

# 12 Orders for production of documents

The power to require the production of information is one of the most significant powers available to a legislature to enable it to carry out its functions of scrutinising legislation and the performance of the executive arm of government.

## 1. Source of the power

The Senate possesses this power through [section 49 of the Constitution](#) which provides that the powers of the Houses of the Commonwealth Parliament are, until declared by the Parliament, the powers of the UK House of Commons at the time of the establishment of the Commonwealth in 1901. Those powers undoubtedly included the power to call for documents. In 1987, the Commonwealth Parliament declared its powers through the [Parliamentary Privileges Act 1987, section 5](#) of which provided for the continuation of those powers in force under section 49 of the Constitution (except to the extent varied by that Act).

## 2. History and terminology

In the early days of the Senate, orders for the production of documents were frequently used as a routine procedure to obtain information from the government. Orders were directed at existing documents as well as at information which was specifically compiled in response to the Senate's orders. The latter were frequently called "returns", giving rise to the term "orders for returns" (the documents when supplied being "returns to order") which is regarded as synonymous with the term "order for production of documents".

Such orders were used by the first Senate to obtain a range of information including copies of government contracts, details of rents for government offices, and information about government appointments, defence procurements and intergovernmental agreements. Details may be found in *Business of the Senate 1901-1906*, available from the Senate Table Office.

The procedure fell into disuse after the Senate's first decade because governments supplied information as a matter of course, but was revived in the 1970s and has been much used in recent years, particularly to obtain information about matters of controversy.

## 3. Basic procedure

Documents may be ordered to be "laid on the table" of the Senate. [Standing order 164](#) contains provisions about communicating such orders, tabling "returns" to orders and dealing with non-compliance. Most orders for production of documents start with a notice of motion, which is moved and determined during "Discovery of formal business" on any sitting day (see [Guide No. 8](#)—Notices of Motion). Sometimes an order for production of documents is contained in an amendment moved to a motion for a particular stage in the consideration of a bill (see [Guide No. 16](#)—Consideration of Legislation).

An order for production of documents has the following elements:

- The “activating” words, “that there be **laid on the table**”, are the core of any such order. Alternative phrases, such as “the Senate **calls on** the Minister to table...”, do not have the same force, although a minister **may** choose to respond as if the resolution were an order for production of documents.
- The person at whