (SAPS, 2019:1).

Cellular phone tracing is another modern technique of investigating crime (Gogolin, 2013:55; Reiber, 2019:17). Using such a tracing technique, the investigator is able to obtain information about the suspected perpetrator's cell phone in order to prove his/ her guilty or innocence by establishing his/her whereabouts during the commission of the alleged offence. Mobile devices encompass cell phones, tablets, and smartphones (Gogolin, 2013:55). These devices have many common capabilities. However, smartphones are also capable of performing many computer-based functions. The lack of cell phone based investigative techniques is one of the fundamental reasons that suspects are discharged by courts based on lack of evidence (Reiber, 2019:17). Every cell phone leaves a traceable record through the particular cell phone's serial number and phone number on the network tower.

The crime scene is the first point of collecting evidence (Van Niekerk et al., 2015:24). Therefore, it is the investigating officer's duty to be adequately vested in the basics of criminal investigation, such as how to approach crime scenes, identify and collect evidence (Orthmann & Hess, 2013:170). It is in this regard that appropriate investigative measures should be taken into consideration when collecting evidence, more so in the event that third parties are involved.

Following the outlined structure of the chapter above, the below-mentioned section provides a historical perspective of criminal investigations, which is intended to contextualise the significantly momentous developments and trends relating to the practice of investigating crimes and resolving them systematically. The historical perspective is then followed by the nature and main purpose of criminal investigations respectively.

## **2.2 A HISTORICAL PERSPECTIVE OF CRIMINAL INVESTIGATIONS**

From both a historical viewpoint and literature analysis perspective, it is nearly impossible to determine and locate the actual origin of criminal investigations (Eterno, 2012:7; Lasley, Guskos & Seymour, 2014:4). However, the ages-old principle of 'an eye for an eye' implied that a person who has injured another should be penalised to a similar degree as the injured party (Anderson, Dodd & Roos, 2012:7). According to authors such as Brandl (2014:25), Lyman (2013:2), Osterburg and Ward (2014:14) and Swanson, Chamelin, Territo and Taylor (2012:3), the origins of criminal investigations is traceable to the activities of several private individuals and groups known as thief-takers, who offered their services to investigate and track down offenders for a fee.

Lasley et al. (2014:8), illuminate that there are three evolutionary and recognisable periods in criminal investigation, namely: the prescientific, the scientific and the technological period. The prescientific era is the first of the American criminal investigation period, and is characterised by the quest to gather information relating to the committed crime. On the other hand, the scientific era is delineated according to the application of three distinct methods: anthropometry, dactylography and deoxyribonucleic acid (DNA) investigations. The anthropometric method refers to the

study of human body measurements for use in anthropological classifications and comparisons (UKEssays, 2018:1). The dactylographic method is used for identification on account of impressions left on a surface of the curves formed along the fingertip ridges, especially when the impression is of ink (UKEssays, 2018:1).

Furthermore, dactylography is used to compare a suspect's fingerprints typically found at the scene of a crime. Meanwhile, the chemically-based deoxyribonucleic acid (DNA) method of investigation is virtually a "blueprint", and determines almost everything from hair colour to a person's susceptibility to diseases (UKEssays, 2018:1). Initially, the process of isolating and reading such genetically derived factors was known as "DNA fingerprinting". However, "DNA typing" is the current term used for this practice.

Based on its scientific advancement, forensic scientists and investigators are able to use the DNA technique in blood, semen, skin, saliva or hair found at a crime scene in order to match the DNA of an individual, such as the perpetrator of a crime (Osterburg & Ward, 2012:112). The process is known as genetic fingerprinting or DNA profiling (UKEssays, 2018:1). Following both the prescientific and scientific epochs, the technological period premises largely on the application of sophisticated high-tech innovations such as automated fingerprint databases for ballistics evidence and DNA profiles, among others (Daniel & Daniel, 2012:232; Osterburg & Ward, 2014:18).

In 1811 Eugene Vidocq (a thief-taker credited as the world's first detective) took the criminal investigation method to new heights when he was hired by La Surete (the investigative branch of the municipal police force of Paris). Vidocq was noted for his use of disguises to conduct undercover investigation assignments (Orthmann & Hess, 2013:6; Osterburg & Ward, 2014:15).

Other notable pioneering scientific contributions to the field of investigation include Bertillon's 1833 method of criminal identification by measurements (Lasley et al., 2014:6; Lochner, 2014:7). The latter authors intimate further that the fingerprint identification technique (used as far back as 700 AD in China) was subsequently overshadowed in 1840 by French toxicologist, Mathieu Orfila's testimony as a forensic expert in a suspected case of murder by poisoning. It was Orfila's toxicologist testimony that pioneered the application of scientific principles and procedures as

established investigative tools. Dutelle (2017:8) and Lasley et al. (2014:4), posit that fictional accounts of detectives in early novels played a key role in defining the public's image of the detective. Most important among such fictional accounts was the portrayal of the detective pair of Sherlock Holmes and Dr Watson by the internationally acclaimed author, Sir Arthur Conan Doyle in his equally renowned 1887 novel: *A Study in Scarlet*. In that novel, the author (Sir Doyle) introduced the idea of deductive logic as a tool used by detectives to solve cases. Galton's 1892 method of fingerprint classification also added towards the development of the scientific method of crime investigation (Dutelle & Becker, 2019:8; Swanson et al., 2012:9).

In 1910, Edmond Locard (a Frenchman) founded the first forensic laboratory in Lyon based on his exchange principles, which uphold the transferability of material when perpetrators come into contact with the crime scene (Arnes, 2018:2; Bila, 2018:327; Dutelle 2017:8). Such forensic means of investigation compel that the investigator should look for possible perpetrator identifiers such as missing items, blood, as well as foot-prints, which serve as a suspect's point of exit from the scene of the crime (Dutelle & Becker, 2019:9; Lasley et al., 2014:86; Van Graan & Budhram, 2015:44).

The discussion so far has focused on a more general historical context of criminal investigations. Following below is a discussion on the history of criminal investigation in respect to the United Kingdom (UK), the United States of America (USA), and the Republic of South Africa (RSA).

### **2.2.1 The United Kingdom perspective**

According to Becker (2013:5), Dutelle and Becker (2019:3), Lyman (2013:2), Newburn (2012:47) and Osterburg and Ward (2014:14), the notion of criminal investigations in the UK emerged towards the end of the 13<sup>th</sup> century. King Edward accordingly introduced a system of justices of the peace and parish constables, which was used in England and the United States until 1829. This inefficient system helped to maintain some order among the class-based agrarian communities of this era. The efficiency was induced by the orientation towards conflict resolution as largely the result of a defence-oriented tradition, than a law enforcement-oriented approach (Becker, 2009:19).

In 1748, Henry Fielding and his half-brother, Sir John Fielding organised the first group of thief-takers (who offered their services to investigate and track down offenders for a fee), the Bow Street Runners in London. In 1829, the British Parliament passed the first Metropolitan Police Act with the effort of Sir Robert Peel (Archbold, 2013:3; Dutelle, 2017:7; Eterno, 2012:8; Lyman, 2013:3; Osterburg & Ward, 2014:14). The Act established a London metropolitan police force, whose headquarters became known as “Scotland Yard” because the building they occupied had formerly housed the royals of Scotland. It is in this regard that police constables were referred to as “Bobbies”, a play based on Sir Peel’s first name. The “Bobbies” proved to be very successful in reducing the crime rate. Sir Peel was also responsible for defining ethical requirements of policing officers through what became known as “Peelian Principles” (Dutelle & Becker, 2019:4).

### **2.2.2 The United States perspective**

Archbold (2013:94) and Lasley et al. (2014:8), explain that the first investigative agency was the United States Marshals Service, formed in 1789 by President George Washington as a federal institution. Later, the Texas Rangers (established in 1835), became the first State police force to incorporate criminal investigation in its operations (Dutelle, 2017:8; Eterno, 2012:11; Lyman, 2013:3; Monckton-Smith, Adams, Hart & Webb, 2013:19). In 1849, Allan Pinkerton was appointed as Chicago’s first detective. After his term as a Chicago crime detective, Allan Pinkerton established his own private detective agency in 1850, the Pinkerton Detective Agency (later known as the National Detective Agency) to provide private policing services for railroad properties and other business enterprises (Brandl, 2014:30; Eterno, 2012:11). Allan later registered the ‘Pinkerton’s’ trade-mark with an open eye above the slogan: “*We never sleep*”. This trade-mark has given rise to the colloquial use of “private eye” to refer to any private investigator (Orthmann & Hess, 2013:7; Palmiotto, 2013:3; Swanson et al., 2012:4). The National Detective Agency was later adopted by the Federal Bureau of Investigation (FBI) (Lyman, 2013:3; Swanson et al., 2012:4).

The establishment of the Federal Bureau of Investigation in 1924 was probably the single most significant and most recognisable development in criminal investigation in the United States (Eterno, 2012:13; Lyman, 2013:4). The FBI began as the Justice

Department's Bureau of Investigation in 1907, which then had few responsibilities. The Bureau attracted significant attention and new federal laws were passed to govern interstate transportation of stolen automobiles. However, the incipient mission of the FBI and John Edgar Hoover, its first director was to eliminate corruption and extricate the agency out of politics (Archbold, 2013:34; Osterburg & Ward, 2014:17; Swanson et al., 2012:8). To achieve this strategic objective, Hoover raised the qualification requirements of investigation personnel, to the point where the FBI is one of many federal investigative agencies that have significantly contributed towards the professionalisation of the field of criminal investigation (Lyman, 2013:4).

In terms of State-based policing, the Detective Bureau of the New York City Police Department (NYPD) is today' the largest municipal police investigative force in the United States (Lasley et al., 2014:8). At the same time, the Pinkerton National Detective Agency is also one of the largest private investigative agencies in the world. At the federal level, there are over 60 investigative agencies, the largest of which are the Federal Bureau of Investigation, the Central intelligence Agency (CIA) and the US Customs and Border Protection (CBP) agency. In 2002, the Department of Homeland Security was established and became the largest investigative organisation in the United States (Archbold, 2013:92; Lasley et al., 2014:16; Swanson et al., 2012:8).

### **2.2.3 The Republic of South Africa perspective**

For purposes of this study, the historical context of policing in general and crime investigation in particular, is 'divisible' into the era of apartheid (pre-democratic) and the post-apartheid (democratic) eras. During the apartheid (pre-1994) period, policing was critically instrumental in enforcing the ideology of white supremacy and racial discrimination, which was the ideology of the ruling National Party (1948-1994) (Minnaar, 2010:189; Potgieter, Wiatrowski & Roelofse, 2016:47).

According to Lebeya (2018:259), Mofokeng (2018:340) and Vuma (2011:27), the oldest division of crime investigation in South Africa was named the Criminal Investigation Department (CID), which was demarcated according to the following criminal offences: diamond dealing; drug running; drinking and gambling; commercial offences; internal security; house-breaking and theft; and murder and robbery. On 1 April 1991, the Crime Combating and Investigation Division (CCID) was established

after merging the security branch and the detective service with the intention to reduce crime (Mofokeng, 2018:351).

Both Mofokeng (2018:345) and Vuma (2011:27) add further that the fingerprint office had been previously established in Pietermaritzburg in 1900 in order to bolster crime investigation initiatives. Thereafter, several fingerprint offices emerged, which necessitated creation of the South African Criminal Bureau (SACB), an institution that employed handwriting, firearms, fingerprints, photography, and medical experts to help in the investigation of crime (Mofokeng, 2018:345; Vuma, 2011:27). In 1954, the SACB developed its own fingerprint lifting chemical compound (1,8-Diazafluoren-9-one DFO), the first to be used in colour photography for police purposes globally (Mofokeng, 2018:245). The technique subsequently enabled the SACB to document and record all convicted criminals in the country. Table 2.1 below demonstrates the various chemical compounds (powders) used in the fingerprint lifting technique.

**Table 2.1: Types of fingerprint powders**

Type of Powder	Composition	USAGE
<b>Aluminium Powder</b>	Gold powder	General dusting on: Glass, metallic surfaces, highly varnished wooden surfaces, enamelled articles. Not suitable for wet, very rough or dirty surfaces.
<b>Black Powder</b>	Black powder	Used on non-porous light-coloured surfaces. White backing cards should be used to provide a sharp contrast with the resulting black ridge detail. Suitable for general use and noted for its black hue.
<b>Gold Powder</b>	Gold coloured	Offers good photographic contrast on light surfaces and very good contrast on dark objects. Suitable for leather, plastic bags, aluminium surfaces etc
<b>White Powder</b>	White	Used for the greatest contrast with a dark coloured surface or background. Suitable for relatively clean smooth surfaces where a light contrast is required.
<b>Magnetic Black Powder</b>	Black with granular powder	Typically used on non-porous, light-coloured surfaces.



Type of Powder	Composition	USAGE
	containing pigment, metals and metal oxides	<p>White backing cards should be used to provide a sharp contrast.</p> <p>Can be used on numerous surfaces including glossy paper, polished wood, leather, plastic, glass and rubber.</p> <p>The powder may be used on plastic surfaces that have been treated previously with superglue fuming.</p>
<b>Magnetic Silver Powder</b>	Same as Magnetic Black Powder except the pigments, metals and metal oxides used in its formulations are of course lighter	This powder is generally more effective on rough, grained or porous surfaces whereby a good colour contrast is required.
<b>Fluorescent Powder</b>	Yellow, Pink, Red, Green	<p>Used in conjunction with an alternative light source (i.e. lasers and low powered ultraviolet lamps).</p> <p>Allows the visualisation of latent prints that may be undetected when using conventional processes.</p> <p>Suitable for either rough or contaminated surfaces</p> <p>Also suitable for multi coloured surfaces.</p> <p>Easily applied with either a soft brush these powders fluoresces at slightly different wave lengths problematic backgrounds.</p>
<b>Magnetic Fluorescent Powder</b>	Red, Green	<p>Similar to granular fluorescent powders.</p> <p>Applied with a magnetic applicator and choice between Red and Green is dependent on the surface to be examined.</p> <p>Red magnetic fluoresces strongly when viewed under wavelengths of light ranging from 450nm to 570nm.</p> <p>For use on plastic bags, glass and other smooth surfaces.</p>

Type of Powder	Composition	USAGE
		May also be used after articles have received superglue treatment.

(Source: <https://www.forensictools.co.za/fingerprint-powders>)

Following the demise of apartheid in 1994, the South African Police Service (SAPS) became the constitutionally and legally mandated law enforcement agency responsible for preventing, detecting and investigating crime in South Africa (Karels, 2014:24; Mofokeng, 2018:340; Montesh, 2007:41). Notwithstanding that there are different SAPS units, the public still classify the police by their duties; for instance, the detective and uniform branches. The detectives are also referred to as investigators whose core function is to investigate crime, gather information for evidence purposes, and present such evidence for prosecution. These investigators are attached to detectives or investigation units that are under the control of a detective commander or unit commander as their team leader.

Section 205(3) of the Constitution of the Republic of South Africa (Act No. 108 of 1996) directs the police service's duties as preventing, combating and investigating crime, which is fundamentally a call to maintain the rule of law, and to protect and secure the property and lives of citizens of the Republic and their property (South Africa, 1996:115). It is in the current post-apartheid era that South African policing has metamorphosed from a "force" (with militaristic connotations) to a "service" (with a human rights orientation) (Ndletyana & Maimela, 2015:32; Potgieter, 2013:150). During the apartheid era, the law enforcement agency was known as the South African Police Force (SAPF), later replaced by the South African Police Service. Additional to the constitutional mandate of preventing, combating, and investigating crime, the South African Police Service Act (No. 68 of 1995) prescribes further that the SAPS should be properly established, organised, regulated, and controlled in all matters providing for its existence and functioning (Ndletyana & Maimela, 2015:32).

The SAPS established the Directorate for Priority Crime Investigation (DPCI, also known as Hawks) on 6 July 2009 as an independent directorate in pursuance of Section 17C of the South African Police Service Act (No.68 of 1995) as amended by

the “South African Police Service Amendment Act (No. 57 of 2008)” (SAPS, 2020:1). The DPCI is tasked with combating, investigating and preventing serious priority crimes nationally, including organised crime as well as serious corruption and commercial crimes in respect of Section 17B and 17D of the “South African Police Service Act, 1995 as amended” (SAPS, 2020:1).

For purposes of checks and balances, the Independent Police Investigative Directorate (IPID) was established in April 1997 in terms of the IPID Act (No. 1 of 2011) as an independent unit responsible for monitoring of the quality and integrity of services delivered by the police in terms of their mandate (Burger, 2015:12; Lebeya, 2018:273; Motsepe, 2019:5). In this regard, IPID is then charged principally with, among other duties, with the promotion of transparent and accountable policing, which involves the investigation of criminal offences and matters that relate directly to systematic corruption by SAPS and MPS members (IPID, 2014:5-6).

Having discussed the historical context of criminal investigation, the next section presents and discusses the nature of criminal investigation. In this regard, the fundamental purposes of criminal investigation are highlighted, given the study’s core focus on cell phone records as a critical aspect of investigating committed crimes.

### **2.3 NATURE OF CRIMINAL INVESTIGATIONS**

The commission of crime (a legally forbidden deed) necessitates that concomitant measures (i.e. systematic process) should be adopted and undertaken in search for the truth about the circumstances of the specific crime (Benson et al., 2015:19; Bila, 2018:322; Lochner, Horne & Zinn, 2020:40). The search (investigation) entails the collection of evidence by means of embedded scientific principles. Such systematic investigation enables the reconstruction of past events intended to trace the perpetrator of the crime and to obtain the truth about the committed crime itself (Hess & Hess, 2013:8; Lochner, 2014:4). Criminal investigation, then, translates into a methodically conducted system for the discovery, collection, analysis and presentation of credible evidence on whose account the courts could make irrefutable determinations concerning an offence and its doer. Therefore, the primary objective of crime investigation (detailed in Section 2.4) is to systematically reconstruct past or

occurred criminal events in order to obtain evidence that is reliable and relevant in the establishment of a truthful account of the committed crime (Hess, Orthmann & LaDue, 2016:8; Piper, 2014:9).

For participants in both Samples A and B, the question was posed: “How would you describe criminal investigation?” This was an open-ended question, and participants were free to respond based on their own ideas. They were not provided with any options from which to select plausible answers. Some of the participants submitted multiple responses, which are reflected thus:

- Five participants mentioned that criminal investigation includes interviewing, interrogating, and evidence collection and preservation.
- Four participants described criminal investigation as systematically searching for the truth.
- Three participants stated that it is finding out whether a crime has been committed or not.
- Two participants submitted that criminal investigation consists of facts gathered to inform criminal trials.
- One participant mentioned that criminal investigation is the interviewing of suspects and witnesses.
- One participant indicate that criminal investigation is premised on determining who is the victim and the perpetrator.
- One participant replied that criminal investigation entails proving that a person was involved in a crime.
- One participant explained that criminal investigation gets the mind to work.

The participants, according to the researcher, have a relatively fair understanding of what a criminal investigation entails. This question was generally well answered. The responses of the participants are supported by Houck and Siegel (2010:581), who explain that criminal investigation entails the discovery of persons responsible for committing the offence. In the event of a suspect being arrested for the crime, criminal investigation would have assisted in searching for evidence that could assist in the conviction or exonerating that suspect.

One participant (Participant A8) indicated that a criminal investigation “gets the mind to work”, to which the researcher agrees, based on the fact that investigating a crime does stretch the mind; especially to the crime investigators in a sense that they need to understand the processes and evidence that will be required for investigation and continuously think about the process and its outcome. Notwithstanding that the participant did not accurately answer the question relating to a criminal investigation, this response does not entirely match the definition of a criminal investigation.

The following are the Sample “B” participants’ responses:

- Three participants mentioned that criminal investigation entails the gathering of evidence.
- Two participants indicated that criminal investigation entails identification of the perpetrator.
- Two participants submit that criminal investigation entails reconstruction of the past in searching for the truth.
- One participant intimated that such investigation serves to secure a conviction.
- One participant submitted that it entails establishment of whether a crime was committed or not.
- One participant stated that it entails the linking of the accused persons to the offence, alternatively, clearing such a person of any accusation.
- One participant mentioned that it serves to ensure that criminal elements do exist in an offence.
- One participant described criminal investigation as the official effort to uncover information about the crime.

Evidently, the above excerpts indicate the participants’ understanding of criminal investigation is not monolithic. Each has his/her own version of the concept. Notwithstanding these varied responses and understanding, there are still constituent elements of the definition that cohere with the definition provided by Hess and Hess (2013:8), who assert that a criminal investigation entails the collection of relevant information and facts identifying the suspect, and presenting credible evidence in court.

According to the researcher, reasons attributable to such disparate conceptualisation could be linked to their lack a common definition from a practical standpoint. However, their definitions are not far from the conventionally known as articulated by Hess and Hess (2013:8). The researcher asserts that the participants' perspectives almost confused the definition of criminal investigation with objectives, which are explained in Section 2.4.

### **2.3.1 Reconstruction of occurred/past criminal events**

The reconstruction of past or occurred crime-related events is a critical phase of investigation (Gilbert, 2010:81; Saferstein, 2013:122). In their examination of the concept of crime investigation, Bertino (2012:29), Brown and Davenport (2012:370) articulate reconstruction as the methodical reproduction of the behaviours and actions of the particular instances of a crime. Based on systematic examination process, as well as interpreting the objective and subjective evidence left behind on the crime scene by the perpetrator and analysing the actions of the perpetrator at the particular crime scene. Such reconstruction (of the crime scene) enables the investigators to obtain both the objective and subjective forms of evidence, which will help to answer questions relating to the who, what, when, why, where and how it happened of a committed crime (Bila, 2018:322; Ogle & Plotkin, 2018:4). Lochner et al. (2012:50), ascertained that the cell phone record's information is an example of usable tangible evidence in the reconstruction of past events.

Furthermore, Casey (2011:16) asserts that the crime investigation project is assisted by traces that suspected offenders leave at a crime scene. Therefore, these traces should be collected and investigated in an effort to reconstruct possible past events related to the crime. However, Casey (2011:16) does not explain the type of traces sought (i.e. objective and subjective evidence).

### **2.3.2 Systematic process**

Investigation of crime is fundamentally a methodically conducted, intended to discover, collect, prepare, identify and present objective and subjective evidence so as to determine a truthful account of the committed crime and its perpetrator (Bila, 2018:322; Brandl, 2014:4; Hess & Orthmann, 2010:6). The elaborately explained latter definition implies that investigating crime should be undertaken intentionally and

logically (Benson et al., 2015:9; Bila, 2018:323; Hess & Orthmann, 2010:6). Accordingly, a systematic investigation or action plan provides the blueprint for any criminal investigation. However, the researcher concurs with the view that the goal of systematisation is to ultimately identify the suspect. Lochner (2016:43) contends further that planning is a significant component of a systematic crime investigation process.

### **2.3.3 Establishing a truthful account**

The truth does not only prove the guilt of the offender, but also indicates the offender's innocence. However, truth alone cannot always be relied on as the absolute determinant of what has transpired already (Dutelle, 2017:4; Gardner, 2012:3; Monckton-Smith et al., 2013:2). As such, establishing a truthful account also requires a person to testify by producing objective and subjective evidence during testimony. Brandl (2014:4) elevates the importance of the investigator's understanding of the objectives of what constitutes the objectives of undertaking a criminal investigation, because the objectives themselves direct the planning and execution of the criminal investigation. These objectives are elaborated in the following Section 2.4.

## **2.4 OBJECTIVES OF CRIMINAL INVESTIGATION**

The objective of a criminal investigation necessarily describes the purpose of the fact-finding initiative which benchmarks the progress of the investigator while also providing a framework for the investigator to coordinate and build on the investigation (Ferraro, 2012:77). According to authors such as Benson et al. (2015:13), Bila (2018:324), Brandl (2014:4), Dutelle (2011:6), Dutelle and Becker (2019:17), Lochner et al. (2020:42-43), Mofokeng (2018:349), Orthmann and Hess (2013:11) and Osterburg and Ward (2010:5), the objectives of a criminal investigation are: collection of objective and subjective facts concerning an alleged offence; the discovery and affirmation of facts; testifying and providing assistance in presenting such legally obtained objective and subjective evidence.

To gain an understanding of the participants viewpoint on the objectives of criminal investigation, the Sample "A" participants were asked the question: "What does the objectives of criminal investigation entail?" This was an open-ended question, which

allowed participants' free response according to their own thoughts and ideas. No options were provided for this question. Some of the participants submitted multiple responses which included the following:

- Seven participants mentioned that the objective of a criminal investigation is to determine if crime was committed.
- Four participants submitted that is to gather evidence.
- Four participants mentioned that it is to identify the perpetrator.
- Four participants indicated that it is to involve the prosecuting team.
- Three participants stated that it is to arrest the perpetrator.
- Three participants averred that it is to ensure conviction.
- One participant replied that it is to bring justice to the victim.
- One participant mentioned that it is to recover stolen properties.

From the accumulated literature reviewed by the researcher, criminal investigation entails detecting the crime; locating and identifying who are possibly responsible for such crime, collecting and processing the subjective and objective evidence; arresting the offenders; recovering property or proceeds of the crime; bring the offenders to court; and securing a conviction (Becker & Dutelle, 2013:17; Osterburg & Ward, 2010:8; Stelfox, 2013:2). The nine participants' responses in Sample "A" mostly cohere with descriptions in literature (Bila, 2018:324; Dutelle & Becker, 2019:17; Lochner et al., 2020:42-43) and documents. From the viewpoint of the researcher, it could be concluded that the participants' understanding relating to the objectives of investigation was reasonably articulated. In this regard, their common or shared understanding of criminal investigation objectives entailed that such investigation shouldn't necessarily determine whether or not the crime itself was committed; gathering of evidence; identifying the perpetrator, involving the prosecuting team, arresting the perpetrator; ensuring conviction; bringing justice to the victim; and recovering any property stolen. Therefore, it could be reasonably concluded that their understanding of the objectives of criminal investigation cohere with the perspectives by Becker and Dutelle (2013:17), Osterburg and Ward (2010:8), and Stelfox (2013:2).

For purposes of addressing the aim, the research objectives and the research questions in the current study, only the following objectives of criminal investigation



are deemed relevant: determining whether or not crime was committed, involvement in the prosecuting process, arrest of the criminals, gathering of evidence and identification of the perpetrator. These particular objectives are discussed in varying degrees of detail in the various sections of the entire study.

#### **2.4.1 Determination of actual commission of crime**

The first objective of crime investigation is to determine whether or not a crime was committed, subsequent to which the police should be alerted/ informed so that they begin to actuate the sequence of investigation events (Lochner et al., 2020:42; Siegel, Saukko & Houck, 2013:13). The sequence of investigation events necessitate that an investigator must have knowledge about all the elements and circumstances of the crime, in order to determine the nature and type of the committed crime. The incorrect identification of a committed crime could potentially steer the investigation in the opposite or unintended direction. The elements of a committed crime are accomplished by collecting all the relevant objective and subjective evidence specific to a relevant crime (Gilbert, 2010:52; Osterburg & Ward, 2010:6; Palmiotto, 2013:4).

#### **2.4.2 Involvement in the prosecution process**

According to Brandl (2014:466), Fisher and Fisher (2012:379) and Palmiotto (2012:7), one of the criminal investigation objectives is the involvement of the investigator in the prosecution process. For Lochner et al. (2020:43), it is important that investigators should understand their respective roles in the prosecutorial process. Notwithstanding that the duties and responsibilities of investigators are often neglected, their involvement/participation in the investigation should be comprehensive and unambiguously understood in the context of the case docket, and clarification of reasons for the investigators' involvement in the investigation and prosecution process (Lochner et al., 2020:43).

Empirical evidence indicates that prosecutors prefer that investigators should at all times keep contact with the prosecutor to assist with preparation for the trial, and even be present at the very trial from commencement to sentencing of the perpetrator (Lochner, 2014:10). In this regard, the investigator serves as the right-hand man of the prosecutor, who is also entitled to control or direct the investigation with specific instructions (Mokoena, Karels, Basdeo & Swanepoel, 2012:17; Yordanova, Markov &

Ilcheva, 2012:7). The above-cited authors mention that the investigating officer primarily collects the objective and subjective evidence, while the prosecutors present evidence. Mutual respect for each other's responsibilities and duties within the criminal justice ensures positive outcomes of the case. From the researcher's practical experience, it is common cause that the investigating officer should present a case docket to the prosecutor and testify during the court process if required. Following is a discussion of two aspects of the case, namely: case docket and testimony.

#### **2.4.2.1 Case docket**

Benson et al. (2015:32) and Lochner et al. (2020:187), indicate that a case docket is a very important and formal management tool (file) used by the SAPS to facilitate, document and conduct the investigation process. Meanwhile, Hess and Orthmann (2010:26) and Shameem and Tuiketui (2012:1) allude that a properly and comprehensively investigated case docket should be presented to the prosecutor, and that the investigator should testify if mandated to do so. The researcher upholds that the case docket is a crime information product for criminal investigators, and demonstrates the investigators' involvement in the investigation in detail. In the SAPS, the case docket is the official dossier (Van Niekerk et al., 2015:212). The dossier consists of six pages divided into clips that are distinguishable by different clip letters, from A, B and C as follows:

- Clip A is used to permanently record the objective and subjective evidence;
- Clip B is used for different correspondence related to the crime; and
- Clip C is reserved for the progress of the investigation. Furthermore, based on the number of years in the police service and experience, the researcher knows that the cell phone record is filed under clip A.

#### **2.4.2.2 Testimony**

Lochner et al. (2020:191), emphatically call for the investigator's active involvement in the prosecutorial process. They aver that investigators have an official interest in their investigated cases, and ought to give oral evidence in such matters. In their testimony, the investigators should particularly focus on how objective and subjective evidence related to the case was identified, marked, documented, collected and preserved

(Lochner et al., 2020:191). Additionally, the investigators' testimony is expected to also elaborate on the arrest of the suspect. With regards to the cell phone records of the perpetrator, the investigator will testify on the legal process followed to obtain such records (Lochner, 2016:56).

### **2.4.3 Arrest of the criminals**

The arrest of a criminal or suspect is the most fundamental principle to any investigation, and constitutes an important objective in criminal investigations as well (Osterburg & Ward, 2010:8; Van der Watt, 2015:175). However, in the event of a suspect being apprehended on the scene of the crime, great caution should be expended, such that no evidence is contaminated, considering that arrest constitutes a serious form of action by the police and has far-reaching implications (Joubert, 2018:285; Lochner et al., 2020:43). The latter authors suggest that it is preferable that alternative measures of arrest should be resorted to, especially when less serious or minor offences have occurred to believe that a perpetrator will attempt to evade justice and not stand trial. In terms of Section 38 of the Criminal Procedure Act (No. 51 of 1977), a person who is accused would also be summonsed through a written warning and be caused to appear in court. Anon (2017:2), Lyman (2011:15) and Orthmann and Hess (2013:11) emphasise that when all the relevant information has been sufficiently collected and the suspect identified, it then becomes the investigator's responsibility to bring the suspect before the court of law to account for his/ her role in the alleged offence.

Furthermore, when the suspect is arrested, investigators should ensure that such a person is notified of his/her constitutional rights. For instance, that s/he is entitled to be silent in order to prevent self-incrimination. Arrested persons should also be escorted to a police station where they will be detained until their appearance in a lower court within a period of 48 hours following their arrest (Van Niekerk et al., 2015:241). In addition, the investigator must ensure confiscation of the evidence, label and handle all the physical evidence that was found in the possession of the suspect. Such a process ensures continuity of possession.

#### **2.4.4 Gathering of evidence**

The term 'crime scene' describes any physical location or place where a materially considerable activity of the crime took place, and where objective and subjective evidence is found (Mofokeng, 2018:377; Stelfox, 2013:126; Van der Watt, 2015:162). On the other hand, Lochner and Zinn (2015:32) and Watkins, Anderson and Rondinelli (2013:114) extend the definition of a crime scene to include not only the occurrence itself, but the planning thereof as well. According to Lochner et al. (2012:50), the details of a cell phone record can be viewed as physical evidence; therefore, helpful in reconstructing previous occurrences attendant to the committed crime.

When cell phone investigations are conducted, signal mapping can be used as evidence. From a cell phone investigation viewpoint, Lochner and Zinn (2014:163), Lochner et al. (2012:76), and Schmitz and Cooper (2015:330) contend that cell phone signals generated on the crime scene is invisible. However, the data or evidence regarding the activation and use of the network is registered and stored on the network company's electronic database. The latter authors further suggest that the investigator is responsible for gathering this evidence from the network company as provided in Section 205 of the Criminal Procedure Act (No. 51 of 1977).

##### **2.4.4.1 Evidence collection**

Bowen (2010:58) and Van Niekerk et al. (2015:24), intimate that the collection of evidence begins at the crime scene. Gilbert (2010:52) illuminates on two different and very important forms of evidence: inculpatory and exculpatory evidence. Exculpatory evidence is characterised by its orientation to exonerating or clearing a person of blame or legal guilt, while inculpatory evidence premises on incrimination as it tends to establish guilt.

According to Birzer and Roberson (2011:91), the collection of evidence differs according to the specific nature of the evidence as it is recovered. To this effect, investigators need to be optimally alert for physical and non-physical evidence relevant to the crime scene. In the context of cell phone records, the proof of the signal or activity is found in the cell phone service provider's electronic database that is usually stored at a remote location (Lochner & Zinn, 2014:160; Sandvik, 2018:199).

The investigator is tasked with finding the evidence at the crime scene, while the scientists process and analyse the evidence found by the investigator (Lochner & Zinn, 2015:8; Orthmann & Hess, 2013:11; Zinn & Dintwe, 2015:445). Based on their experience and training, investigators are fully conscious of the evidential value of what they are looking for. For the investigator to locate cell phones signal, message or data generated on a scene or during the commission of a crime, a request has to be made with the service provider in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977) to obtain the cell phone records. The collection of cell phone evidence is discussed in more detail below.

#### **2.4.4.2 Collection of cell phone evidence**

Whenever they are used, cell phones drop a trail by sending a registration message, which includes the serial and phone numbers at the cellular tower that services the larger area where the cell phone was switched on (Lochner & Zinn, 2014:171; Lochner et al., 2012:150). The registration message makes it possible for cell phone information to be traced back to the crime scene, whether or not the handset is used. The important part of the cell phone is for it to be switched on for the traceability of the information and evidence stored in it. The Lochner principle (also known as Trademark 2006/00362 and 2006/00367), registered in terms of Section 29 (2) of the Trademarks Act (No. 194 of 1993) has made significant contributions to technology assisted evidence gathering. This principle entails that: “in order to reveal invisible technological traces left at a crime scene by mapping them through telecommunication techniques, and to render, on a scientific and technological basis, a technological service to examine a crime scene, with the aim of making the invisible trace visible” (Lochner & Zinn, 2014:171).

The network service provider’s computerised database operates through mapping and computer programmes immediately receiving data or communication through the recorded signal on the computer database. The recorded signal is then subsequently analysed and presented in visible format as submissible documentary evidence. It is worth noting that, in order for the investigator to obtain cell phone evidence from the network service provider, a Section 205 subpoena is first required in terms of the Criminal Procedure Act (No. 51 of 1977). The subpoena should then be served on the

cell phone network service provider, who should then properly analyse the requested cell phone records for precise identification and linking the perpetrator to the scene of the crime (Hunter, 2020:15 and Van Niekerk et al., 2015:214).

The Sample B participants were asked the following open-ended question: "What aspects do you regard as important during the gathering of cell phone record evidence?" Similar to the previous questions posed to them, the question which allowed participants to respond freely and according to their own thoughts. They were not provided with any options from which to select possible answers or responses. Some of the participants submitted multiple responses below:

- Three participants indicated that the chain of custody was important.
- Two participants submitted that the cell phone number in question was important.
- Two participants mentioned that the incoming and outgoing calls were important.
- Two participants explained that the towers involved in transmitting signals in a particular area location were significant.
- Two participants mentioned that cell phone records were significant.
- One participant intimated that the RICA information was of significance.
- One participant submitted that the general packet radio service was important in examining the website visited by the user.
- One participant responded that it was significant to follow the proper procedure as provided in the Criminal Procedure Act.

Even though the responses of the participants differed slightly from the literature (Hunter, 2020:15; Lochner et al., 2012:150; Lochner & Zinn, 2014:171) and documents analysed by the researcher, the participants' perspectives show that they had a reasonable understanding regarding aspects considered relevant to the gathering of cell phone record evidence. Therefore, their comprehension was not significantly different from that found in the conventional literature.

There were similarities in the participants' responses with perspectives from the reviewed insofar as they are related to RICA information, cell phone number in question, maintaining the chain of custody, record of incoming and outgoing calls, and the tower involved for the area location. Hunter (2020:15) submit that the subpoena

may simply be for the Rica details, suspect cell phone number or handset IMEI number, and area location. The researcher is convinced that the opinions expressed by the participants were mostly similar to those found in the literature in relation to Section 205 of the Criminal Procedure (Act No. 51 of 1977).

#### **2.4.4.3 Handling of evidence**

Van Rooyen (2018:193) asserts that evidence is the information that is presented in court to either support or dispute a version of the crime committed. Gardner and Krouskup (2019:6); Rodivich (2012:81) and Van Rooyen (2012:17) view evidence as anything other than mere information submitted to court that proves or disproves a fact in question. The presiding court officer has to consider the value of the evidence before he/she decides whether the accused person is guilty or not. From a crime investigation viewpoint, Shaler (2012:20) makes a connection between evidence, the crime, and the victim or the scene of the crime, in terms of which evidence is related to objects that could be used in establishing that a particular crime was committed; or could provide a connection between a victim in the crime itself.

Watkins et al. (2013:4), submit that from a judicial perspective, the term 'evidence', is synonymous with proof, and relates to the information presented before the court by the prosecution and the defence. On the other hand, Lochner and Zinn (2015:38) and Van Rooyen (2018:187) allude to various forms of evidence, namely: circumstantial, oral, physical, documentary evidence and computer and electronic evidence.

Participants in both samples A and B were asked the following question: "Based on your experience, how would you describe 'evidence'?" Which was an open-ended question and intended to facilitate the participant's own thoughts and ideas. They were not provided any option from which to select plausible responses. The Sample "A" participants answered as follows:

- Three participants mentioned that evidence relates to anything that can be used to prove or disprove the facts of an issue.
- One participant premised his response on the fact that evidence relates to information gathered through the investigation that determines whether the allegations are true or not.

- One participant mentioned that evidence is anything that one hears or sees, and is usable in a court of law to prove something correct or otherwise.
- One participant mentioned that evidence relates to any type of information or object that could assist investigators in determining what happened during an incident of crime.
- One participant submitted that in the case of cell phone records, evidence should be obtained legally.
- One participant intimated that for cell phone records, evidence would be the proof of the authenticity of the information gathered.
- One participant indicated that evidence relates to the facts of the crime.
- One participant submitted that evidence may include the testimony of witnesses, records, documents, or objects.

The Sample “B” participants responded thus:

- Four participants mentioned that evidence is information gathered to prove or disprove the facts of an issue.
- One participant submitted that evidence is something that one can draw inferences from.
- One participant mooted that it is a link of a suspect to the particular offence.
- One participant mentioned that evidence is information that proves or corroborates that a crime took place.
- One participant averred that evidence is information that is presented by the prosecutor or the defence in court.

The responses by the majority of the participants cohere with conventional perspectives in the literature (Gardner & Krouskup, 2019:6; Rodivich, 2012:81; Van Rooyen, 2012:17). These authors’ perspectives describe evidence as information that can be used to verify or disprove the facts at hand. From the literature study, documentary sources, interviews and personal experience of the researcher, it is clear that evidence is ultimately destined for a court trial. Therefore, the researcher reasonably concludes that enough evidence has to be presented in order to prove all elements of a crime, as well as connect the perpetrator to the offence, which would help in ensuring a successful conviction. These viewpoints are corroborated by



Bennett and Hess (2012:238) and Gilbert (2010:33), who contend that evidence also entails verbal and written statements of witnesses, documents and objects presented for inspection or examination by the courts. The next section presents the nexus between real, documentary, electronic or computer-generated evidence, court evidence, contamination of evidence and chain of evidence.

#### **2.4.4.3.1 Real evidence (objective evidence)**

Real evidence pertains to a physical object that is displayed for the same court to see, to touch or even to taste (Joubert, 2014:380). Real evidence is also viewed as an object which becomes either subjective or objective evidence in itself upon identification, and whose safety entrusted to the investigating officer for the courts to see. Subjective evidence refers to information from the people who are connected to a crime indirectly, and reflects the personal opinions and feelings of the people involved (Lochner et al., 2012:72). Objective evidence, on the other hand, is unemotional. If presented in the form of a document, the purpose is to prove the truth on the basis of the content of such a document (Van Rooyen, 2018:175).

Rodivich (2012:83) submits that the physicality of evidence does not necessarily mean it is visible, because other invisible physical evidence should still be developed using technological instrumentation for its enhanced visualisation. The above author indicates further that physical evidence is not easily refutable because of its tangibility. However, the failure by humans to identify, examine and collect the physical evidence may inadvertently cause the reality of such evidence to be unrealisable. In addition, physical evidence establishes a framework of facts and objective knowledge that guide the investigating officers to understand the investigated cases better and lead to valid decisions regarding the guilt or innocence of the defendant (Rodivich, 2012:83).

#### **2.4.4.3.2 Documentary evidence**

According to Joubert (2018:421) and Van Rooyen (2018:179), a document is any written material capable of being construed as evidence, and encompasses everything containing text- or picture-based proof of something. In that context, and for purposes of this study, examples of document-based evidence include (but not limited to) business or medical records, reports, posters, checks, log files, transcripts of recorded

conversations, and affidavit (written records of witness evidence) photographs, sketches, pamphlet, letters and computer printouts (Joubert, 2018:422; Lochner & Zinn, 2015:39; Watkins et al., 2013:5). Since they constitute real evidence, documents become exhibits when produced in court.

According to Joubert (2018:175), Lochner and Zinn (2015:38), Ogle (2012:2), Van Graan and Budhram (2015:55) and Van Rooyen (2018:175), a document is objective evidence which speak for itself, does not lie and does not experience memory loss. A document is tangible, can be seen by the naked eye, touched and sometimes even smelled. It is the views of Lochner and Zinn (2015:40) and Ogle (2012:4) that documents are dominant as objective evidence, and are viewed as superior to all other types of evidence. Moreover, Dutelle (2017:374), Joubert (2013:386), Lochner and Zinn (2015:39), Zinn and Dintwe (2015:371) and Van Rooyen (2018:175) regard electronic evidence as falling into the category of documentary evidence.

Sample B participants were asked the question: "In your own words please explain the concept documentary evidence?", which is an open-ended question designed to allow participants' unconstrained and spontaneous responses. There were no multiple options from which to choose plausible alternatives. Sample B responses are listed below:

- All five participants mentioned that evidence pertains to written documents such as letters, contracts documents, statements, receipts, medical records and cell phone records.

Additionally, one of the participants also contributed an example of documentary evidence thus:

Let's say for instance, there is allegation [against] a particular individual ... alleged to be [an] illegal immigrant into the country of South Africa. So we're going to need the documentary evidence to prove that indeed that the person is illegal in the country. So, what we do is to engage the office of the Department of Home Affairs to print out a document to show that this person indeed according to the system is illegal in the country. So they bring a certain document attesting to the allegation, meaning that the printout that was received from [the] Department of Home Affairs with information. [That] is the documentary evidence.

All of the participants in Sample B described documentary evidence as a written document. The participants in sample B were familiar with the notion of documentary evidence as provided in the literature by authors such as Lochner and Zinn (2015:39); Joubert (2018:421) and Van Rooyen (2018:179). The researcher then conclusion that all of the participants understood the concept, 'documentary evidence', congruent with the view posited by Lochner et al. (2020:116). The latter posit documentary evidence as any written, typed, or printed document that can be used as evidence.

#### ***2.4.4.3.3 Electronic or computer-generated evidence***

The use of computers, cell phones and smart phones has resulted in evidence that is transmittable or stored through an electronic device. Accordingly, computer generated evidence or information is stored on computer disks and other modern information storage media (Dutelle, 2017:374; Gans & Palmer, 2014:60; Zinn & Dintwe, 2015:441).

For Bellengere, Swanepoel and Karels (2012:255), Orthmann and Hess (2013:169) and Watkins et al. (2013:150), computer generated evidence or information is stored or transmitted in binary codes. In this regard, automatically generated computer printouts of cell phone records are printed and presented as real or electronic evidence (Van Rooyen, 2018:175). The information stored on such media cannot be accessed directly by a human being. Instead, it must be accessed by means of devices such as a computer. Like other types of evidence used to link particular individuals to a crime, computer generated evidence may be protected or hidden to evade discovery by police, and it may be inadvertently tainted.

The participants in Sample B were asked the following question: "In your own words, please explain the concept of electronic or computer-generated evidence", which was an open-ended question intended to allow participants free responses in their own words and thoughts. The Participants were not provided with any options from which to choose plausible answers. Some of the participants submitted multiple responses. Indicated below are the main responses derived from their views.

- Four participants submitted that it is evidence produced or printed by the computer.

- Two participants mentioned that such evidence is generated by the computer without human intervention.
- One participant mentioned that such evidence relates to information that is stored on a computer system.

Broadly, the participants' answers indicate that they had a general understanding of the concept, 'electronic or computer-generated evidence' as prevalent in the literature (Dutelle, 2017:374; Gans & Palmer, 2014:60; Van Rooyen, 2018:175; Zinn & Dintwe, 2015:441). From the literature reviewed, the documents analysed and participants' responses, it is clear that electronic or computer-generated evidence is evidence that is generated by the computer. This was understood by the participants and supported by Lochner et al. (2020:110), who indicate that electronic or computer-generated evidence can be documentary, or real evidence of a documentary nature that is stored and produced by the computer.

Electronically generated evidence pertains to information solely stored on electronic media and cannot be accessed directly by ordinary human means or agency (Krige, 2013:26; Lochner et al., 2012:77). Similar to other types of evidence used to link particular individuals to a crime, computer generated evidence may be protected or hidden, and it may inadvertently be tainted when the police find it. The cell phone network captures the data messages electronically without human interference.

#### **2.4.4.3.4 Court presentation of evidence**

As a general rule, the person presenting documentary evidence should also produce the original document indicating the testimony of the person who signed the particular document as proof of its authenticity (Joubert, 2015:381; Van Huyssteen, Van der Merwe & Maxwell, 2012:97). While the contents of the document could be admissible, it is the accuracy of the contents that still have to be proved in the ordinary way, usually by means of oral evidence or an affidavit, depending on the official status of the said documents (Jordaan & Dintwe, 2015:252; Palmoitto, 2013:30; Swanepoel, 2014:199). Unofficial documents have to be proved by the maker, and witnesses have to testify orally and under oath in court (Bellengere et al., 2012:254; Van Huyssteen et al., 2012:97).

Sections 212 and 213 of the Criminal Procedure Act (No. 51 of 1977) make provision for the handing in of official documents and cell phone records as evidence with an accompanying affidavit by the official in charge of such document or records, stating his/ her position in the network service provider and that he/ she is in fact in charge of the records (Palmoitto, 2013:30; Swanepoel, 2014:199). Therefore, the service provider or its personnel are relieved of the burden of having to come to court to testify about everyday cell phone records.

#### **2.4.4.3.5 Contamination of evidence**

Contamination of evidence refers to the act by which evidence is tampered with, or failure to protect the chain of custody of such evidence (Jordaan, 2015:379; Lyman, 2013:43). Furthermore, acts such as improper or unnecessary entry to the crime scene could constitute evidence contamination since they have the likelihood to destroy evidence found at the crime scene. Badore (2018:22) ascertains that collecting evidence at the crime scene should be done according to proper policies and procedures in order to prevent the contamination from occurring. For example, investigators should be cautious that they do not perform such actions as may lead to crime scene being compromised (Dutelle, 2011:225; Van der Watt, 2014:117).

According to Lochner et al. (2012:74) and Lochner and Zinn (2014:169), the investigating officer may request cell phone records as documentary evidence from the network service provider in terms of a Section 205 subpoena of the Criminal Procedure Act (No. 51 of 1977). It is incumbent in this regard, for the investigating officer to maintain a chain of custody, commencing with the subpoena application and collection of the evidence. Lambrechts (2017:17) intimates that, upon receiving the Section 205 subpoena, the network service provider should furnish the requested information electronically in both PDF format and Excel spreadsheet on a compact disc (CD), flash drive or hardcopies, depending on the volume of the records. The PDF format is presented in court, while the Excel spreadsheets is used for analysis by the police during the investigations as it is not rights protected. If the records in question are presented in court, the network service provider can always produce the original records to prove the authenticity of the records. The investigator is advised to make one extra copy that he/she will be working on, in order to prevent contamination and

record the original copy in the SAPS 13 register book, which should also reflect on the docket as evidential material (Van Niekerk et al., 2015:26).

Participants in Sample “A” and Sample “B” were asked the question, “What is your understanding of the concept contamination of evidence?”, which was an open-ended question intended to allow participants free and unhindered responses. They were not given any options from which to choose any plausible responses. Some of the participants submitted multiple responses. The following are an indication of the responses of Sample “A”’s responses:

- Four participants indicated that contamination of evidence relates to the failure to maintaining chain of custody.
- Two participants mentioned that from cell phone records perspective, it would be similar to providing data without the Section 205 subpoena.
- Two participants submitted that handling the data without accountability constitutes evidence contamination.
- Two participants responded that contamination of evidence premises on the collected evidence being tampered with and does not reflect the true version of the evidence collected.
- One participant replied that it was the mixing of evidence, such as cell phone and DNA swap on same evidence bag.
- One participant explained that an investigator’s usage of a seized cell phone to make calls was tantamount to contaminating evidence.
- One participant stated further that it was the manipulation of cell phone records.
- Another reported that it is when the evidence is being fiddled or interfered with.

The Sample “B” participants responded thus:

- Three participants submitted that it relates to providing cell phone records without a Section 205 subpoena.
- Two participants mentioned further that deleting calls made or destroying messages or fiddling with evidence constitutes is contamination.
- One participant indicated that tampering with evidence in whatever manner constituted the contamination of evidence.

- One participant answered that it refers to improper or unnecessary entry to the crime scene.

From both Samples A and B, it is evident that most of the participants believed that contamination of evidence relates to fiddling or altering it, providing cell phone records without a Section 205 subpoena. One of the participants from Sample A indicated that contaminating evidence is constituted by an investigating officer using a seized cell phone to make his/her personal or private calls. Collectively, the responses from both Samples A and B cohere with the assertions by Gilbert (2004:93) and Lochner et al. (2020:121), who aver that contamination of evidence borders on the investigators' negligence in so far as permitting the tampering of evidence of failure to protect the chain of custody.

#### **2.4.4.3.6 Chain of evidence**

Van der Watt (2014:117) illuminate that the chain of evidence is the record of each agency or person who had control of, access to, taking custody of cellphone records, or had any other form of contact with the records from the day of obtaining such records, leading to the time such records were needed to be produced as evidence. Maintaining the chain of evidence serves the purpose of ensuring that such evidence is intact and presentable in its original condition. According to Bila (2018:327), James, Nordby and Bell (2014:566), Orthman and Hess (2013:128) and Roberson and Birzer (2012:370), the maintenance of the chain of custody is a demonstration that such evidence was not interfered with or changed in any way. Lochner et al. (2020:122) and Palmoitto (2013:28), explain further that chain of custody traces those who possessed the evidence from the beginning of the investigation until the day of submitting such evidence during the trial. Therefore, the purpose of the chain of evidence is to demonstrate or prove the persons *who* had contact with the evidence itself, the *time* and circumstances of the meeting; as well as changes made to the evidence, if any (Dutelle, 2017:23; Van der Watt, 2015:199).

The investigating officer must ensure at all times that evidence is made available to the court when required. Therefore, the investigating officer is obliged to safeguard such evidence in a manner that does not alter or destroy its value or worth until such

time as it has been formally handed into safe custody of the concerned court of law (Jordaan & Dintwe, 2015:252).

The investigating officer must ensure at all times that evidence is made available to the court. The Sample B participants were asked the question: "In your own words, please explain your understanding of the investigative principle or chain of evidence?" Similar to all the questions posed previously to them, this question was also open ended, which allowed the participants free involvement and presentation of their thoughts unhindered. The responses of the participants in Sample B are:

- Two participants mentioned that is the process of ensuring that evidence remains the same at all times and proves that such evidence was not changed at all.
- Two participants submitted that every person who came in to contact with such evidence must account by submitting statement.
- One participant mentioned that it entails safekeeping of the record of all the steps taken to obtaining the cell phone records.

From the viewpoint of the researcher the Sample B, responses are congruent with the literature consulted (Fisher & Fisher, 2012:9; Jackson & Jackson; 2011:42), which indicates that the recorded information about the occurrence and developments pertaining to the evidence from his acquisition at the crime scene to the day of its production in the courts is an apt demonstration of a reflection of the chain of custody to the courts. In this regard, the researcher concludes that the Sample B participants have a reasonable understanding of what constitutes the chain of custody. The researcher is further in concurrence with both the literature and the participants' perspectives regarding the need to maintain the chain of custody as proof to the cause, that the evidence presented was not changed or altered in any form; therefore. Maintaining the chain of custody at all times, is almost sacrosanct in investigations, especially that the cause, integrity should also be protected as custodians of the criminal justice system. This is supported by Van der Watt (2014:117), who ascertains that the chain of evidence constitutes the record of each person or agency insofar as controlling, examining or testing evidence from the beginning to to the end of the investigation, and the consequent prosecutorial and conviction process.



#### **2.4.5 Identification of the perpetrator**

The primary aim of a criminal investigation and its analysis of physical evidence is to identify the perpetrator by linking and placing him/her at the place where the crime was committed (Girard, 2015:40; Osterburg & Ward, 2010:8). In the context of cell phone records, identifying the perpetrator is viewed as establishing the connection of the crime perpetrator to the crime and the cell phone records obtained during the investigation (Benson et al., 2015:20; Brandl, 2014:4; Petherick, 2012:294).

According to Maras (2015:40), computer-based evidence is not limited to hard drives only and other electronic devices. As such, this type of evidence can be used to corroborate statements of suspects, victims, and witnesses. In order to link the suspect precisely to a crime scene, cell phone network providers are then subpoenaed to disclose records of a cell phone in question, in compliance with Section 205 of the Criminal Procedure Act (No. 51 of 1977) by the investigating officer to link and identify the perpetrator with the cell phone records.

When the invisible cell phone signal is analysed and transformed into visible physical evidence in documentary form, it automatically becomes computer generated evidence. However, and based on the fact that such evidence has been technologically generated without human intervention, it is to be regarded as electronic evidence as prescribed by legislation (Lochner et al., 2012:76). Since South African courts were cautious about admitting electronic evidence, it was not possible to completely exclude such evidence. Contemporary society is technologically oriented, and cell phones are used daily to manage and store huge volumes of data (Lochner et al., 2012:76). This development has necessitated the government's review of electronic evidence, leading to the promulgation of the Electronic Communications and Transactions Act (No. 25 of 2002).

The researcher posed the following question to participants in Sample B: "In your opinion, can information on a cell phone record assist in identifying the perpetrator?" The question was open ended in its design, so as to allow participants free of responses in their own thoughts and words. Similarly, they were not provided any alternative answers to choose from, since it would suggest that the researcher was directing their responses in your particular way. Their responses were as follows:

- Three participants proffered that cell phone records can prove the ownership of the user through RICA processes.
- Two participants affirmed (“yes”), that such cell phone records can enable the identification of the perpetrator.
- Two participants also responded affirmatively, suggesting that cell phone records can place the offender/perpetrator at a particular crime scene.
- One participant mentioned further that in the event that the cell phone number is on contract, the documents used in the opening of the account could assist with relevant information such as a copy of the ID, the salary advice and proof of residence.
- One participant also responded affirmatively and implied that the interpretation of the cell phone records information could enable the investigation.

It is evident that all the participants were unanimous in their agreement that information from a cell phone record could assist the identification of a perpetrator/offender. From the literature, authors such as Benson et al. (2015:20), Brandl (2014:4), and Petherick (2012:294) assert that the identification of the perpetrator through cell phone records analysis could enable the location of the communication between relevant parties, to identify and individualise the cell phone numbers of associates and place the suspect at or near a crime scene (Lochner, Horne & Zinn, 2020:115). Based on responses of participants in sample B, it is clear that identifying the perpetrator using cell phone records is intelligible and corresponds to the information included in a cell phone record that can aid in identifying the perpetrator.

## **2.5 SUMMARY**

This chapter focused principally on the historical aspects of criminal investigation, its nature and objectives. To this effect, reference was made to a few European and American contexts for allocating better understanding of the traceable origins of the field of criminal investigation as a critical and systematic search for the crime perpetrator and reconstruction of the crime scene. The chapter also presented various forms of evidence that serve as admissible records of the crime committed before a court of law.

The chapter also highlighted the indispensable role of the crime investigator in the entire chain of events and prosecution. Consistent with the overall intention of the study as captured in the research topic, the issue of cell phone records constituted a critical aspect of various discussions in the chapter. In this regard, the investigator's knowledge of the applicable laws in criminal investigation was also highlighted, particularly the Criminal Procedure Act (No. 51 of 1977), which is detailed in the next chapter.

**CHAPTER THREE: THE FORMAT TO OBTAIN CELL PHONE RECORDS  
IN TERMS OF SECTION 205 SUBPOENA OF THE CRIMINAL PROCEDURE ACT  
51 OF 1977**

**3.1 INTRODUCTION**

The previous chapter presented discussions on the historical dimensions of crime investigation, as well as its nature and objectives in relation to the method of cell phone records to obtain pertinent crime-related data and information. The current chapter premises fundamentally on the legal processes attendant to the acquisition of cell phone records from the network providers. The researcher has experienced a number of criminal cases based on cell phone criminality. Hence, his conviction that cell phones are instrumental in the commission and subsequent investigation of crimes. Accordingly, government's promulgation of the Regulation of Interception of Communications and Provision of Communication Information Act (RICA) Act (No. 70 of 2002) could be viewed as an attempt to eliminate illegal usage of cell phones when crimes are committed (South Africa, 2002:1). Mobile phone producers and network operators, retail and service providers are required to register the identity, physical address and cellular phone numbers of the existing and new customers who buy, or have bought Subscriber Identity Module (SIM) cards guided by the requirements stipulated in the RICA (Lochner et al., 2012:69; South Africa, 2002:1).

It is on the basis of his personal experience that the researcher has previously observed the inability to provide the required cell phone information in court due to policy, legal and literature-related opacity on how to obtain such records when compiling a Section 205 subpoena. These subpoenas were frequently rejected by network service providers due to irregularities such as: date stamps not corresponding or even unstamped requests, subpoenas not authorised by the magistrates; and required information not specifying the exact time frames. Compared to smart phones, cell phones do not have many computer-based technological features such as internet access, email and interactive applications functionality (Gogolin, 2013:55; Reiber, 2019:17). Many mobile devices have one or more cameras, a geographic positioning system and other software technologies that are often linked to the internet. Such a high level of multi-functionality raises concerns to the community as their privacy and

confidence is being threatened by illegal cyber invasion. As such, many of the reported cases have been discarded by the courts based on inaccurate evidence caused by inexperienced investigators (Van Niekerk et al., 2015:223).

It is obligatory for an investigator to be highly knowledgeable and understand the Criminal Procedure Act (No. 51 of 1977), and properly apply it in both the preparation and presentation of successfully investigated and prosecutable evidence which will be accepted and registered in a court of law (Dutelle, 2014:7). It is in this specific context that the current study attempts to explore, describe and analyse the format to obtain cell phone records as prescribed by Section 205 of the Criminal Procedure Act (No. 51 of 1977) to assist in the investigation of criminal offences.

### **3.2 THE CELL PHONE AS COMMUNICATION DEVICE**

Cell phones are mobile telephonic devices which can make and receive calls using radio waves of high frequency for the transmission of voice and digital data messages (Ciampa, 2010:227; Doherty, 2013:4; Nelson, Philips & Steuart, 2010:496). The cell phone technology derives from the similar notion of a two-way radio that communicates wirelessly using radio-frequency spectrum through cell phone towers connected to radio signals (Daniel & Daniel, 2012:230; Frenzel, 2010:183; Reiber, 2019:17).

In the cell or smart phone, radio signal serve as waves used to transmit and receive messages used for a variety of tasks which form part of an electromagnetic wave (Clark & Clark, 2015:27). A radio signal is used to carry radio broadcasts, send signals and to establish Wi-Fi connections for cellular communications, amongst some of its many applications that enable today's technology to function. The cell phone tower is designed to cover a large geographical area, which enable the cell phone to search for the strongest signal and connect to the tower as the user moves within the network, whether a call is underway or not (Daniel & Daniel, 2012:229; Levinson-Waldman, 2018:1).

The heart of the cell phone system is the electronic computer-based switching system of which the Mobile Service Switching Centre (MSSC) is the most important. The MSSC is the control centre of a cell phone system which monitors the location and

quality of a cell phone's signal between the different cell phone towers and the public switched telephone network (PSTN) (Daniel & Daniel, 2012:226; Lochner, 2014:67; Van Niekerk, 2015:62). The MSSC consists of control devices, switches, communication links and the electronic computer databases of the handsets using the system. The control centre of the MSSC is the core of the whole system that manages the processing commands between cell phone towers. The cell phone towers control the handset, while the different cell phone towers in an area are controlled by the MSSC.

The main computer database in the cell phone system is the Home Location Register (HLR) which comprises the recorded, dialled, or received phone numbers as well as the Location Area (LA), which is a unique identification number of the handset, and the Visitor Location Register (VLR) of the handsets using the particular network. The user database, which is also located in the HLR, contains the details of the users of the network and also has the information of the cell phone bills, whether the cell phone is a pre-paid phone or contract phone (Van Niekerk, 2015:62). According to Lochner (2014:67), the four important MSSC functions are: to liaise between the cell phone system and the public telephone system (landline); provide overall supervision and control of the mobile communications; authorise the use of the system if the user has a valid account or prepaid account with a positive balance; and also controls and provides the accounts. It also keeps track of the systems users. For investigators, these functions are critical for understanding the evidential value of a cell phone. The next section highlights the records of a cell phone as a crucial piece of information in the value chain of evidence and prosecution.

### **3.3 CELL PHONE RECORD**

Lochner et al. (2012:13) and Van Niekerk (2015:49), state that cell phone records are the computer-generated voice and messaging activities recorded by service providers on their servers. The activities could only take place through a cell phone and are referred to in the investigation environment as itemised billing. Cell phone records provide details of any transaction made on a cell phone and stored on the network computer server. Speed (2013:4) and Van Niekerk (2015:4) assert that every transaction or conduct made by the user on an active cell phone will automatically be

registered by the network service provider, and remains on the computer servers. To the extent that information is stored, cell phone records can assist criminal investigators with certain transactions made and received on the crime scene (Marshall, 2008:116).

Cell phone records cannot be tampered with, and can provide investigators with correct information and movement of the suspect in terms of an accurate timeline surrounding a criminal event (Lambrechts, 2017:18; Orthmann & Hess, 2013:170). According to the Regulation of Interception of Communications and Provision of Communication-related Information Act (No. 70 of 2002), cell phone records or itemised billing can only be available for a period of not less than three years (South Africa, 2002b). Schmitz and Cooper (2015:327) reasoned that cell phone records have been used in court as evidence to successfully prosecute offenders in South Africa.

Participants in both samples A and B were asked the following question: “Based on your experience, how would you describe a cell phone record?” The question was open-ended, which allowed participants to express their ideas openly and freely. However, they were not provided any options from which to select plausible answers or responses. Some of the participants submitted multiple responses, which include the following responses from Sample A.

The Sample A participants replied thus:

- Eight participants mentioned that cell phone records relate to call data information which includes all the activities that happened on the cell phone, such as incoming and outgoing calls and short message texts (SMS).
- Three participants indicated that these were records pertaining to the number, the handset for specific time period, the Rica information, IMEI number, the General Packet Radio Service transactions, the Wi-Fi, the voice over the IP transactions and internet transactions.
- Two participants submitted that cell phone records relate to the information retrieved from the system showing the caller’s number, the duration of the call, cell phone towers, as well as the starting and end times of the calls.

- One of the participants intimated that it relates to information, or records that can place a person at a crime scene.
- One participant answered that cell phone records they can proof communication between parties, and they play a very pivotal role concerning solving crimes.

The Sample B participants responded as indicated below:

- Three participants mentioned that cell phone records relate to all the activities made on a cell phone.
- Another three of the participants submitted that cell phone records are incoming and outgoing calls, SMS, the location, the GPRS, PIN and PUK, including the make and model of the cell phone.
- Two participants indicated that these were anything recorded by the network service provider to have been performed on the cell phone.
- One participant intimated that it is called data records and RICA details.
- One participant replied that these were records of the communication between the user and the people that the particular user communicated with insofar as the particular crime was concerned.

All of the above cited responses by the participants are relevantly linked to perspectives and information provided in the literature. The responses are indicative of the fact that the participants understood that cell phone records that could be requested from the network service provider. The cell phone records can provide the location, calls made or messages generated or received (Lochner & Zinn, 2014:168). The ensuing discussion premises on the researcher's examination of the legislative framework applicable when cell phone records are obtained from a network service provider.

### **3.4 LEGISLATIVE FRAMEWORK APPLICABLE TO OBTAIN CELL PHONE RECORDS FROM NETWORK SERVICE PROVIDERS**

According to Ally (2012:1), when unconstitutional or illegal evidence is excluded from the proceedings of a criminal trial, it becomes a subject that usually elicits conflicting ideas. For instance, the protagonists of crime control react negatively to the acquittal of persons deemed to be guilty factually. These protagonists argue that society suffers



excessively when an accused persons are not found guilty on the basis that the evidence against them was obtained unconstitutionally. They argue furthermore that crucial evidence necessary for a conviction is often excluded, especially when the nature of the crime is considered serious. On the other hand, human rights protagonists contend that obtaining personal cell phone records could be legally invalid and constitute an invasion of the right to privacy.

When evidence is considered to be in violation of the Bill of Rights, such evidence must be excluded, especially when it is found that its admission into a trial may render a particular trial unfair; or inadvertently, render such a trial not conducive to the notion of administration of justice (Ally, 2012:496). The researcher upholds that every evidence that is collected should be in consideration of the rights of the accused subjects. Furthermore, and for conducive purposes of this study, the researcher submits that relevant legislative framework must be considered when obtaining cell phone records from network service providers in relation to the Constitution of South Africa (Act No. 108 of 1996); the Promotion of Access to Information Act (No. 2 of 2000); and the Criminal Procedure Act (No. 51 of 1977); all of which are discussed below.

#### **3.4.1 Constitution of the Republic of South Africa (Act No. 108 of 1996)**

Irrefutably, the Constitution of the Republic of South Africa (Act No. 108 of 1996) is supreme law of the land. As the legal foundation for the very existence of the Republic, it determines the rights and duties of citizens, and also articulates structure of government and governance (South Africa, 1996). To this effect, Section 32 (1) (b) of the Constitution prescribes everyone's right to access any information that is in someone else's possession, but on the caveat that such information "is required for the exercise or protection of any rights" (South Africa, 1996:16). The researcher submits that Section 32 of the Constitution must also be utilised for the purpose of accessing information which is held by a third party so as to assist during the investigations.

#### **3.4.2 Promotion of Access to Information Act (No. 2 of 2000)**

The Promotion of Access to Information Act (No. 2 of 2000) ("the Act") came into existence on the 9<sup>th</sup> of March 2001. This Act provides natural and/or juristic persons

with the right of access to records that are in the possession of individuals privately or publicly, in consideration of some limitations, so as to enable such persons in the exercise or protection of their natural rights. In terms of Section 51 of the Act, private bodies such as network service providers must compile a manual to assist a person's access to information held by such bodies. The above-mentioned section also stipulates the minimum requirement for compiling and complying with demands for the manual in the following manner:

- Postal and street address, phone and fax number and where available, the electronic mail address of the person heading the private body;
- A description of the guide referring to Section 10 of the Act where applicable, and the manner of accessing it;
- Information categories available without a need for a formal request, if any;
- A description of available records attendant to any other legislation; and
- A description of the subjects on which the body holds records and categories of records held on each subject.

In terms of Section 51 of the Act, the objectives of the manual are stated thus:

- Providing a list of the records held by the network service provider;
- Setting out the requirements concerning persons entitled to request such information according to the Act, and the basis for making such a request if denied; and
- Defining the manner and substance for the requested information.

Furthermore, requests for information pertaining to this Act ought to be furnished in Form C fully and returned to the service provider together with any other information that the network service provider in conjunction with relevant information required by the network service provider to assist when such requests are decided.

### **3.4.3 Criminal Procedure Act (No. 51 of 1977)**

Criminal procedure in South Africa's legal system is governed by the Criminal Procedure Act (No. 51 of 1977). Therefore, the Act regulates the criminal justice system in respect of pre-trial, trial, convictions and remedies following judgement and

sentencing (Joubert, 2018:32). The researcher considered Section 205 of the Criminal Procedure Act (No. 51 of 1977) as relevant for this study, and this section is discussed in the next sub-section.

#### **3.4.3.1 Section 205 Subpoena in terms of the Criminal Procedure Act (No. 51 of 1977)**

Milo and Stein (2013:112) and Pete, Hulme, Du Plessis, Palmer and Sibanda (2011:241) are of the view that a Section 205 subpoena issued in terms of the Criminal Procedure Act (No. 51 of 1977) is a valid and legal document. The subpoena is addressed to someone in possession or custody of information believed to be relevant for assisting the investigation of crime or incident, or one who has access to that information. It is imperative to subpoena the service provider in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977) in order that the service provider should be able to disclose the activities of a cell phone as appearing on the cell phone records (Baxter, 2015:23; Lambrechts, 2017:17; Schmitz & Cooper, 2015:328).

In *Nel vs Le Roux and Others (Constitutional Court, 1996, Case No. CCT 30/95)*, the ruling by the presiding court officer aptly demonstrates the legal authority of the courts to summons the court appearance of someone with information required by the courts in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977) (Constitutional Court, 1996). Accordingly, a magistrate may, when requested by the public prosecutor, require persons having material or relevant information of any crime to appear before her/him to respond to questions posed to them regarding the material or information at hand (Hunter, 2020:13). Realistically, the cell phone network provider will provide information needed by the investigator after being subpoenaed without having to appear before the magistrate. Information which appears on a Section 205 subpoena is detailed in Sub-section 3.5.3.1 and Section 3.6 of this chapter respectively.

Sample A and Sample B participants were asked the question: "What purpose do you think this Section 205 subpoena fulfils in the investigation of crime?" Participants were allowed free to respond unhindered to this open-ended question. Moreover, they were not provided any alternatives to choose from which allowed participants to provide their own varied responses.

The Sample A participants responded thus to the above question:

- Three participants replied that it makes provision for the custodian of information release or furnish the information in a legal manner.
- Three participants explained that it serves to establish that the perpetrators were at a specific area location during the time of the incident, or to prove that there was communication despite denial of such communication by the suspect.
- Two participants mentioned that it gives the investigators authority to obtain information of third party legally from institutions such as network service providers so as to assist in the crime investigation.
- One participant averred that usually the call records could establish the conduct of the victim and perpetrator during the incident.
- One participant replied that the records could help to determine whether the person is guilty or not.
- One participant submitted that it is a structured process to substantiate other evidence to prove or dispute evidence obtained in the investigation.
- One participant indicated that information relevant to the investigation could not be obtained without a Section 205 subpoena since such information was kept by the network service providers.

One of the participants provided a practical example of an ambiguous Section 205 subpoena issued to a high-profile individual:

“On one occasion, cell phone records were requested pertaining to the cell phone number of a very high-profile person. Due to uncertainty of the section 205 subpoena, I personally went to court and submitted the records directly to court and left the court with the decision to decide whether the records should be admitted as evidence or not”.

Sample B participants responded to the above cited question as follows:

- Three participants mentioned that it makes provision for investigating officers to access information of the third party in a lawful manner.
- One participant responded that it is a legal process or method that authorises an investigator to gain access to another person’s information.
- One participant explained that it is a tool used by investigating officers to access third party information, or any information held by such a party.

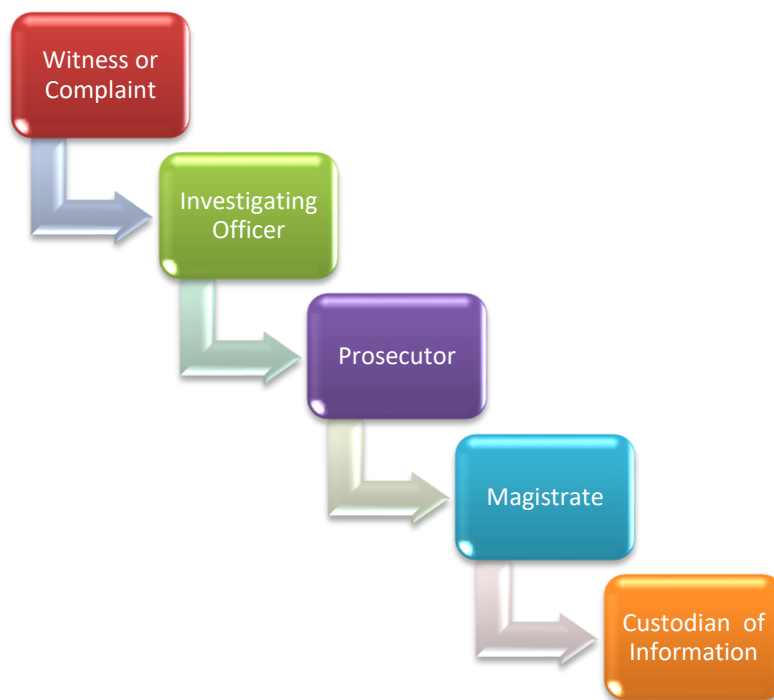
- One participant mentioned that is to compel the custodian of records to appear before the magistrate in case records cannot be furnished or the order/subpoena has not been honoured.

When compared to available literature and documentary evidence, it is clear that the responses of four of the participants show lack of understanding of the purpose of a Section 205 subpoena in terms of the Criminal Procedure Act (No.51 of 1977) in the investigation of crimes. In both Samples A and B, the majority of the participants support the view expressed in literature; that Section 205 subpoena was a legal document for gaining access to third party information. Lochner et al. (2020:115), proffer that information found on cell phone records which is registered on a network service provider can be obtained by issuing a Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977). The researcher concludes that majority of the participants from samples A and B understand the purpose of a Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) in the investigation of crime, although some of these participants could not understand the question clearly and responded in terms of cell phone records in the investigation of crime. It should be noted that the Section 205 subpoena application involves some specific stakeholders involved in obtaining cell phone records. This aspect is discussed in the ensuing section.

### **3.5 ROLE PLAYERS INVOLVED IN OBTAINING OF CELL PHONE RECORDS FROM NETWORK SERVICE PROVIDERS**

Hunter (2020:15) submits that the investigating officer should first have the application of Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) counter-signed by a prosecutor before submitting it to a magistrate, who must give the final authorization for the network service provider to actually provide a material that is relevant to the information required. The prosecutor is approached by the investigating officer based on the information provided under oath by a witness or complainant; or based on the investigator's own information derived from the investigation and applies for the Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977).

Hunter (2020:15), further mentions that an investigating officer, upon receiving the sworn affidavit that includes details of the case and any relevant evidence, he/she generally transmits the magistrate's order, which is in fact the Section 205 subpoena to a regional or provincial branch of the SAPS' Technical Support Unit (TSU). The TSU then liaises with a designated staff member at the relevant network service provider's offices. Informed by this practical experience, the researcher then submits the roles of various stake holders in the application of the Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) to be: the witness, the investigating officer, the prosecutor, the magistrate and the custodian of information (i.e. cell phone network service provider). Figure 3.1 below depicts these role players in sequence of their importance. Any disjuncture in the sequence may lead to the undesirable invalidation of the requested subpoena.



**Figure 3.1: Role players involved in the application of section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977)**

(Source: Researcher's own compilation)

The researcher upholds that the criminal investigator is obliged to apply for Section 205 subpoena systematically so as to demonstrate the chain of justice events, and find the truth and relevant information concerning a crime. For the investigator to apply for Section 205 subpoena there should be a police case docket that is in existence.

Participants in sample A and sample B were asked the following question: “In your opinion, who are the role players involved in requesting and providing of cell phone records through a Section 205 subpoena in terms the Criminal Procedure Act 51 of 1977?” Once again, the question was open ended in order to enable the participants free responses. The participants were not provided with any option from which to select any other plausible response or answer. Some of the participants provided multiple responses.

The participants in sample A responded as follows to the above-mentioned question:

- Nine of the participants mentioned that it was the investigating officer who was responsible for requesting and receiving the subpoena.
- Nine participants mentioned that it was the prosecutor.
- Nine participants submitted that it was the magistrate who authorises the Section 205 subpoena.
- Nine participants replied that it was the network service provider’s responsibility to furnish such information.
- Four participants answered that the data goes through the Technical Support Unit.
- One participant replied that it was the complainant who made the statement under oath to register a case docket, who was responsible of receiving for requesting and making quest for such records.

The Sample B participants answered thus:

- Five participants mentioned that is the investigating officer.
- Five participants indicated the prosecutor.
- Five participants submitted that the magistrate.
- Five participants responded that is the custodian of records at the network service provider’s offices.
- Five participants explained that the witness/complainant.
- One participant averred that it was the duty of the commander who gave instructions.

The participants from both samples provided answers of who they believed to be the role player tasked with requesting and receiving cell phone records from the network

service provider in the application of a Section 205 subpoena. From the participants' responses. Four participants from sample A argued that the data goes through the Technical Support Unit that coordinates the Section 205 subpoena between the SAPS and the network service provider as provided by Hunter (2020:15) and Van Niekerk (2015:26) who, submit that the Section 205 subpoena is served on the cell phone service provider's Technical Support Unit (TSU). A structure within the Crime Intelligence Division, which provides a variety of digital forensics, services within SAPS. The TSU liaises with a designated staff member at the relevant network provider.

One Sample B participant argued that the inspecting officer/commander was also involved in requesting instructions on SAP 5 diary on the docket. The researcher agrees with the participants regarding the role players involved in both the request and provision of cell phone records. The researcher further supports the participant who argued and supported the involvement of the inspecting officer or commander who gives out instructions to the investigating officer. The researcher also concludes that sample A and sample B participants have a good understanding of the role players involved in seeking and giving cell phone records through a Section 205 subpoena. In terms of the Section 205 subpoena, the witness, the investigating officer, the prosecutor, the magistrate, and the information custodian play critical roles in the securance of cell phone records, as explained in the next section.

### **3.5.1 The witness**

Gilbert (2010:119), Lochner (2014:15) and Osterburg and Ward (2014:119) refer to the witness as someone who actually saw the occurrence of a crime incident and can attest to it in a court of law about it. Manamela and Mokwena (2015:173) mentions also that the witness is a person who has first-hand knowledge of an incident, or relevant information about a crime. Manamela and Mokwena (2015:173) ascertains further that the witness can under oath, assist to clarify important aspects about the crime incident. For this study, the researcher emphasises that the witness is referred to as the complainant who submits the statement under oath with regards to the crime witnessed or experienced. The statement of the witness is discussed in sub-section 3.5.2.2.1 and the sample of witness statement attached as Annexure F.



### **3.5.2 The investigator**

The investigator is a specialist police official who systematically investigates crimes in searches of the truth (Dutelle, 2014:7; Gardner, 2012:21; Zinn & Dintwe, 2015:445). Investigators should systematically seek all types of evidence for the identification of the individual responsible for committing a crime, locate such an individual and further obtain sufficient evidence to prove in court that the particular individual is guilty beyond any reasonable doubt. The evidence sought includes cell phone records. For Dutelle and Becker (2019:18), Lochner and Zinn (2015:8) and Orthmann and Hess (2013:11), the duties of an investigator are prominently distinguished by the ability to recognise and manage the investigation of a reported crime with the sole purpose to find all types of evidence. Cell phone records (which are categorised as documentary evidence) are obtainable to investigators who demonstrate proficient knowledge of the Criminal Procedure Act (No. 51 of 1977). Therefore, it is important to examine the investigator's legal knowledge and responsibilities in relation to the Section 205 subpoena application.

#### **3.5.2.1 Investigator's legal knowledge**

An investigator should possess a variety of skills and knowledge within the field of investigation. According to Dutelle (2014:7), the legal knowledge of the investigators will enable them to understand the applicable laws pertaining to finding and obtaining evidence on the actual crime scene or during the course of investigating a crime. Van Rooyen (2018:175) mentions that any successful investigation depends on the value of the evidence gathered and the legal principles applied whether on the crime scene or during the investigation.

It is very critical for investigators to be highly knowledgeable about the applicable laws in criminal investigation and procedures (Birzer & Roberson, 2011:14; Lochner, 2014:8). Furthermore, the criminal investigator must also have veritable knowledge of human behaviour. The researcher corroborates from his practical experience that the conviction of a suspect could be seriously jeopardised by an investigator's lack of knowledge concerning the application of the Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977).

### **3.5.2.2 The Investigating Officer's responsibility in the Section 205 Subpoena Application**

The investigating officer is charged with reporting a crime by legally gathering all relevant evidence through documents or a sworn witness statement (Gilbert, 2012:52; Osterburg & Ward, 2010:21). Investigators should realise and fully understand their ultimate obligation to the courts of law in so far as the manner in which their conducting their investigations and obtaining evidence is concerned (Lochner et al., 2020:23; Shameem & Tuiketei, 2012:1). According to the researcher the responsibilities include their actions with regards to the application for a Section 205 application of the Criminal Procedure Act (No. 51 of 1977). In terms of the Serious and Violent Crime Investigators Course of the South African Police Service, the following information can be obtained from the relevant network service provider (SAPS, 2005:2):

- Detailed billing of all the incoming and outgoing calls on a specific cell phone number, including the date and time of the calls, the duration of these calls, the direction of the specific calls, as well as the make of the cell phone;
- The location of the user during incoming or outgoing calls;
- The International Mobile Equipment Identity (IMEI) mapping on both the number and/ or the handset (cell phone usage and handset usage); and
- Determine a cell phone number from the Subscriber Identity Module (SIM) card number.

The SAPS course referred to above, further indicates that the information on a cell phone number/handset number (IMEI) is only obtainable through a Section 205 subpoena issued and addressed to the network service provider (SAPS, 2005:3). Hunter (2020:16) indicates that once the cell phone records are in the hands of the police, they can be analysed for investigative leads or evidence. Immediately the Section 205 subpoena has been authorised, the investigating officer will then submit it to the TSU to serve and collect the subpoena on behalf of the investigating officer. The investigating officer will make his/her statement based on the witness' statement and approach the prosecutor within the jurisdiction of the commission of the particular crime with a case docket. The prosecutor and the investigating officer will then discuss

the evidence and establish whether it is necessary to apply for the Section 205 subpoena to obtain evidence from the suspect's cell phone records.

As explained in sub-section 2.4.2.1 in Chapter 2, the investigating officer will receive the case docket and study it from pages 1 to 6, especially the witness's statements and the SAP 5 (diary). Annexure G exemplifies the SAP 5 (diary) with instructions of the inspecting officer or commander. The investigating officer will make an application for a Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) based on the witness' statement, see annexure "H" for the investigating officer statement.

The Sample B participants were asked the following question: "What are the responsibilities of a crime investigator with regards to cell phone record evidence?" Participants were free to answer this open-ended question in their own words according to their thoughts and ideas no alternative answers were provided to the participants from which to choose plausible responses. While some participants provided various responses the following below mentioned capture the overall response rate of the Sample B participants:

- Three participants mentioned that the responsibilities of a crime investigator were to apply or request for the information.
- Three participants replied that responsibilities entailed to safeguard and to store such information in a safe place, for presentation in court.
- Two participants submitted that the responsibility was to analyse the requested information.
- Two participants submitted that the responsibility involved making sure that cell phone records were obtained in a lawful manner.
- One participant mentioned that responsibility entailed linking the perpetrator with the crime.
- One participant answered that responsibility was to maintain the chain of custody.
- Another participant cited that responsibility was to submit the affidavit to the prosecutor.

- Another participant concluded that the responsibility involved following proper procedures according to the law as guided by the Criminal Procedure Act (No. 51 of 1977).

In addition, one of the participants provided an example in terms of which the investigating officer had not analysed the procedure to obtain cell phone records as part of his responsibilities:

In one of the cases that I dealt with, the investigating officer upon receiving the cell phone records from network service provider. Couldn't bother to analyse the records and presented them as raw as they were received, large number of documents that took us a lot of time to prove the communication between the parties and the area location before the court. Due to time spent already on the records the magistrate suggested that the matter be postponed for easier interpretation of records analysis and to provide the defence lawyer with such records.

When comparing the Sample B participants' responses with literature and the researcher's personal experience, it was found that there were elements of concurrence with the perspectives raised by Hunter (2020:16) who, submit that once the cell phone records obtained through Section 205 subpoena and in the possession of the police, can be analysed in proving the communication between two parties. The responses of the participants are also supported by Lochner et al. (2020:23), who, reveals that it is the duty of the investigator to pursue the clues and to put the evidence before the court. The researcher concludes that the participants have a fair understanding of the investigating officer responsibilities in the Section 205 subpoena application. The researcher has experienced that the investigating officers upon receiving the case docket, studies the docket more specifically the witness statement that is discussed on the latter.

#### **3.5.2.2.1 Information on the witness statement**

A statement is an evidence-based verbal account, expression, or communication thereof which presents facts and information in the form of a written narrative relating to the crime committed (Lochner, 2014:84; Van Niekerk et al., 2015:224). A valid statement is characterised by accuracy, completeness, clarity, conciseness, objectivity, comprehensiveness, and truthfulness (Humbulani, 2016:57; Van Niekerk

et al., 2015:236). Furthermore, a statement consists of different logically sequenced sections which becomes easy for the investigating officer or person obtaining the statement to include all the relevant elements of the crime. The sections of the statement are preamble, the body, the conclusion and the oath or affirmation; all of which are explained below.

- **The preamble**

According to Lochner (2014:94) and Van Niekerk et al. (2015:237), the preamble is the introduction to the statement. It normally contains information that identifies the person who makes the statement (deponent) and their addresses, and contact details which can be used to locate the deponent if needed. According to the University of South Africa's Forensic Methods and Techniques course, the statement begins with a preamble containing the title, full first and last names (surname), racial group and gender, age, occupation, full work address and further particulars indicating whether the person is married, single, divorced or widowed (UNISA, 2014:81).

- **The body**

Lochner (2014:98) and Van Niekerk et al. (2015:238), indicate that the information recorded in the body of the statement becomes the crux of the investigation and guides the prosecutor and the investigator in respect of aspects of the crime to be investigated. A complete statement is based on the 5x W and H formula (*who, what, when, why, where and how*). Similar to the recording of a crime scene, the *WWWHW-formula* (who, what, when, why, where and how.) is applicable when taking a statement (Humbulani, 2016:57). The latter author emphasises that the investigating officer's adherence to the 'formula' increases the possibility that a very detailed statement will be taken. All these questions and their answers are basically intended to establish what happened and who should be held accountable for it.

- **The conclusion**

The information in the conclusion of the statement helps to detail certain elements relating to the perpetrator, as well as the deponent's desire for prosecution and willingness to testify (Van Niekerk et al., 2015:239). Investigators should refrain from adding: "*I request prosecution*" in the conclusion to the statement. It is the responsibility of the State, and not the witness, to determine whether or not

prosecution should be initiated against the individual suspected of committing the criminal offence (Lambrechts, 2020:30; Lochner, 2014:100).

- **The oath or affirmation**

Without the oath and affirmation, the statement cannot be complete (Van Niekerk et al., 2015:239). The oath and affirmation forms are an integral part of taking the statement and could be likened to sealing the pre-trial process. Once the deponent has read the statement or it has been read to him/her, the Commissioner of Oaths may administer the oath in the presence of the witness. Should the deponent object to taking the oath, an affirmation may then be considered (Humbulani, 2016:64; Van der Merwe, 2010:45).

The researcher submits that a Section 205 subpoena application will be granted on account that a case docket exists and statements are made under oath. This application takes the form of a sworn affidavit that includes details of the case and any relevant evidence (Hunter, 2020:15). Practically, the investigation officer make statement under oath based on the information from the witness statement with reasons provided for his/her application for the Section 205 subpoena, and also indicating the required information. The investigating officer will then discuss the evidence with the prosecutor, whose role is discussed in the next section.

### **3.5.3 Role of the prosecutor**

The prosecutor is a legally qualified practitioner appointed by the National Prosecuting Authority, and presents evidence on behalf of the state in a criminal trial (Baxter, 2015:9; Dlamalala, 2018:38; Joubert, 2014:63). Lambrechts (2020:33) states further that the prosecutor is a legal practitioner employed by the NPA, and delegated to lawfully prosecute a matter by the Director of Public Prosecutions who brings the case before the court of justice. Nkashe (2015:33) posit that the responsibilities of the prosecutor include the duty of enforcing the due process rules and ensure the investigator's compliance with the law and also upholds the defendants' rights.

Furthermore, Du Toit, De Jager, Paizes and Van Der Merwe (2014:23-52C) and Hunter (2020:13) indicate that an authorised public prosecutor is delegated by the Director of Public Prosecutions to cause any person to attend any trial and provide

any materially relevant attendant to an alleged offence, irrespective of whether the offender is known or unknown.

Hess and Orthmann (2010:26) state that a prosecutor helps with preparing of search and other applications, when the investigation stages of a criminal process takes place, and ensure that the investigating officer's reports or applications are completed. The investigating officer on the other hand, is obliged to discuss the application of Section 205 subpoena with the prosecutor.

Participants in Sample B were asked the question: "What is the role of the prosecutor in Section 205 applications regarding cell phones?" Similar to other questions, this was an open-ended question in which case the participants were free to respond spontaneously. They were not provided with any alternative answers from which to choose. Some participants provided different answers. On the whole, the responses of the Sample B participants are listed below:

- Four participants indicated that the prosecutor makes an application, then requests the magistrate to authorise the Section 205 subpoena.
- Three participants submitted that the prosecutor needs to discuss the case docket with the investigating officer, especially the witness statement needed to establish whether or not there was a need to make a request for the cell phone records.
- Three participants explained that to the prosecutor establishes whether there was a need to obtain the cell phone records on the specific number.
- Two participants mentioned that the prosecutor ensures the registration of a case docket with the South African Police Service.
- Two participants answered that the prosecutor ensures submission of a statement by the investigator.
- Two participants mentioned that the prosecutor ensures that the crime reported falls within his/her jurisdiction before signing the Section 205 subpoena.
- One participant replied that the prosecutor must understand what he/she needs to prove with the cell phone records when provided, and be able to interpret such records.
- One participant answered that the prosecutor ensures that the requested records were solely for the investigation reflected on the case docket, and nothing else.

The submitted responses of the participants are congruent with the researcher's personal experience and in the consulted literature (Joubert, 2009:62; Kyprianou, 2010:30 & Mokoena et al., 2012:17). Two participants indicate that the crime reported should fall within the prosecutor's jurisdiction prior signing the Section 205 subpoena. One participant answered that, the prosecutor must ensure that the requested records are for the investigation on the case docket and nothing else. The researcher supports the two participants that it is a normal practice about the jurisdiction and there is no literature about the Section 205 subpoena that must be signed by the prosecutor within the crime jurisdiction. The participants comprehend the role fulfilled by the prosecutor in Section 205 applications regarding cell phones. The sources of data in this research agree that the role fulfilled by the prosecutor in Section 205 applications regarding cell phones is to scrutinise the request carefully and police case docket is examined (Hunter, 2020:23 & Van Rooyen, 2013:330).

#### **3.5.4 Magistrate's role during the application of the Section 205 Subpoena**

The magistrate's primary role in court is to ensure that justice is dispensed fairly and impartially (Swanepoel, Lotter & Karels, 2014:11). When approached by the prosecutor with a Section 205 subpoena application in terms of the Criminal Procedure Act (No. 51 of 1977), the magistrate is obliged to scrutinise the evidence and further establish whether the application has a police case number and falls within his/ her magisterial jurisdiction as signed by the prosecutor (Lochner et al., 2012:77). The researcher adds further that the magistrate's satisfaction with the application will be followed by him/her filing a copy and authorising application for the Section 205 subpoena (court order) to the custodian of the cell phone records. The magistrate will also specify the timelines for the expected cell phone records, or the network service provider's court appearance before him or her, or any other magistrate, in case the network service provider cannot furnish such requested cell phone records as indicated on the Section 205 subpoena (court order).

#### **3.5.5 Role of custodian of the cell phone record**

There are predominantly four licensed cell phone network operators in South Africa: Vodacom, MTN, Cell C and Telkom. These cell phone network operators are the owners of network service provider companies that are their primary channels to the



market (Lochner et al., 2012:77). Customers use the network services either on prepaid or contract subscriptions. According to Lambrechts (2017:17), Lochner et al. (2012:71) and Van Niekerk (2015:43), the custodian of cell phone records is someone who is employed by the network service provider and likely to furnish any material or relevant information requested, and can also testify in court when subpoenaed to provide cell phone records of a suspected crime perpetrator.

In practice, the custodian should provide the requested information after subpoenaed and there is no need to appear before a magistrate. In the case of *S v Brown and Others* (CC18/2017), the manager of the network service provider's law enforcement department testified that upon receiving the subpoena from the Technical Support Unit of the SAPS, he then encrypts the file and send it back to the Technical Support Unit and processes it for the relevant investigating officers. The ensuing section below, highlights the fuller details of the Section 205 subpoena application proceeding from the magistrate in terms of the CPA. The complete format of a subpoena application to obtain cell phone records in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977) is indicated in the ensuing Section 3.6 of this chapter.

### **3.6       FORMAT OF THE APPLICATION TO OBTAIN CELL PHONE RECORDS           IN TERMS OF SECTION 205 OF THE CRIMINAL PROCEDURE ACT (No.           51 OF 1977)**

Basically, a subpoena to obtain cell phone records in compliance with Section 205 of the Criminal Procedure Act (No. 51 of 1977) should involve the role players already mentioned in the preceding section, except the witness. The essential role players in the Section 205 subpoena itself are the investigating officer, prosecutor, magistrate, and the custodian of the cell phone records (i.e. network service provider's duly designated representative). Therefore, and as a factor of the role players involved, the format of the Section 205 subpoena comprises two main aspects, namely: information required from the custodian and the return of service agreement.

Based on his professional background and experience, the researcher unequivocally attests to the regularity of the Section 205 subpoena rejections experienced by the researcher at the network service provider as a result of investigators not providing

relevant information when compiling the Section 205 subpoenas in terms of the Criminal Procedure Act (No. 51 of 1977). Some of the reasons for network service provider's dismissal of the Section 205 subpoena requests included: date stamps not corresponding or even not stamped, crime committed (charge) not mentioned, as well as the troublesome issue of copy- and-paste where two different case numbers would be reflected on the same Section 205 subpoena.

The Sample A participants were asked the question: "From your experience, are you aware if there is any standard procedure in place to be followed between the Police and the Network Service Providers to obtain cell phone records with a Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977)?" The question was close-ended and meant for the researcher to obtain some insightful understanding regarding the format of a standardised procedure when obtaining cell phone records through a Section 205 subpoena. The participants were not provided with alternative choices from which to choose what they considered to be plausible answers. In this regard, the participants had an option of responding "Yes" or "No" to the question above.

- Five participants answered 'No'.
- Three participants said 'Yes'.
- One participant was uncertain and replied both "Yes" and "No".

The participants in Sample A were probed further with the questions: "What is the format – what does the format look like – how does the format differ from different stations and or specialised Units?" In this regard, the participants were urged to elaborate as freely as they could in their own words and expressing their unhindered opinions, views or thoughts. They were not provided with any alternatives from which to choose. The participants provided a range of responses as shown below:

- Six participants responded that all the provinces have a central point called the Technical Support Unit from where the subpoenas are controlled and coordinated.
- Five participants mentioned that there was no standard format or procedure, since they receive large number of section 205 subpoena's that are so different from each other.

- Five participants indicated that, Section 205 subpoenas were sometimes handwritten and made their lives difficult, since they did not clarify what was required as a result that they furnished incorrect information.
- Three participants responded that the section 205 subpoena requiring the involvement of the TSU was different from one province to the other. Of these three participants, one of them indicated further that a standardised format was proposed with Department of Justice but was not yet implemented.
- Two participants responded that sometimes we receive Section 205 subpoenas which were one page long and others were even longer.
- One participant reported that specialised units like the 'Hawks' typed their subpoenas and rendered their work easier and quicker compared to the handwritten subpoenas.
- One participant indicated that as network service providers they only rely on the fact that it has been authorised by the magistrates and had all the required information, such as the police case number, as well as the prosecutor's and magistrate's signatures.
- One participant answered both "yes and no", which implied the lack of a standardised procedure to be followed through Technical Support Unit, as well as the prevalence of the standardised format. The participant attributed such variants to the effect that they received different section 205 subpoenas that were handwritten and rendered their work difficult.
- One participant submitted that network service providers would not accept the Section 205 subpoena that is not received through the TSU.
- One participant answered that there is no standardised section 205 subpoena format in place. However, there was a process in place to be followed when submitting the Section 205 subpoena, that was standardized. Each province has its own way of drafting the subpoenas. Some have a list of tick box and they only tick on the information required and some they just tick everything even though they are not going to use the whole information. However, this tick box method was preferred as it was clear, straightforward and easy to work on.

In addition, one of the participants shared his experience with the format of the application for obtaining cell phone records from the network service provider, stating:

They do not have a problem with the format of the subpoenas, as some of the subpoenas are very lengthy and explain the whole law, and after reading everything at the bottom you will see a small piece where they put the number that they are requesting the data on. Whilst other subpoenas have this tick boxes that would indicate exactly what you can apply for. Some of investigators they do not know what they want, what they do is just to “tick tick tick” and we need to supply everything that is requested on the subpoena. In my opinion, if I was to format the subpoena that is what I would remove from the subpoena, I would suggest that the investigating officer to tell me what he/she wants and I will give him/her. However, some of the investigators really do not know how to interpret the data, they don't know what they need to prove, they just tick everything. I don't mind giving that data since is my job but we're talking about millions of records and a stack of papers you give it to him and he thinks what must I do with this all data, it is a lot of information and give it to the prosecutor to see what he can do about it.

As the range of responses in sample B, above, underpin the researchers' desire to fully understand the participants comprehension of the Section 205 subpoena format. Which is the reason for the researcher posing the same question differently. It is in this regard that the researcher asked the question: “Is there a standard format of the information which warrants the issuing of a section 205 subpoena that should be completed to obtain cell phone records (annexure to the Section 205)?” The participants were asked to elaborate their responses to this open-ended question intended to elicit unhindered responses from the participants. Their responses are shown below:

- Four participants responded that there was no standard format as they address the different types of sub printers from different stations and units, all of which were in different formats.
- Three participants submitted that as long as the Section 205 subpoena meet the standard requirements it will be processed.
- Two participants reflected that the format should have the police case number.
- Two participants indicated that the format should have the name of the prosecutor.
- One participant intimated that the format must have the charge or crime committed.
- One participant submitted that it should be signed by the prosecutor and the magistrate.
- One participant indicated that the format is not the issue. However, the investigating officer and the prosecutor ought to understand what is needed for their investigation.

- One participant reflected further that the format was not an issue. However, the investigating officer and the prosecutor should be able to understand what was required for the investigation.
- One participant mentioned that the requirements differed from one case to the other. As such, the requirements differed also.
- One participant concluded that the format should indicate the required information with timelines.

The majority of the participants in Sample A indicated that there was no standardised format in place followed by the Police and the Network Service Providers to obtain cell phone records with a Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977). Three participants answered affirmed that there was a standardised format in place as the Section 205 subpoena request, which must be issued following the provisions of the Criminal Procedure Act (No. 51 of 1977), and should be served on the Technical Support Unit of the cell phone service provider (SAPS, 2015:4; Van Niekerk, 2015:26). One participant was in between saying ‘yes and no” and elaborated further that the process is that all the section 205 subpoenas are send to TSU for control purpose and in respect of the format there is none, as they receive different section 205 subpoenas that are handwritten and making their work difficult as the police sequence a four line sentences into two-line space. Two participants from the same sample answered that sometimes they receive Section 205 subpoenas with one page and sometimes with more pages. Five participants from this sample indicated that they receive handwritten Section 205 subpoenas, which makes their lives difficult as result of not being clear of what is requested and lead to furnishing incorrect cell phone records compromising other cell phone user’s personal information. The researcher’s analysis of the participants’ responses enabled his understanding of their different responses to both questions posed to them.

From the Sample B participants, four participants mentioned the absence of any standardised format, since they dealt with different types of subpoena from different stations and units, which are in different formats. Three participants submitted that as long as the Section 205 subpoena meet the standard requirements it will be processed. One participant indicated that the format was not necessarily the issue. However, the investigating officer and the prosecutor ought to understand what is

needed for their investigation. Other participants from the same sample did not understand the question posed to them as these participants answered the question by providing the requirements of Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977). Their respective responses included answers that the Section 205 subpoena should be signed by the prosecutor and the magistrate in tandem, have the station name and the case number, charge or crime committed, timelines and the details of the custodian at the network service provider. In support of such literature by Hunter (2020:15), who indicate that the section 205 subpoena should include the details of the case, signed by a prosecutor before taking it to a magistrate.

The researcher concludes that the responses of the Sample A and Sample B participants indicate their awareness to the absence of a standardised format, but only a procedure in place to be followed to obtaining cell phone records in in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977). The researcher agrees with the participants that there is no standardised format in place, but the procedure is that all the section 205 subpoenas should be send to TSU for coordination and control purposes. According to Hunter (2020:15), SAPS, (2015:4) and Van Niekerk, (2015:26), all the subpoenas addressed to the network service providers must be submitted to the SAPS's Technical Support Unit, a structure within the Crime Intelligence Division which liaises with a designated staff member at the relevant network service provider. Based on the literature and the participants' responses, the researcher concludes that both the Sample A and Sample B participants are aware that there is no standardised format, but only the procedure that is in place to be followed in obtaining cell phone records in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977). The information required from custodian of the cell phone records are elaborated in the following Section 3.6.1.

### **3.6.1 Information required from custodian of the cell phone records**

There is no standard format prescribed for a Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977). However, its design should ensure the information contained is sufficient and relevant (Hunter, 2020:15; SAPS, 2005:1; Van Niekerk, 2020:25), and not limited only to:

- Name of police station and case number;
- The charge;
- The prosecutor's name and signature;
- The name of the custodian of records;
- The name of the network service provider;
- The district name of jurisdiction of commission of crime;
- The name of investigator and his/her rank;
- Full names of the suspect;
- The magistrate's name and signature;
- Information required from the network service provider;
- Date on which the information required should be provided;
- Court date in case failed to provide the information requested;
- Penalty in case failed to provide requested information; and
- Dates on which the subpoena was made and authorised.

It was largely as a result of the shortcomings mentioned in Section 3.6 that the researcher was inspired to conduct this study and develop a **standardised** format of the Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) as shown in the diagrammatic representations below. Consistent with the chain of evidence, the Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) becomes legally valid when first authorised by the prosecutor and the magistrate acting in tandem. Derived from the existing SAPS format, Figure 3.2 below depicts the researcher's version of his developed format intended to allocate a modicum of standardisation and professionalism in order to prevent an unending replication of rejections of section 205 subpoenas in terms of the Criminal Procedure Act (No. 51 of 1977) by network service providers (cell phone record custodians).

**SUBPOENA IN TERMS OF SECTION 205 OF CRIMINAL PROCEDURE ACT (NO. 51 OF 1977)**

I (***Name of the prosecutor***) the undersigned Public Prosecutor, duly authorized thereto in writing by the Director of Public Prosecutions, hereby request the attendance of (***Name of the custodian /person in possession of the records***) or representative of (***Name of the Network Service Provider***) to appear before the Magistrate at (***Place /Name of the court***) for examination by me or another Public Prosecutor authorized thereto because the mentioned person is likely to give material or relevant information regarding an alleged offence: (***Charge or Crime committed***)

**POLICE INVESTIGATION REFERENCE NUMBER: (*Name of Police station and case number*)**  
 Suspected to have been committed by: (*Name of the suspect if known*)

.....

**AUTHORISED: STATE PROSECUTOR**

**IN THE MAGISTRATES COURT FOR THE DISTRICT OF (*Name of the district*)**

You are hereby ordered to subpoena (***Name of the custodian***) or representative of (***Name of the Network Service Provider***) to appear in person before me or any other Magistrate in Court in the Magistrates building in (***Place / Name of the court***) on the (***Date of court*** at 09:00 to be examined by a Public Prosecutor – duly authorized thereto and to testify about all the representative knows about the case under investigation. The nature of the information required is as follows: **AS PER ANNEXURE 1**

Provide that the representative of (***Name of the network service provider***) furnishes the required information (to the satisfaction of the duly authorized Prosecutor) to the investigating team member: (***Name of the investigating officer***) of Serious Corruption Investigation SAPS, prior to the date on which the representative is required to appear before me or any other Magistrate, the representative of (***Name of network service provider***) shall be under no further obligation to appear before me or any other Magistrate.

**FAILURE TO MEET THE CONDITIONS OF SECTION 205 OF CRIMINAL PROCEDURE ACT (NO. 51 OF 1977) WILL SUBJECT YOU TO A FINE NOT EXCEEDING R10000, 00 OR IMPRISONMENT NOT EXCEEDING A PERIOD OF 3 MONTHS**

Serve a copy of this subpoena on the representative of (***Name of network service provider***) and report to me on what transpired.

Signed at ..... this ..... day of ..... **2021**

.....

**AUTHORIZED MAGISTRATE** 1/3

**Figure 3.2: The subpoena in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977)**

(Source: Researcher’s own adaptation of existing format)

The researcher developed the format shown in Figure 3.2 from examples in the studied literature as well as interviews conducted with research participants in this study (see paragraph 3.6). Policymakers in the criminal justice system may consider using this format to analyse the aforementioned format for acceptability and application by investigators. This presented format could guide investigators to apply standardised procedures during the application process to obtain cell phone records



from network service providers in compliance with Section 205 of the Criminal Procedure Act (No. 51 of 1977).

Following authorisation by both the prosecutor and the magistrate, the next part of the Section 205 subpoena developed by the researcher specifies the requested information to be provided by the network service provider in adherence to Section 205 of the Criminal Procedure Act (No. 51 of 1977). Figure 3.3 below is a depiction of the details required from the network service provider as entailed in the Section 205 subpoena signed again by both the prosecutor and the magistrate.

<b><u>ANNEXURE 1</u></b>	
<b><u>SUBPOENA IN TERMS OF SECTION 205 OF THE CRIMINAL PROCEDURE ACT (NO. 51 OF 1977)</u></b>	
<b>(Name of the police station and case number)</b>	
<b><u>INFORMATION REQUIRED FROM THE NETWORK SERVICE PROVIDER</u></b>	
<input type="checkbox"/> A list of MOC made from the SIM Card (outgoing calls)	
<input type="checkbox"/> A list of MTC received from the SIM Card (received calls)	
<input type="checkbox"/> A list of MOC calls made from the IMEI (handset)	
<input type="checkbox"/> A list of MTC received from the IMEI (handset)	
<input type="checkbox"/> A list of incoming SMS transactions received (MTSMS)	
<input type="checkbox"/> A list of outgoing SMS transactions (MOSMS)	
<input type="checkbox"/> GPRS (Internet Transactions)	
<input type="checkbox"/> Tower/Site Location of calls & messages made & received	
<input type="checkbox"/> Rica Ownership (Prepaid/Contract)	
<input type="checkbox"/> MSISDN Profile (simcard)	
<input type="checkbox"/> IMEI Profile (handset)	
<input type="checkbox"/> IP Address	
<input type="checkbox"/> Recharge History (Airtime/Vouchers)	
<input type="checkbox"/> Call Data on the New SIM Card/s used for the period below	
<input type="checkbox"/> Section 213 Statement	
Kindly supply me with the above information for the period ..... to ..... on the following cell phone number 000 000 0000.	
.....	
<b>SIGNED BY THE PUBLIC PROSECUTOR</b>	
.....	
<b>AUTHORIZED MAGISTRATE</b>	<b>2/3</b>

**Figure 3.3: Information required from the network service provider**

(Source: Concept developed by researcher)

The last part of such a Section 205 subpoena application in terms of the Criminal Procedure Act (No. 51 of 1977) entails the return of service, which is discussed in the next section. It is worth reiterating that the researcher emphasises both the content and sequence (structure) of the subpoena, based on his intention to allocate standardisation, professionalism in investigations, and consequently eliminate the spate of rejections which embolden perpetrators of crime (Ally, 2012:496; Van Niekerk et al., 2015:226).

### **3.6.2 The return of service**

The return of service is a written acknowledgment signed by both the recipient and the authorised official stating that a legal service was provided in the form of a fully completed subpoena document, which should include the following information:

- Name of the police station and case number;
- Full names of the recipient, who is over the age of 16;
- Place or work address delivered;
- Date subpoena served;
- Signature of the recipient;
- Signature of the authorised official;
- Full names of authorised official;
- Designation of the authorised official; and
- Full work address of the authorised official.

Following information required from the service provider, the researcher's developed Section 205 subpoena reflects on the return of service, as depicted in Figure 3.4 below.

<b>RETURN OF SERVICE</b>	
<b>NAME OF THE POLICE STATION AND CASE NUMBER</b>	
I, the undersigned, certify that I have served this subpoena upon the within-named person by .....	
or	
(a) Delivering a true copy to her/him personally,	
(b) Delivery as he/she could not be found, a true copy to: .....	
a person apparently over the age of 16 years and apparently residing or employed at the person's place of	
Employment/Residence/Business	at
.....	
The nature and exigency of this Subpoena was explained to the recipient thereof,	
Time.....Day.....Month.....Year.....	
Place.....	.....
	Signature of authorised officer
.....	.....
<b>Signature of recipient</b>	<b>Full name</b>
.....	.....
<b>Full name</b>	<b>Capacity</b>
*Delete whichever is not applicable.	
	3/3

**Figure 3.4: The return of service format**  
 (Source: Concept developed by researcher)

Once the Section 205 subpoena is served to the custodian of the cell phone records at the network service provider, the investigating officer will report back to the magistrate who authorised the very Section 205 subpoena and produce the served or signed return of service. Thereafter, the investigating officer will file the signed return of service on “A” clip of the case docket (Van Niekerk, 2015:26).

### **3.7 THE VALUE OF CELL PHONE RECORDS OBTAINED THROUGH SECTION 205 SUBPOENA IN TERMS OF THE CRIMINAL PROCEDURE ACT (No. 51 OF 1977)**

Computer generated evidence obtained through technology-aided storage devices such as cellular phones and geographical positioning systems (GPS) would provide voluminous and treasurable information that is congenial to the schedules, communication, criminal behaviour, and schedules of a suspect. As such, these devices are potentially valuable sources of evidence for criminal investigations

(Bellengere, Swanepoel & Karels, 2012:255; Bezuidenhout, 2014:306; Bila, 2018:316; Brandl, 2014:138). These devices are very valuable insofar as gathering, processing, analysis, and interpretation of digital evidence from lists of phone numbers and call logs, electronic documents, records of a device's location at a given time, chats logs and more, including databases, internet browsing history, list of friends and calendars (Lochner & Zinn, 2015:39; Zinn & Dintwe, 2015:441).

Computer generated evidence could be viewed as conservative and exclusionary by some courts (Joubert, 2015:386; Van Niekerk, 2015:64; Van Rooyen, 2018:185). However, the judge in the Jimmy Mashopane case (*High Court Case 63/2019*) ruled that the cell phone records were effectively a corroboration of the State's case, since the legally obtained cell phone records effectively placed the accused person in the location of the crime scene during the very period of the commission of the self-same crime. Lochner et al. (2012:19) and Speed (2013:4), emphasise that an analysis of the cell phone records is able to yield the following valuable evidence:

- Telephonic conversations of certain cellular and/or telephone numbers;
- Refutes or corroborates the version of a complainant, witness or suspect;
- Proves previous possession of stolen property, such as a cell phone or SIM card;
- The cell phone user's previous geographical location;
- Placement of a person on the crime scene or its vicinity;
- Direction and approximated speed of the cell phone's movement;
- Supporting witness statements;
- Highlighting investigation loopholes;
- Possible other places for finding physical evidence; and
- Narrowing spatial areas for tracing suspects.

Prior to presenting the records to the court, it is critical for the investigator and prosecutor to understand what information is required to assist the investigation and enable interpretation of the records using appropriate terminologies. Cell phone records gathered legally play a critical part in criminal investigations (Lochner et al., 2012:19; Speed, 2013:4). While the cell phone record analysis is of assistance to the investigating officer and the prosecutor, it also enhances the court's satisfactory conclusion regarding the guilt or innocence of the accused person (Speed, 2013:5).

### **3.8 SUMMARY**

This chapter premised primarily on the methodology for obtaining cell phone records (digital evidence) by means of the Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977). The concepts 'cell phone', 'cell phone records', and the role players involved in obtaining evidence were discussed. The chapter further discussed the handling of evidence in preparation for its presentation in court as a mechanism to connect a suspect to a crime incident.

In order to ensure that cell phone records are obtained lawfully, Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) has to be utilised, whose application and authorisation emanates from the complainant/ witness statement as reflected in the docket. Firstly, the investigating officer has to apply for the cell phone records in terms of Section 205 subpoena and approach the prosecutor within the jurisdiction of the crime committed to discuss the case docket. The prosecutor will sign the application and thereafter request the magistrate's authorisation of the Section 205 subpoena for the custodian of the records at the network service provider to furnish such records as requested.

It was largely a factor of the shortcomings mentioned in Section 3.6 previously, that the researcher was inspired to conduct this study and develop a standardised format of the Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) as shown in the diagrammatic representations in Figure 3.2 and Figure 3.3. Consistent with the chain of evidence, the Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) becomes legally valid when first authorised by the prosecutor and the magistrate acting in tandem. Derived from the existing SAPS format, Figure 3.2 depicts the researcher's version of his developed format intended to allocate a modicum of standardisation and professionalism in order to prevent an unending replication of rejections of Section 205 subpoenas in terms of the Criminal Procedure Act (No. 51 of 1977) by network service providers or cell phone record custodians.

As for the custodian to furnish such records, a clear format of section 205 subpoena which is typed, could make their work easier and simple to read. The investigating

officer upon receiving the requested cell phone records must make sure that he/she store and safeguard the records until presented at court of law as evidence. The format depicted in paragraph 3.6 could be used by the criminal justice system's policymakers to evaluate the afore-mentioned format for acceptability and adoption by investigators. This format could assist investigators in following standardised processes when requesting cell phone records from network service providers in accordance with Section 205 of the Criminal Procedure Act (No. 51 of 1977).

The findings of the study are detailed in Chapter Four, in which recommendations are also provided as concomitant products of the findings and the study's conclusions. The researcher reiterates that Section 205 of the Criminal Procedure Act (No. 51 of 1977) still constitutes an integral aspect of Chapter Four.

## **CHAPTER 4: FINDINGS AND RECOMMENDATIONS**

### **4.1 INTRODUCTION**

This chapter concludes the rest of the study by focusing largely on the findings derived from the researcher's interview-based interactions with the sampled participants (Anderson, Dodd & Roos, 2012:11). Additionally, the researcher's own recommendations are provided chapter, which is indicative of his own conclusions derived from the self-same findings (Hammond & Wellington, 2013:89). The Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) makes provision that the person controlling or possessing information or material believed to be relevant for the investigation of crime or incident, or one who has access to that information ought to release such information or material to the delegated requestor. Based on his personal and professional experience, the researcher has observed and experienced most of the challenges referred to by the participants concerning the Section 205 subpoenas being dismissed due to inadequate information failure that also consequently results in the failure of the evidence gathering process.

Consequently, the researcher undertook this study in order to enhance knowledge on the format to obtain cell phone records as prescribed Section 205 of the Criminal Procedure Act (No. 51 of 1977). In that regard, the aim of this research was to critically analyse the required format for obtaining cell phone records of crime suspects as prescribed in Section 205 of the Criminal Procedure Act (No. 51 of 1977). Two research questions were developed as the fundamental framework to achieve the aim of the research as listed below:

- What are the objectives of investigation?
- Which format should be used to obtain cell phone records in pursuance of Section 205 of the Criminal Procedure Act (No. 51 of 1977)?

Based on the above-mentioned questions, this chapter focuses on the findings accruing from the interviews with the participants. Necessarily, these findings relate to the critical research units of analysis, namely, the research problem, the aim of the study as well as the attendant research questions (Hammond & Wellington, 2013:89).

The recommendations made by the researcher, therefore, emanate objective from the evidence as accrued from the findings that have been referred to perennially since the beginning of the study. The recommendations made are objectively derived from the responses of the forensic service personnel, the manager of a reputable telecommunication network in Johannesburg; as well as prosecutors from the Specialised Commercial Crime Unit in Pretoria, all of whom are directly involved in the implementation of Section 205 subpoenas as prescribed in the Criminal Procedure Act (No. 51 of 1977). It is worth noting that these empirical findings were complemented with a protracted literature review, document-based sources; as well as the researcher's personal and professional experiences linked to the research topic.

## **4.2 FINDINGS**

As mentioned above the findings in this study are a product of the collective impetus of data gathered from international and local South African literature, credible document-based sources, and empirically generated evidence from the interviews. Necessarily, these findings are presented in this section to specifically address the research questions.

### **4.2.1 Primary findings**

The primary findings mostly relate to the evidence linked to the direct responses of the research questions that answer the main research questions of this study.

#### **4.2.1.1 Research Question 1: What are the Objectives of Investigation?**

From the various literature-based perspectives it was determined objectively by the researcher that the gist of the objectives in Criminal Investigation locates such investigations in the detection of crime; locating, identifying and arresting the offender; processing the evidence; recovering property; bringing offenders before court and securing a conviction (Becker & Dutelle, 2013:17; Osterburg & Ward, 2010:8; Stelfox, 2013:2). Central to the participants' understanding is the view that such investigations were designed to determine whether or not a crime was committed; to gather information as evidence; to identify *who* the perpetrator is; to involve the prosecuting team; to arrest the perpetrator; and to ensure that a conviction materialises. As such,



the process itself is designed to bring justice to the victim, and to recover stolen properties where applicable.

The researcher focused on the relevant objectives of criminal investigation which is described as “determination of actual commission of crime, involvement in the prosecution process, arrest of the criminals, gathering of evidence and identification of the perpetrator” (Dutelle & Becker, 2019:17). This definition is directly linked to the research topic and helped in the development of the findings as framed in Section 4.2.2.1 above. The researcher concludes that the participants had a reasonable understanding of the objectives of criminal investigation, and were able to articulate that understanding clearly.

#### **4.2.1.2 Research Question 2: Which format should be used to obtain cell phone records in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977)?**

As indicated in Figure 3.1, the format of the application used to request cell phone records from network service providers in accordance with Section 205 of the Criminal Procedure Act (No. 51 of 1977) includes a number of role players (in section 3). In terms of the consulted literature, the Section 205 subpoena is issued in compliance with the Criminal Procedure Act (No. 51 of 1977) after the investigating officer has received the case docket and discussed it with the prosecutor for the data required. The investigating officer will then approach the magistrate for authorization of the subpoena. After such authorisation has been obtained, the subpoena will then be served on the network service provider’s Technical Support Unit (SAPS, 2015:4; Van Niekerk, 2015:26). The researcher’s personal experience also concurs with that of most of the research participants insofar as indicating that there was no standardised format in obtaining records from network service providers.

When analysing the participants’ responses, five of them in Sample A indicated that there was no standardised format in place followed by the Police and the Network Service Providers to obtain cell phone records with a Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977). The participants elaborated further on the nature of the format and its characterisation, as well as the different versions of

the format from one police station to the other; and from one specialised unit to another. The researcher found that there were some differences in the responses of the participants, which included variability at stations and specialised unit level. Such variability was also observed from inter-provincially. The researcher found that there were some differences in the participants' responses to that effect. For instance, two participants in the same sample indicated that sometimes they received one-page Section 205 subpoenas; which could be more pages at other times. Five participants in that same sample indicated that some subpoenas were hand-written, which rendered them difficult to read and understand the exact nature of the request. In such instances they would inadvertently fill-in incorrect information, which then rendered the requested authorisation legally flawed to the extent of compromising other cell phone users' personal information.

From the Sample B findings, the majority (four) participants mentioned that there was no standard format due to the different types of subpoena formats and the degree of variation from different stations and provinces. Three participants in this sample submitted they went on to process these requests notwithstanding such different formats so long as they complied with the required standard requirements for the Section 205 subpoena in adherence to the Criminal Procedures Act (No. 51 of 1977). One participant indicated that the format was in fact not the issue, the most important consideration was for the investigating officer and the prosecutor to understand *what* was exactly needed for their investigation. Other participants in the same sample replied in more relevant terms insofar as the requirements of the Criminal Procedure Act's Section 205 subpoena. Their respective responses included the fact that the Section 205 subpoena should be signed by the prosecutor and the magistrate in tandem, have the station name and the case number, charge or crime committed, timelines and the details of the custodian at the network service provider.

The researcher agrees with the participants that there is no standardised format in place, but the procedure is that all the Section 205 should be sent to the TSU for coordination and control purposes. The latter is congruent with the literature (SAPS, 2015:4; Van Niekerk, 2015:26).

The researcher established the following: the different type formats and the network service providers are unable to execute their lawfully required duties timeously as result of factors such as unclear routine subpoenas, which might lead to compromisation of other network users' information. It was also found that there is no centralised format of the application to obtain cell phone records according to Section 205 of the Criminal Procedure Act (No. 51 of 1977), because stations and specialised units were at variance as regards the format of the application to obtain a Section 205 subpoena that complies with the Criminal Procedure Act (No. 51 of 1977). The Sample B participants' responses, in conjunction with the literature and empirical sources, contributed to the researchers' development of the standardised format of the application to obtain cell phone records complying with Section 205 of the Criminal Procedure Act (No. 51 of 1977).

As shown in Figures 3.2 and 3.3 (see section 3) a standardised format of the application to obtain cell phone records in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977) was developed by the researcher to allocate a modicum of standardisation and professionalism in order to prevent an endless replication of rejections of Section 205 subpoenas. This developed format by the researcher derives collectively from the literature sources and empirical data of Samples A and B narrated responses.

#### **4.2.2 Secondary findings**

The secondary findings accrue from the study's two main research questions (Thomas, 2016:12).

##### **4.2.2.1 Research Question 1: What are the Objectives of Investigation?**

The following secondary findings are based on facts, in terms of further relevant points that the researcher identified and outlined the findings as below.

###### **4.2.2.1.1 Criminal investigation**

The commission of crime (a legally forbidden deed) necessitates that concomitant measures (i.e. systematic process) should be adopted and undertaken in search for the truth about the circumstances of the specific crime (Benson et al., 2015:19; Bila,

2018:322; Lochner et al., 2020:40). The search (investigation) entails the collection of evidence by means of embedded scientific principles. Such systematic investigation enables the reconstruction of past events intended to trace the perpetrator of the crime and to obtain the truth about the committed crime itself (Hess & Hess, 2013:8; Lochner, 2014:4).

The researcher objectively found that participants in Sample A proficiently understood the nature of a criminal investigation. Their responses were generally articulated such that they answered the question, which corresponds with the propositions by Houck and Siegel (2010:581), who contend that criminal investigation is a process involving the discovery of an offender. In the event that the suspect is arrested for the crime, a concomitant search for the evidence should be undertaken in order to assist the conviction or exoneration of that suspect. One participant indicated that “criminal investigation gets the mind to work”. The researcher affirms such an assertion, since criminal investigation stretches the mind in the sense that the investigator would need to understand all the processes and generate evidence required for investigation. The above-cited participants’ response was not precise, because the response to *what* constitutes criminal investigation was directed to the crime investigator during the investigation of crime; which is not a total digression of what the researcher expected.

It is clear from the Sample B participants’ responses that they did not fully dissemble the concept of criminal investigation by also focusing on the possible reasons from their own viewpoints. Despite their different responses, the participants were generally still relevant when compared with the views of Hess and Hess (2013:8), who describe criminal investigation as involving perpetrator identification, information/ evidence gathering, and presenting such evidence in court.

#### **4.2.2.1.2 Collection of cell phone records**

It was established from the literature (Birzer & Roberson, 2011:91) that the collection of evidence differs with the specific types of evidence identified, investigators need to be optimally alert for physical and non-physical evidence relevant to the crime scene. In the case of cell phone records, the transactions of the cell phone which are

computer generated are stored at the network service provider's database, which is kept at a remote location (Lochner & Zinn, 2014:160; Sandvik, 2018:199).

Based on their responses, the Sample B participants showed that they had some knowledge of what aspects were regarded as important during the collection of cell phone record evidence. However, they failed to mention all aspects needed to be collected as contained in the consulted literature (Van Niekerk et al., 2015:214). Notwithstanding their varied responses, the responses of the Sample B participants cohere with the literature consulted by the researcher in relation to the collection of cell phone records. Only one participant mentioned that proper procedure should be followed when collecting required information of the cell phone records according to the Criminal Procedure Act (No. 51 of 1977). Thus, the researcher concludes that the Sample B participants' responses indicate their above-average understanding of the collection of cell phone records.

#### ***4.2.2.1.3 Handling of evidence***

According to Watkins et al. (2013:4), a judicial perspective of the term, 'evidence' is synonymous with proof, and relates to the information presented before the court by the prosecution and the defence. Meanwhile, Van Rooyen (2018:193) asserts that evidence relates to information presented in court to either support or dispute a version of the crime committed. The consulted literature further provided that evidence was tangible in nature as it pertains to the items that have been collected at the crime scene to be examined, analysed, and presented before court for the purpose of either proving or disproving facts on an issue. The literature-based secondary sources also revealed that evidence is not necessarily visible, which necessitates its further establishment by means of instrumentation that enhances the visualisation of such evidence. It is in this regard that the Lochner principle provides that the presence of a cell phone signal at the crime scene could be established further by consulting the electronic data base of the cell phone service provider, which is kept at a location far from the scene of the crime (Lochner, 2014:160).

When compared to the literature-based information, the Sample A and Sample B participants' responses were somewhat at variance with each other. However, the

responses were generally in agreement with the perspectives found in the concerted literature study insofar as handling of evidence was concerned. In that regard, the researcher concludes that the Sample A and Sample B participants have a reasonable understanding of what the notion of evidence entails.

#### **4.2.2.1.4 Documentary evidence**

The researcher's consulted literature sources established that documentary evidence is any written material capable of being construed as evidence, including containing pictorial or written proof (Joubert, 2018:421; Van Rooyen, 2018:179). In that context, and for purposes of this study, examples of document-based evidence include (but not limited to) business or medical records, reports, posters, checks, log files, transcripts of recorded conversations, and affidavit (written records of witness evidence) photographs, sketches, pamphlet, letters and computer printouts (Joubert, 2018:422; Lochner & Zinn, 2015:39; Watkins et al., 2013:5). Since they constitute real evidence, documents become exhibits when produced in court.

When compared to the participants' responses, the reviewed literature showed some elements of convergence regarding documentary evidence, whose meaning was understood by all participants in Sample B. They mentioned that documentary evidence refers to written documents, such as letters, contracts documents, statements, receipts, medical records and cell phone records. In addition, one of the participants contributed an example of documentary evidence, namely:

Let say for instance there is allegation for particular individual, that is alleged to be illegal immigrant into the country of South Africa. So we going to need the documentary evidence to prove that indeed that the person is illegal in the country. So what we do is to engage the office of the Department of Home Affairs to print out a document to show that this person indeed according to the system is illegal in the country so they bring a certain document attesting to the allegation. Meaning that the printout that received from Department of Home Affairs with information is the documentary evidence.

The researcher then concludes that all the Sample B participants understand what documentary evidence is, as presented in the literature. Documentary evidence is any written, typed or printed document capable of being evidence (Lochner et al., 2020:116).

#### **4.2.2.1.5 *Electronic or computer-generated evidence***

The researcher has established that the use of electronic devices such as cell phones and smart phones have made it possible for evidence to be transmitted or stored. Accordingly, computer generated evidence or information is stored on computer disks and other modern information storage media (Dutelle, 2017:374; Gans & Palmer, 2014:60; Zinn & Dintwe, 2015:441).

The dependability of the printout from the electronic device is centred more on the credibility of the person, rather than that of the persons or stakeholders concerned (Krige, 2013:26). The computer records and retains information through its software. Similar characterisation of electronic devices was obtained from Sample B participants when asked to explain or define the concept of electronic or computer-generated evidence. Accordingly, their responses cohere with the conventional literature descriptions regarding electronic or computer-generated evidence. Four participants submitted that such evidence produced or printed by the computer, while two participants mentioned that it was evidence that is generated by the computer without any human agency. Another participant intimated that such evidence pertains information stored on a computer system.

#### **4.2.2.1.6 *Contamination of evidence***

The researcher has objectively established that evidence contamination refers to an act of allowing tampering with such evidence, or not protecting the chain of custody of such evidence, as explained by Jordaan (2015:379) and Lyman (2013:43). In this study, it was the researcher's determined effort and focus to understand the concept contamination of evidence from both Sample A and Sample B participants through an open-ended question. The participants' viewpoints from both samples indicate that they understood the concept and believed that contamination of evidence premises on fiddling or altering the evidence, and providing cell phone records without a Section 205 subpoena as required in the Criminal Procedure Act (No. 51 of 1977). One of the participants from Sample A indicated that using a seized or confiscated cell phone to make calls for any purpose will automatically lead to contamination of evidence. Overall, the Sample A and Sample B participants' statements are in accord with Badore (2018:22) and Lochner et al. (2020:121), who aver that the act of allowing

evidence tampering or rendering the chain of custody unprotected is tantamount to contamination of evidence.

#### **4.2.2.1.7 Chain of custody**

In the consulted literature, chain of evidence is presented as each person's or agency's record regarding contact with, control or custody of cell phone records throughout the course of investigation (Van der Watt, 2014:117). The chain of evidence is maintained in order to ensure that such evidence remains in the original state until the day of the court. That is, from the instance of the investigator gaining control of evidence until it is submitted into trial (Lochner et al., 2020:122; Palmoitto, 2013:28). In essence then, the chain of custody also shows the person *who* accessed the evidence, the time, and circumstances of the meeting; as well as the changes made to the evidence, if any (Dutelle, 2017:23; Van der Watt, 2015:199).

The Sample B participants' responses are attuned to the consulted literature (Bila 2018:327; James, Nordby & Bell, 2014:566; Orthman & Hess, 2013:128; Roberson & Birzer, 2012:370). Accordingly, the chain of custody is maintained to eliminate probabilities of altered evidence. On that basis, the researcher concludes confidently that the Sample B participants adequately understood what the chain of custody entails.

#### **4.2.2.1.8 Identification of the perpetrator**

From the consulted literature (e.g. Girard, 2015:40; Osterburg & Ward, 2010:8) the researcher established that a criminal investigation's primary objective in its analysis of physical evidence is to identify the perpetrator by linking and placing the suspect to the crime and crime scene. In the context of cell phone records, the identification of the perpetrator is viewed as a link between the crime and the cell phone records obtained during the investigation of crime; which is viewed as the primary objective of criminal investigation (Benson et al., 2015:20; Brandl, 2014:4; Petherick, 2012:294).

The Sample B participants' contributions were in concert with the consulted literature, and indicated their familiarity with the information of a cell phone record that can assist in identifying the perpetrator as indicated by Lochner et al. (2020:115), who submit



that identifying the perpetrator through cell phone records analysis can illuminate on the communication between relevant parties; identify and individualise the cell phone numbers of associates; and place the suspect at, or near a crime scene. One participant from the same Sample B concurred that successful interpretation of the information contained in the cell phone records is helpful to an investigation. The researcher can conclude that the participants from sample B have a good understanding on how to identify the perpetrator with the cell phone records.

#### **4.2.2.2 Research Question 2: Which format should be used to obtain cell phone records in pursuance of Section 205 of the Criminal Procedure Act (No. 51 of 1977)?**

The study has reached the below-mentioned findings for Research Question 2, based on the cumulative impetus of the literature and document-based sources, personal experience and the Sample A and Sample B participants' contributions.

##### ***4.2.2.2.1 Cell phone records***

The literature study indicates that cell phone records are the computer-generated voice and messaging activities recorded by service providers on their servers, the activities could only take place through a cell phone and are referred to in the investigation environment as itemised billing (Lochner et al., 2012:13; Van Niekerk, 2015:49). The researcher established that cell phone records provide details of any transaction made on a cell phone and stored on the network computer server.

The Sample A and Sample B participants are knowledgeable in cell phone records, as demonstrated by their varied responses as supported in the consulted literature (Lochner & Zinn, 2014:168). On that basis, the researcher concludes that the participants had adequate understanding of cell phone records and their attendant purpose.

##### ***4.2.2.2.2 Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977)***

It was established from the literature (Milo & Stein, 2013:112; Pete et al., 2011:241) that a Section 205 subpoena issued in terms of the Criminal Procedure Act (No. 51 of

1977) is a valid and legal document. The researcher found that subpoena is addressed to someone in possession or custody of information believed to be relevant for assisting the investigation of crime or incident, or one who has access to that information. It is imperative to subpoena the service provider in pursuit of Section 205 of the Criminal Procedure Act (No. 51 of 1977) in order that the service provider should be able to disclose the activities of a cell phone which appear on the cell phone records (Baxter, 2015:23; Lambrechts, 2017:17; Schmitz & Cooper, 2015:328).

The Sample A participants displayed inadequate comprehension of the purpose of the Section 205 subpoena in terms of the Criminal Procedure Act (No.51 of 1977) that it fulfils in the investigation of crime. Three participants from sample A explained that is to establish that the suspects were at the specific area location during the time of the incident or to prove that there was communication even though the suspect or victim might deny that there was communication. One participant said, often times the call data records can establish the conduct between the victim and perpetrator. One participant submit that is a structured process to substantiate other evidence to proof or dispute evidence obtained in the investigation.

The Sample B participants demonstrated a good understanding of the purpose of Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) that it fulfils in the investigation of crime. Three participants mentioned that it makes provision for investigating officers to access information of the third party in a lawful manner. One participant answered that it is a legal process or method that authorises one to have access to another person's information. One participant mentioned that it serves to compel the custodian of records to appear before the magistrate in the event that the requested records are not furnished, or the order/subpoena has not been honoured. The latter view is supported by Hunter (2020:13), who indicates that Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977), enjoins a magistrate upon the request of a prosecutor, to require any person's attendance who was likely to illuminate on materially relevant information about any offence alleged, whether it is known by whom the offence was committed or not.

The researcher then concludes that the Sample A participants do not have full comprehension of the purpose of a Section 205 subpoena in terms of the Criminal

Procedure Act (No. 51 of 1977), that it fulfils in the investigation of crime. In contradistinction, the participants in Sample B fully comprehend the purpose of Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977) that it fulfils in the investigation of crime as is in tandem with the consulted literature in Baxter (2015:23); Lambrechts (2017:17) and Schmitz & Cooper, 2015:328).

#### ***4.2.2.2.3 The role players involved in obtaining of cell phone records from network service providers.***

This study reveals that the complainant, investigating officer, prosecutor, magistrate, and the custodian were the central role players in both the request and provision of cell phone records through Section 205 subpoenas in terms of the Criminal Procedure Act (No. 51 of 1977). The investigating officer should first have the application for such a subpoena counter-signed by a prosecutor before taking it to a magistrate, who must give the final authorisation for network service provider to give material or relevant information (Hunter, 2020:15). The literature further reveals that the prosecutor is approached by the investigating officer based on the information provided under oath by a witness or complainant; or based on the investigator's own information derived from the investigation and applies for the Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977).

All of the participants in both Sample A and Sample B rendered similar responses showing their understanding of role players involved in both the requesting and provision of cell phone records through a Section 205 subpoena in terms the Criminal Procedure Act (No. 51 of 1977). In addition, four participants from Sample A answered that the Technical Support Unit was the appropriate conduit of the cell phone data. One Sample A participant intimated that the inspecting officer or the investigating officer's Commander usually provides instructions on the SAP 5 diary, such as "obtain cell phone records from network service provider". Based on the researcher's personal experienced, the response of the participant cohere with the instruction of the Commander as indicated in Annexure G (SAP 5 diary). Van Niekerk (2015:26) and Hunter (2020:15) submit that the Section 205 subpoena is served on the cell phone service provider's Technical Support Unit, a structure within the Crime Intelligence Division which provides a variety of digital forensics, services within SAPS. The TSU

then liaises with a designated staff member at the relevant network provider to search for any relevant records from their system, download them and send to the police liaison.

The researcher concludes that the Sample A and Sample B participants have a good comprehension of the role players involved in requesting and obtaining cell phone records through a Section 205 subpoena as prescribed in the Criminal Procedure Act (No. 51 of 1977).

#### ***4.2.2.2.4 The investigating officer's responsibility in the Section 205 subpoena application***

The study has established that the literature consulted and Sample B responses are in agreement that the investigating officer's role in the Section 205 subpoena application is to investigate the reported crime by legally gathering all materially relevant evidence. The researcher concludes that the same persons from Sample B responded differently to the question, yet their answers were correct when compared to the literature (Hunter, 2020:16; Van Rooyen, 2013:174).

In addition, one of the participants provided the following testimony:

The investigating officer upon receiving the cell phone records from network service provider. Couldn't bother to analyse the records and presented them as raw as they were received, large number of documents that took us a lot of time to prove the communication between the parties and the area location before the court. Due to time spend already on the records the magistrate suggested that the matter be postponed for easier interpretation of records analysis and to provide the defence lawyer with such records.

The literature study and the participants' responses indicate jointly that there is a need for investigators to know and understand their responsibilities in interpreting and analysing the evidence prior to their court presentations (Shameem & Tuiketui, 2012:1). Investigators ought to realise and understand that they are ultimately answerable to the courts of law for the manner in which they conduct their investigations and obtain evidence. In this regard, the researcher concludes that the Sample B participants understood the investigating officer responsibilities in the Section 205 subpoena application in terms the Criminal Procedure Act (No. 51 of 1977).

#### **4.2.2.2.5 *The role of the prosecutor***

It was established from the literature (Baxter, 2015:9; Dlamalala, 2018:38; Lambrechts, 2020:33) that the prosecutor is a legal practitioner employed by the National Prosecuting Authority, which delegates prosecutorial authority from the Director of Public Prosecutions by presenting evidence on behalf of the state in a criminal trial. Nkashe (2015:33) posits that the responsibilities of the prosecutor include enforcement of rules relating to due process, and ensuring the investigators adherence to the applicable laws. The Sample B participants' responses are in concord with the literature. For example, Hess and Orthmann (2010:26) assert that while the investigation proceeds during the criminal justice process, the prosecutor provides assistance in preparing applications for search warrants, and also renders assistance to law enforcement officers by ensuring that their investigative reports or applications have been fully completed. The investigating officer must also discuss application of Section 205 subpoenas with the prosecutor. The literature further reveals that it is the authority of the public prosecutor as mandated by the Director of Public Prosecutions to cause any person to attend any trial to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed (Hunter, 2020:13).

The responses of the Sample B participants are in concurrence with the literature perspectives expressed by Hess and Orthmann (2010:26), who ascertain the role of the prosecutor in Section 205 applications regarding cell phones as that of causing any person to furnish more relevant information (Hunter, 2020:23; Van Rooyen, 2013:330). The latter perspective is also supported by Van Rooyen (2013:330) and Hunter (2020:23). On this basis, the researcher then concludes that the Sample B participants comprehend the role fulfilled by the prosecutor in Section 205 cell phone records applications.

### **4.3 RECOMMENDATIONS**

As outlined in Chapter 1 of this study, the aim of this research was to critically analyse the required format for obtaining cell phone records of crime suspects as prescribed in Section 205 of the Criminal Procedure Act (No. 51 of 1977). The findings and recommendations gained from literature could easily be adopted by the network

service provider's and prosecutors to improve the format for obtaining cell phone records of crime suspects as prescribed in Section 205 of the Criminal Procedure Act (No. 51 of 1977). The results of the literature review, document-based sources, and participant interviews have been reported in the preceding section. Based on these results, the following recommendations were then developed (Van Graan & Budhram, 2015:65).

- Based on the different formats of the application to obtain cell phone records in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977) from stations and specialised units, it is recommended that one format be utilised across all the stations and specialised units in all the provinces, for the network service providers to have a common understanding of the format and be able to furnish the records without any probable compromise of other network users' information.
- That network service providers' personnel should be trained on the purpose of Section 205 subpoenas in terms of the Criminal Procedure Act (No. 51 of 1977), and be conscientised that it fulfils in the investigation of crime and not meant to establish the whereabouts of the cell phone user, or to prove the communication between users. to the emphasis should be on disclosing the activities of a cell phone which appear on the cell phone records in order for the cases to be finalised as soon as possible.
- To overcome the rejections of the section 205 subpoenas by network service providers, it is recommended that the section 205 subpoena applications at all times be typed for easier executing their duties and providing the records timeously.
- Due to failure of the investigating officer to analyse and interpret the cell phone records and submitting them as raw to the prosecutor, it is recommended that prosecutors be trained on the cell phone records terminologies, analysis and interpretation of cell phone records in order to save court time with cases that are regularly discarded for lack of prosecutable evidence.
- The researcher recommends that one centralised format of the application to obtain cell phone records in pursuance of Section 205 of the Criminal Procedure Act (No. 51 of 1977) be implemented and utilised all across the country. In this regard, the researcher's developed format illustrated in Figure 3.2 and Figure 3.3

should be considered for adoption and implementation by the Department of Justice policymakers, network service providers and prosecutors when obtaining cell phone records through a Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977).

#### **4.4 CONCLUSION**

This study was conducted with the aim to critically analyse the required format of the application for obtaining cell phone records of crime suspects as prescribed in Section 205 of the Criminal Procedure Act (No. 51 of 1977). The researcher undertook a review of both international and local South African scholarship for more insightful knowledge and understanding of the subject under investigation; that is, criminal investigation (Babbie, 2013:58; Creswell, 2014:102). The researcher established that there is no standardised format in place to obtain cell phone records with a Section 205 subpoena in terms of the Criminal Procedure Act (No. 51 of 1977).

The qualitative research approach enabled the involvement of human subjects who provided the actual lived experiences attendant to the challenges presented by the lack of a standard format to obtain cell phone record of suspected offenders as prescribed in Section 205 of the Criminal Procedure Act (No. 51 of 1977). Other data was gathered from the participants, who are Forensic Service Personnel and 1 (one) Manager from the telecommunications network (Sample A) in Johannesburg; as well as the prosecutors (Sample B) attached to Specialised Commercial Crime Unit in Pretoria responsible for presenting evidence on behalf of the state in a criminal trial.

The research aim was accomplished by responding to the following research questions:

- What are the objectives of investigation?
- Which format should be used to obtain cell phone records in pursuance of Section 205 of the Criminal Procedure Act (No. 51 of 1977)?

The theoretical findings assisted in developing practical applications. Based on the information obtained in this research, it is determined that there's a lack of the format

of the application to obtain cell phone records in terms of section 205 of the Criminal Procedure Act (No. 51 of 1977).

The researcher also views this study as providing an important opportunity for all relevant stakeholders including network service providers, prosecutors, investigators and magistrates to find a common goal of eliminating sophisticated criminal activities in which cell phones have been central instruments in the committed crimes. Therefore, the standardisation of the format for the application to obtain cell phone records in terms of Section 205 of the Criminal Procedure Act (No. 51 of 1977) strengthens the Department of Justice in South Africa and its ever-increasing, demand for protecting citizens. If adopted, the recommendations in this study offer an important contribution to the network service providers and prosecutors, and presents a standardised format for protracted use by the Department of Justice.



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## **DECIDED CASES**

- Nel vs Le Roux and Others (Constitutional Court, 1996, Case No. CCT 30/95)
- S v Brown and Others (CC18/2017)
- S v Mashopane (High Court Case 63/2019)

## ANNEXURES

### 6.1 ANNEXURE A: NETWORK SERVICE PROVIDER INTERVIEW SCHEDULE FOR SAMPLE A

**PARTICIPANT NUMBER:** \_\_\_\_\_

**TOPIC:** A critical analysis of the format to obtain cell phone records in terms of Section 205 of the criminal procedure act 51 of 1977.

I am Putiki Daniel Makuwa a post graduate student that is currently busy conducting research for the degree “Master of Arts in Criminal Justice” at the University of South Africa. My supervisor is Prof Juanida Horne who can be contacted at the university on 012 433 9415 with regards to any matters pertaining to my research.

The aim of the research is to critically analyse the format to obtain cell phone records in terms of section 205 of the criminal procedure act 51 of 1977.

The following research questions will be answered in this study:

- What are the objectives of investigation?
- Which format should be used to obtain cell phone records in terms of section 205 of the Criminal Procedure Act 51 of 1977?

My research seeks to conduct interviews with participants. Your participation in this research is of major importance for the successful answering of the research questions.

The researcher is bound to his assurances and guarantees by the research ethics code of the University of South Africa. The information you provide will be used in a research project for a school of criminal justice for the degree of Master of Arts in Criminal Justice at the University of South Africa. The analysed and processed data will be published in a research report.

The interviewer will personally note your answers on paper and record the interview. Should any question be unclear, please ask the researcher for clarification. Only one

answer per question is required. When answering the questions, it is very important to give your own opinion.

**All interviews will be treated as strictly confidential**

Your participation in this study is voluntary and can be terminated at any time. All responses will be treated with the utmost confidentiality by the researcher and all participants will remain anonymous. The names of the organisations participating in this will not be included. All participants will be allocated a number and completed interview schedules will be captured in an electronic database. All computerised notes will be stored on a secure, password-protected computer. Transcribed interviews will be kept in a secure place for a period of three years as required by the university rules. The transcribed interviews will thereafter be destroyed.

**Research agreement between researcher and participant:**

I undertake not to disclose your name.

All information will be treated confidentially.

When reporting on the findings, no names of individuals or companies will be mentioned. You are free to terminate the questioning at any stage of the interview.

The above information has been explained to me and I understand it. My name will not be disclosed, and I will allow my information or responses to be used in a confidential manner that will not harm me or my employer in any way and I am also aware that the thesis might be published in future.

If you have any queries about this interview schedule, please contact Daniel Makuwa on 071 351 7278 and via email at [42748321@mylife.unisa.ac.za](mailto:42748321@mylife.unisa.ac.za)

Thank you for your cooperation.

Putiki Daniel Makuwa: student

UNISA

_____	_____	_____
<b>Signature of participant</b>	<b>Place</b>	<b>Date</b>
<b>PARTICIPANT</b>		

I hereby give permission to be interviewed and that information supplied by me can be used in this research.

YES	NO
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**SECTION A: BIOGRAPHICAL INFORMATION**

1. What is the title of the position you occupy?

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2. How many years of service do you have at Vodacom Forensic Service?

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3. What is your current position?

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4. In which section within the Vodacom Forensic Service are you attached?

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5. For how long have you been in this position?

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6. What are your primary responsibilities in the position that you occupy?

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7. Do you have any qualifications?

YES	NO
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If yes, elaborate (please include all qualifications).

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8. Have you ever received a subpoena in terms of Section 205 of Criminal Procedure Act 51 of 1977 to make cell phone records available?

YES	NO
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Please elaborate.

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9. Have you ever testified why you cannot make cell phone records available to the police with regards to a Section 205 Subpoena in terms of the Criminal Procedure Act 51 of 1977?

YES	NO
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Please elaborate.

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10. Have you ever testified in court regarding the cell phone records that you made available to the police?

YES	NO
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11. If you answered 'yes' to question 10, please indicate how many cases you have made cell phone records available and testified on section 205 subpoena in terms of Criminal Procedure Act 51 of 1977.

<b>Number of cases where you made cell phone records available to the police without testifying in Court</b>	<b>Number of cases where you made cell phone records available to the police and testified in Court</b>
01 – 05	01 – 05
06 – 10	06 – 10
11 – 15	11 – 15
16 +	16 +

**SECTION B: CRIMINAL INVESTIGATION**

12. How would you describe criminal investigation?

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13. In your opinion, what does the objectives of criminal investigation entail?

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14. Based on your experience, how would you describe evidence?

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15. In your opinion, what type of evidence is cellphone records? Please elaborate.

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16. What is your understanding of the concept contamination of evidence?

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17. From your experience how can cellphone records or the information on it be contaminated?

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**SECTION C: OBTAINING OF CELL PHONE RECORDS**

18. Based on your experience, how would you describe a cell phone record?

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19. What purpose do you think this Section 205 subpoena in terms of the Criminal Procedure Act 51 of 1977 fulfill in the investigation of crime?

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20. Based on your experience, what information is mostly requested in terms of a Section 205 subpoena, to appear on a cell phone record?

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21. How are the cell phone records relevant to the investigation?

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22. On what specific aspects have you testified in the cases you have been subpoenaed to testify in court (J32)?

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23. Do you know how the activities that is registered on a cellphone record is registered (Phone Calls, Whatsapp, Google, Emails etc)? Please elaborate.

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24. How will you describe an itemised billing?

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25. What information was supplied to the applicant in the cases where you were subpoenaed to testify on the information you have made available.

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26. Were you subpoenaed as a witness in terms of the information you supplied in terms of section 205 subpoena of Criminal Procedure Act 51 of 1977?

YES	NO
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27. On which aspects did you have to testify when you were subpoenaed as a witness in terms of section 205 subpoena of Criminal Procedure Act 51 of 1977?

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28. If you testified, which aspects of your testimony was tested?

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29. Have you received training on any aspects a Section 205 subpoena in terms of the Criminal Procedure Act 51 of 1977?

YES	NO
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Please elaborate.

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30. What is your role and responsibilities in the provision of cell phone records when a Section 205 Subpoena in terms of the Criminal Procedure Act 51 of 19775 is received?

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31. From you experience, are you aware if there is any standard procedure in place to be followed between the Police and Vodacom to obtain cell phone records with a Section 205 subpoena in terms of the Criminal Procedure Act 51 of 1977?

YES	NO
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Please elaborate (What is the format – what does the format look like – how does the format differ from different stations and or specialised Units)?

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32. In your opinion, can cell phone records be furnished to an investigator without a Section 205 subpoena in terms of the Criminal Procedure Act 51 of 1977?

YES	NO
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Please elaborate.

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33. Based on your experience, what suggestions can you make regarding the format that is completed by the SAPS to request cell phone records with a Section 205 subpoena in terms of the Criminal Procedure Act 51 of 1977?

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34. In your opinion, who are all the role players involved in both the requesting and provision of cell phone records through a section 205 subpoena in terms of the Criminal Procedure Act 51 of 1977?

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35. What challenges have you experienced with (subpoenas) that was served on you in terms of section 205 subpoena of the Criminal Procedure Act 51 of 1977?

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36. Are service providers obliged to store and safeguard cell phone records you have been subpoenaed for in terms of section 205 subpoena of the Criminal Procedure Act 51 of 1977?

YES	NO
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37. For how long should these cell phone records be stored and safeguarded that you have been subpoenaed for in terms of section 205 subpoena of the Criminal Procedure Act 51 of 1977?

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38. In your opinion, are investigators knowledgeable of these timelines noted in the previous question (storing and safeguarding of cell phone records)?

YES	NO
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Please elaborate.

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39. Is there any specific Standard Operating Procedures / Guidelines within your working environment on the provision of cell phone records requested through section 205 subpoena in terms the Criminal Procedure Act 51 of 1977?

YES	NO
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Please elaborate.

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40. Upon receiving a Section 205 Subpoena – in which format (different types of documents) will you furnish the requested information?

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41. In your opinion, what type of information can be requested from a network service provider in a Section 205 Subpoena in terms of Section 205 subpoena of the Criminal Procedure Act 51 of 1977 which can add value in the investigation of crime

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42. In your opinion, how can the information obtained in terms of Section 205 subpoena of the Criminal Procedure Act 51 of 1977 be used in the investigation of crime?

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43. In your opinion, what is the most important information that should be captured in an application to obtain cell phone records from a network service provider in terms of Section 205 subpoena of the Criminal Procedure Act 51 of 1977?

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44. What practical guidelines, procedures and recommendations can be offered to the SAPS to successfully obtain cell phone records from network service providers in terms of section 205 of the Criminal Procedure Act 51 of 1977?

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45. What practical guidelines, procedures and recommendations can be offered to the NPA to successfully request cell phone records from network service providers in terms of section 205 of the Criminal Procedure Act 51 of 1977?

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Thank you for participating in this interview.

## **6.2 ANNEXURE B: NPA INTERVIEW SCHEDULE FOR SAMPLE B (prosecutors)**

**PARTICIPANT NUMBER:** \_\_\_\_\_

**TOPIC:** A critical analysis of the format to obtain cell phone records in terms of section 205 of the criminal procedure act 51 of 1977.

I am Putiki Daniel Makuwa a post graduate student that is currently busy conducting research for the degree “Master of Arts in Criminal Justice” at the University of South Africa. My supervisor is Prof Juanida Horne who can be contacted at the university on 012 433 9415 with regards to any matters pertaining to my research.

The aim of the research is to critically analyse the format to obtain cell phone records in terms of section 205 of the criminal procedure act 51 of 1977.

The following research questions will be answered in this study:

- What are the objectives of investigation?
- Which format should be used to obtain cell phone records in terms of section 205 of the Criminal Procedure Act 51 of 1977?

My research seeks to conduct interviews with participants. Your participation in this research is of major importance for the successful answering of the research questions.

The researcher is bound to his assurances and guarantees by the research ethics code of the University of South Africa. The information you provide will be used in a research project for a school of criminal justice for the degree of Master of Arts in Criminal Justice at the University of South Africa. The analysed and processed data will be published in a research report.

The interviewer will personally note your answers on paper and record the interview. Should any question be unclear, please ask the researcher for clarification. Only one

answer per question is required. When answering the questions, it is very important to give your own opinion.

**All interviews will be treated as strictly confidential**

Your participation in this study is voluntary and can be terminated at any time. All responses will be treated with the utmost confidentiality by the researcher and all participants will remain anonymous. The names of the organisations participating in this will not be included. All participants will be allocated a number and completed interview schedules will be captured in an electronic database. All computerised notes will be stored on a secure, password-protected computer. Transcribed interviews will be kept in a secure place for a period of three years as required by the university rules. The transcribed interviews will thereafter be destroyed.

**Research agreement between researcher and participant:**

I undertake not to disclose your name.

All information will be treated confidentially.

When reporting on the findings, no names of individuals or companies will be mentioned. You are free to terminate the questioning at any stage of the interview.

The above information has been explained to me and I understand it. My name will not be disclosed, and I will allow my information or responses to be used in a confidential manner that will not harm me or my employer in any way and I am also aware that the thesis might be published in future.

If you have any queries about this interview schedule, please contact Daniel Makuwa on 071 351 7278 and via email at [42748321@mylife.unisa.ac.za](mailto:42748321@mylife.unisa.ac.za)

Thank you for your cooperation.

Putiki Daniel Makuwa: student  
UNISA

\_\_\_\_\_  
**Signature of participant**

\_\_\_\_\_  
**Place**

\_\_\_\_\_  
**Date**

**PARTICIPANT**

I hereby give permission to be interviewed and that information supplied by me can be used in this research.

YES	NO
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**SECTION A: BIOGRAPHICAL INFORMATION**

1. What is your rank (state advocate/senior state advocate/senior public prosecutor / prosecutor)?

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2. How many years of service do you have as a prosecutor?

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3. What is your highest formal Qualification?

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4. Have you presented evidence that was obtained in terms of section 205 of the Criminal Procedure Act 51 of 1977?

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5. Have you prosecuted criminal cases which involved section 205 subpoena for cell phone records in terms of Criminal Procedure Act 51 of 1977?

YES	NO
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6. If you answered 'yes' to question 5, please indicate how many cases have you prosecuted using cell phone records obtained through section 205 subpoena in terms of CPA 51 of 1977.

Number of cases where cell phone records were obtained through section 205 subpoena in terms of CPA 51 of 1977.	Number of cases prosecuted where cell phone records were obtained through section 205 subpoena in terms of CPA 51 of 1977.
01 – 05	01 - 05
06 – 10	06 - 10
11 – 15	11 - 15
16 – 20	16 - 20
21 – 30	21 - 30
31 +	31 +

**SECTION B: CRIMINAL INVESTIGATION**

7. How would you define criminal investigation?

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8. What aspects do you regard as important during the gathering of cell phone record evidence?

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9. What are the responsibilities of a crime investigator with regards to cell phone record evidence?

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10. What guidelines should an investigator take in consideration when collecting cell phone record evidence?

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11. In your own words please explain your understanding of the concept evidence.

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12. In your own words please explain the concept of electronic or computer-generated evidence.

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13. In your own words please explain the concepts documentary evidence.

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14. In your opinion, what type of evidence is cell phone records? Please elaborate.

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15. What is your understanding of the concept contamination of evidence?

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16. From your experience how can cell phone records or the information on it be contaminated?

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17. In your experience what can you suggest that should be done by investigators to prevent the contamination of documentary or computer-generated evidence?

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18. In your own words please explain your understanding of the investigative principle "chain of evidence".

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19. In your experience how can the chain of evidence with regards to a cell phone record evidence be maintained by investigators?

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### **SECTION C: OBTAINING OF CELL PHONE RECORDS**

20. In your opinion, what is a cell phone record?

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21. How are the cell phone records relevant to the investigation?

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22. In your opinion, can information of a cell phone record assist in identifying the perpetrator? Please elaborate.

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23. How long are the cell phone service providers obliged to store and safeguard cell phone records?

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24. What are the specific procedures that have to be followed by a prosecutor to obtain cell phone records?

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25. What happens to the statement of the investigator officer that is submitted to request cell phone records?

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26. What information should be contained in an investigators statement when cell phone records are requested?

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27. Before signing a 205 application, is the information on which the application is based verified in the case docket? Please elaborate.

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28. Which facts should be contained in a case docket before a section 205 is signed?

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29. What is the role fulfilled by the prosecutor in section 205 applications regarding cell phones?

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30. When cell phone records are requested by the SAPS investigator, do you meet with the investigator to discuss the case under investigation?

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31. What are the specific procedures that have to be followed by the police investigator to obtain cell phone records?

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32. From you experience, what is the standard procedure for obtaining cell phone records from a Network Service Provider

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33. What is the purpose of a Section 205 subpoena in terms of the Criminal Procedure Act 51 of 1977?

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34. In your opinion, can cell phone records be furnished to an investigator without a Section 205 subpoena in terms of the Criminal Procedure Act 51 of 1977?

YES	NO
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Please elaborate

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35. In your opinion, who are all the role players involved in both the requesting and provision of cell phone records through a section 205 subpoena in terms the Criminal Procedure Act 51 of 1977?

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36. What challenges have you experienced with (subpoenas) section 205 subpoena in terms the Criminal Procedure Act 51 of 1977?

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37. Is there any specific Standard Operating Procedures / Guidelines within your working environment on the requesting of cell phone records requested through section 205 subpoena in terms the Criminal Procedure Act 51 of 1977?

---

---

---

38. In your opinion, what type of information can be requested from a network service provider in a Section 205 Subpoena of the Criminal Procedure Act 51 of 1977 which can add value in the investigation of crime

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39. In your opinion, how can the information obtained in terms of Section 205 subpoena of the Criminal Procedure Act 51 of 1977 be used in the investigation of crime?

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40. Is there an administrative format (excluding PDF, Excel, Word) in which information is requested in terms of Section 205 subpoena of the Criminal Procedure Act 51 of 1977?

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41. Is there a standard format of the information which warrants the issuing of a section 205 subpoena that should be completed to obtain cell phone records (annexure to the 205)? Please elaborate.

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42. What information in specific should be contained in the annexures which forms part of the section 205 subpoena to warrant the issuing of a subpoena?

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43. In your opinion, what is the most important information that should be mentioned in an application to obtain cell phone records from a network service provider in terms of Section 205 subpoena of the Criminal Procedure Act 51 of 1977?

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44. What practical guidelines, procedures and recommendations can be offered to the SAPS regarding the specific information requested in the format to successfully request cell phone records from network service providers in terms of section 205 of the Criminal Procedure Act 51 of 1977?

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Thank you for participating in this interview.

**6.3 ANNEXURE C: OFFICIAL NETWORK SERVICE PROVIDER'S LETTER OF APPROVAL TO CONDUCT RESEARCH**



22 February

Attention: Mr Putiki Daniel Makuwa

Dear Mr Makuwa

RE: Request to conduct research on a critical analysis of compilation guidelines for cell phone records in terms of section 205 of the Criminal Procedure Act 51 of 1977.

- > Your application to conduct a research on the above mentioned topic refers.
- > We have evaluated and approved your request.
- > Information obtained during the research process should only be utilised for research study purpose only.

Best of luck

Yours faithfully,

Jacobo Katumela  
Executive Head – Vodacom Forensic Services

Vodacom (Pty) Ltd  
Vodacom Corporate Park  
002 Vodacom Boulevard, Midrand, 1685  
Private Bag X6864, Sandton, 2146

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[vodacom.co.za](http://vodacom.co.za)

Directors: MS Acta, Joseph Kooze, CEO and Managing Director Zeph Beesie, JP Orlitz, Viliame Viliame, VP Khanya, MTR Koni, SP Mlangu, Jule de Wit,  
Abimola Odehin, J. Makhubo, WSM Sisoni, Company Secretary: SP Leroth

6.4 ANNEXURE D: THE OFFICIAL NPA LETTER OF APPROVAL TO CONDUCT RESEARCH



**PRETORIA**  
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228 Visagie Street  
Pretoria  
  
P/Bag X297  
Pretoria  
0001  
South Africa  
  
[www.npa.gov.za](http://www.npa.gov.za)

**TO:** adv. Mokgatlle  
**FROM:** adv. P J Louw  
**DATE:** 12 February 2016

**RE: AUTHORISATION RESEARCH PROJECT**

**1. PURPOSE**

The purpose of this memorandum is to inform the Regional Head: SCCU: Pretoria about the progress in this matter.

**2. REQUEST TO CONDUCT RESEARCH**

Attached as Annexure A hereto please find the curriculum vitae of Mr Daniel Makuwa. In terms of his Masters of Arts in Criminal Justice studies, he request permission / approval from our office in order to conduct research interviews within the Specialised Commercial Crime Unit (Pretoria) for his research topic, which is the following:

Justice in our society, so that people can live in freedom and security

Page 1 of 6

- A critical analysis of compilation guidelines for cell phone records in terms of section 205 of the criminal procedure act 51 of 1977.

The purpose of this research is :

- To evaluate the existing procedures followed by investigators in mining evidence from technology. This is to establish the value of the existing procedures, in an attempt to determine their strengths and weaknesses.
- To obtain information from the prosecutors that can empower investigators in compilation of section 205 subpoenas in terms of the criminal procedure act 51 of 1977.
- To arrive at recommendations for good practices, based on the results of the data analysis, that address the problem and enhance investigation skills of investigators.

**Target population:**

- Vodacom Forensic Service (Midrand and Capetown)
- National Prosecuting Authorities (Pretoria)

**Data collection and analysis:**

Guided by the Constitution, we in the National Prosecuting Authority ensure justice for the victims of crime by prosecuting without fear

Page 2 of 5

He plans to take an observer role and data will be collected via documentary evidence and qualitative questionnaires.

- Interview Questionnaires
- Documentary evidence.
- Policy documents (Rica)
- Criminal Procedure Act 51 of 1977

All interviews will be conducted anonymously and Prosecutor names will not be mentioned anywhere.

He requests the aforementioned for the Ethics Committee of Unisa, as it must finally be approved there.

Attached as Annexure B , please find his application for permission, approved research proposal and CV that outlines my experience and attributes.

### 3. RECOMMENDATION

It is recommended that the following officials be interviewed:

Adv. Meg Allie

Guided by the Constitution, we in the National Prosecuting Authority ensure justice for the victims of crime by prosecuting without fear



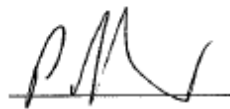
Adv. Avinash Rampararat

Adv. Gerhard Van Eeden

Adv. P J Louw

Adv. J M Ferreira

Adv. S Mogoshi



P. LOUW

SCCU: Pretoria Office

DATE: 8 February 2016



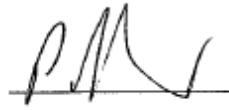
ADV M.P. MOKGATLHE

*Remission is hereby granted to  
Mr Pitiki D. Makunde.*

DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

REGIONAL HEAD: SPECIALISED COMMERCIAL CRIME UNIT -

PRETORIA.



P. LOUW

SCCU: Pretoria Office

DATE: 8 February 2016



ADV M.P. MOKGATLHE

*Remission is hereby granted to  
Mr Puleki D. Makwala.*

DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

REGIONAL HEAD: SPECIALISED COMMERCIAL CRIME UNIT –

PRETORIA.

DATE: 15/02/2016

Guided by the Constitution, we in the National Prosecuting Authority  
ensure justice for the victims of crime by prosecuting without fear

Page 4 of 5

## 6.5 ANNEXURE E: THE OFFICIAL UNISA COLLEGE OF LAW ETHICS COMMITTEE LETTER OF APPROVAL TO CONDUCT RESEARCH



### UNISA 2020 ETHICS REVIEW COMMITTEE

Date: 2020:10:02

Dear Pubiki Daniel Makuwa

ERC Reference No. : ST109-2020

Name : PD Makuwa

**Decision: Ethics Approval from 2020:10:02 to 2023:10:02**

**Researcher:** Mr Pubiki Daniel Makuwa

**Supervisor:** Prof JS Horne

**A CRITICAL ANALYSIS OF THE FORMAT TO OBTAIN CELL PHONE RECORDS IN TERMS OF SECTION 205 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977**

**Qualification:** MA Criminal Justice

Thank you for the application for research ethics clearance by the Unisa 2020 Ethics Review Committee for the above mentioned research. Ethics approval is granted for 3 years.

*The **Low risk application** was **reviewed** by the CLAW Ethics Review Committee on 2 October 2020 in compliance with the Unisa Policy on Research Ethics and the Standard Operating Procedure on Research Ethics Risk Assessment.*

The proposed research may now commence with the provisions that:

- 1. The researcher will ensure that the research project adheres to the relevant guidelines set out in the Unisa Covid-19 position statement on research ethics attached. Provisional authorisation is granted.**



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2. The researcher(s) will ensure that the research project adheres to the values and principles expressed in the UNISA Policy on Research Ethics.
3. Any adverse circumstance arising in the undertaking of the research project that is relevant to the ethicality of the study should be communicated in writing to the CLAW Committee.
4. The researcher(s) will conduct the study according to the methods and procedures set out in the approved application.
5. Any changes that can affect the study-related risks for the research participants, particularly in terms of assurances made with regards to the protection of participants' privacy and the confidentiality of the data, should be reported to the Committee in writing, accompanied by a progress report.
6. The researcher will ensure that the research project adheres to any applicable national legislation, professional codes of conduct, institutional guidelines and scientific standards relevant to the specific field of study. Adherence to the following South African legislation is important, if applicable: Protection of Personal Information Act, no 4 of 2013; Children's act no 38 of 2005 and the National Health Act, no 61 of 2003.
7. Only de-identified research data may be used for secondary research purposes in future on condition that the research objectives are similar to those of the original research. Secondary use of identifiable human research data require additional ethics clearance.
8. No field work activities may continue after the expiry date **2023:10:02**. Submission of a completed research ethics progress report will constitute an application for renewal of Ethics Research Committee approval.

**Note:**

*The reference number ST 109-2020 should be clearly indicated on all forms of communication with the intended research participants, as well as with the Committee.*

Yours sincerely,



Prof T Budhram  
Chair of CLAW ERC  
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## 6.6 ANNEXURE F: STATEMENT OF THE WITNESS

---

### WITNESS STATEMENT

---

I PAUL SMITH states under oath in English.

1

I am an adult white male 56 years old with identity number 640201 5350 089 and residing at 69 market street, Bendor, Polokwane, telephone 015 351 5242, employed as salesman at Volkswagen, 12 Thabo Mbeki street, Polokwane, telephone 015 325 1500.

2

At approximately 08:00 on Saturday, 2020-06-20. I left my house at above-mentioned address to my workplace also indicated above. Everything was in order, all the doors were locked and all the windows secured. There was nobody on the premises.

3

Approximately 13:00 the same day I returned to my house and found my dining room and bedroom in disorder. I discovered that a windowpane in the bathroom window had been broken. The window was wide open. Entrance to the house had thus been gained.

4

On close investigation, I have discovered that the following items that belongs to me were missing:

- One black Samsung flat screen 70 inch - serial number NAJDB24618 - R7 999
- One black decoder/DSTV - serial number JDGRD64854155GDJ - R1 999
- One black Samsung handset/cell phone - IMEI number 359624108861802 - R6 999
- One black men's suit (Polo) - R4 999
- One pair of men's shoes – brown leather (Pierre Cardin) - R699
- One grey leather suitcase – R4 999
- Total Value - **R27 694**

5

The items were removed from the built in cupboard in my bedroom. I will be able to identify the stolen properties if I see them again. Old Mutual, Polokwane, insures me against burglary.

6

Nobody had any right to remove and steal my property from my house. I do not suspect anybody, and I desire police investigation into this matter.

7

Do you know and understand the contents of this statement? **'YES'**

Do you have any objection to taking the prescribed oath? **'NO'**

Do you consider the prescribed oath to be binding on my conscience? **'YES'**

---

PAUL SMITH

I certify that the deponent has acknowledged that he knows and understands the contents of this statement, which was sworn to before me and the deponent's signature was placed thereon in my presence at Polokwane on this the 20<sup>th</sup> day of June 2020 at 15:00.

---

SIGNATURE OF COMMISSIONER OF OATH

FULL NAMES: .....

DESIGNATION: MEMBER OF THE SOUTH AFRICAN POLICE SERVICE

AREA: REPUBLIC OF SOUTH AFRICA

BUSINESS: 15 SCHOEMAN STREET POLOKWANE SAPS

**6.7 ANNEXURE G: THE SAP 5 (DIARY) INSPECTING OFFICER/  
COMMANDER INSTRUCTIONS**

SAPS/SAPD 5

**INVESTIGATION DIARY**

<b>Date and time</b>	<b>Polokwane CAS: 1275/06/2020</b>	<b>Reference</b>
2020/06/20 15:15	1. First information of crime as per 2. The complainant / witness allege that at around 08h00 on Saturday 20 <sup>th</sup> June 2020 he left his house to work and everything was in order 3. Complainant further allege that at around 13h00 the same day he returned to his house and found his dining and bedroom in disorder. 4. As he check around. He noticed that a windowpane in the bathroom was broken into and the window was open, as result of gaining entrance 5. The complainant alleged that on close investigation he noticed that the following items were stolen: One black Samsung flat screen 70 inch - serial number NAJDB24618 - R7 999 One black decoder/DSTV - serial number JDGRD64854155GDJ - R1 999 One black Samsung cell phone - IMEI number 359624108861802 - R6 999 One black men's suit (Polo) - R4 999 One pair of men's shoes – brown leather (Pierre Cardin) - R699 One grey leather suitcase – R4 999 <b>Total Value - R27 694</b>	A1
	6. He further indicated that the stolen items are insured by Old Mutual Polokwane with insurance number HDHF56648	
	<b>Signature of the police official registering the docket, Sgt Makhubela</b>	
2020/06/20 15:40	1. Polokwane LCRC was contacted, informed about the burglary and they promised to send officer on standby to go and check if he/she cannot pick up some finger prints on the scene, LCRC – Ref 215/06/2020	
	<b>Signature of the police official registering the docket, Sgt Makhubela</b>	
2020/06/20 16:20	1. Docket inspected at Polokwane SAPS (CSC) and transferred by hand to Polokwane Detective Service for further investigation.	
	<b>Signature of the Commander at the CSC transferring the docket, Col Alex</b>	
2020/06/22 08:00	1. <i>Captain Sadiki</i> 2. <i>Receive the docket for further investigation</i> 3. <i>Acknowledge the docket on CAS function 4.8</i> 4. <i>Make contact with the complainant and advise him that you're the Investigating officer of this matter</i> 5. <i>Bring the docket for 24hrs inspection</i>	
	<b>Signature of the Commander at the Detective services, Colonel Ngoma</b>	

2020/06/22 10:15	1. Colonel Ngoma	
	2. Docket received for further investigation	
	3. CAS function 4.8 will be actioned accordingly	
	4. Complainant Mr Smith will be visited at his house and provide feedback	
	5. Docket will be brought for 24hrs inspection	
	Signature of the Investigating Officer Captain Sadiki	
2020/06/22 14:45	1. Docket has been acknowledged on CAS system function 4.8	
	2. Complainant Mr Smith was visited at his house and advised that I will be the investigating his matter, any developments on the case will be provided to him timeously.	
	3. The complainant appreciated the prompt response and also indicated that Polokwane finger prints experts lifted few finger prints from the window and cupboard at his bedroom where items were stolen.	
	4. Polokwane LCRC was contacted and indicated that the scene was visited by Warrant Officer Raseala, who is still preparing the outcome report.	
	5. Docket for 24hrs inspection	
	Signature of the Investigating Officer Captain Sadiki	
2020/06/23 09:40	1. <i>Captain Sadiki</i>	
	2. <i>Receive docket from 24hrs inspection</i>	
	3. <i>Obtain finger prints report from Warrant Officer Raseala of LCRC</i>	
	4. <i>Circulate the stolen items with serial numbers and file circulation report</i>	
	5. <i>Apply for section 205 subpoena in terms of Criminal Procedure Act (No 51 of 1977) with all the network service providers, in respect of the stolen cell phone with IMEI number 359624108861802 to establish the current user as possible suspect.</i>	
	6. <i>Task your informers to assist in tracing the stolen items and suspects</i>	
	7. <i>Visit local Pawnshops and check if there's no suspicious items</i>	
	8. <i>Brought forward (B/F) 2020/07/22</i>	
	Signature of the Commander at the Detective services, Colonel Ngoma	
2020/06/24 08:00	1. Colonel Ngoma	
	2. Docket received from inspection	
	3. Warrant Officer Raseala will be engaged for the finger print report	
	4. The stolen items will be circulated and report will also be filed	
	5. <i>The matter / docket will be discussed with the prosecutor in applying for such records with network service providers to establish the user</i>	
	6. Informers will be triggered to trace the stolen items and suspects	
	7. Local Pawnshops will be visited to check stolen items	
	8. Brought forward date noted and diarised	
	Signature of the Investigating Officer Captain Sadiki	



## 6.8 ANNEXURE H: THE INVESTIGATING OFFICER STATEMENT

---

### INVESTIGATING OFFICER'S STATEMENT

---

1

I, the undersigned, Masofo Elias Sadiki hereby state under oath that I am a Captain in the South African Police Service attached to Polokwane Detective Services situated at 17 Grobblers Street, Van Riebeck Building, Polokwane. Contact details 071 351 7278.

2

I am the investigating officer of a Police Case with reference **Polokwane CAS 1275/06/2020** wherein an alleged crime of Housebreaking and theft is being investigated, following a complaint under oath by Paul Smith with identity number 640201 5350 089. The statement is made in support of a request to obtain cell phone records with section 205 subpoena in terms of Criminal Procedure Act (No. 51 of 1977).

3

The circumstances and/or the facts of the alleged crime are summarized as follows: According to the complainant Mr Paul Smith, at approximately 08:00 on Saturday, 2020-06-20, he left his house No 69 market street, Bendor, Polokwane to work. Everything was in order, all the doors were locked, all the windows were secured and was nobody on the premises.

4

The complainant alleged that at approximately 13:00 the same day he returned to his house and found his dining room and bedroom in disorder. He discovered that a windowpane in the bathroom window had been broken. The window was wide open. Entrance to the house had thus been gained.

5

On close investigation, he has discovered that amongst the items stolen was also a black Samsung handset/cell phone with IMEI number 359624108861802 to the value of R6 999, which was also stolen. Suspect are unknown at this stage.

6

It is therefore required that section 205 subpoena in terms of Criminal Procedure Act (No. 51 of 1977) be applied with the network service providers in establishing the current user of the

stolen handset/cell phone with IMEI number 359624108861802 for the period 2020-06-20 to 2021-12-31.

7

I know and understand the contents of this statement.

I have no objection to taking the prescribed oath,

I consider the prescribed oath to be binding on my conscience.

\_\_\_\_\_CAPTAIN

ME SADIKI

I certify that the deponent has acknowledged that he knows and understands the contents of this statement, which was sworn to before me and the deponent's signature was placed thereon in my presence at Polokwane on this the day of 29<sup>th</sup> June 2020.

\_\_\_\_\_  
SIGNATURE OF COMMISSIONER OF OATH

FULL NAMES: .....

DESIGNATION: MEMBER OF THE SOUTH AFRICAN POLICE SERVICE

AREA: REPUBLIC OF SOUTH AFRICA

BUSINESS: 17 GROBBLER STREET POLOKWANE

## 6.9 ANNEXURE I: EDITOR'S LETTER

### EDITOR'S LETTER

This serves as proof of my involvement in the academic editing, language control, text redaction, research methodology compatibility, and technical compliance of the Master's dissertation manuscript of Mr Putiki Daniel Makuwa (Student Number: 42748321) submitted to me as part of his fulfilment of the requirements for the Master of Arts (Criminal Justice) degree registered with the University of South Africa (UNISA), and entitled:

**A Critical Analysis of the Format to Obtain Cell Phone Records in Terms of Section 205 of the Criminal Procedure Act 51 of 1977**

In my capacity as independent academic editor, I attest that all possible means have been expended to ensure that the final draft of Mr P.D. Makuwa's dissertation manuscript reflects both acceptable research methodological practices and language control standards expected of postgraduate research studies.

In compliance with conventional ethical requirements in research, I have further undertaken to keep all aspects of Mr P.D. Makuwa's study confidential, and as his own individual initiative.

Sincerely,

TJ Mkhonto

BA Ed: North-West University, Mafikeng (1985)

MEd: School Administration; University of Massachusetts-at-Boston, USA, Harbor Campus (1987)

DTech: Higher Education Curriculum Policy Reform, Design & Management; University of Johannesburg, (2008)

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Signed:  \_\_\_\_\_

Dr TJ Mkhonto

*Independent Academic Editor*

Date: 16 September 2021

dd/mm/yyyy

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## 6.10 ANNEXURE J: TURNITIN DIGITAL RECEIPT



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**CHAPTER ONE**  
**GENERAL ORIENTATION**

**1.1 INTRODUCTION**

The current chapter introduces the entire study in terms of a general orientation to the various critical units of analysis attendant to the research topic, its core tenets and the study as whole (Du Plooy, 2013:101; Mouton, 2014:11). While these critical variables are outlined briefly in the current chapter, they are elaborated further in various levels of detail in the ensuing chapters. In this regard, and to a larger extent, the general orientation provides an interrelated framework of the beginning and completion/ conclusion of the entire research process.

The menace of crime in South Africa manifests in different forms, including murders, robberies, rapes, burglaries and hijackings. Each of these crimes characteristically exhibits its own peculiar causal factors and modus operandi (Adams, Caddell & Krutinger, 2012:12; Jackson & Jackson, 2016:22). Cell phones are ostensibly a large part of contemporary society, and have an immense impact on everyday life (Lochner, Benson & Home, 2012:69). It is in this context that criminals have exploited and refined technology-driven crimes in recent times using cell phones as their instruments of choice in planning and executing their criminal activities.

The relevant serious and violent criminal investigation sectors of the South African Police Service (SAPS) have determined that a cell phone is a useful technological resource during investigations of serious and violent crimes (Lochner et al., 2012:69). Given the intense environment of cell phone-perpetrated crimes, it is then imperative for investigating officers to be thoroughly conversant with the value of cell phone information and the possible impact such information may have on an investigation. For instance, the probing of cell phone records is a useful investigative method for tracing suspects and placing them at the scene of a crime, as well as identifying their accomplices (Benson, Jones & Home, 2015:9; Lochner & Zinn, 2014:162).

Notwithstanding the rampant spate and sophistication of crimes in which cell phones were instrumental, it is clear that *ad hoc* solutions have become untenable and diminish the trust of the public in the capacity of the police to address crime effectively (Zinn & Dintwe, 2015:106). Therefore, investigating officers should be unequivocally conversant with, and knowledgeable about the proscribed laws and

1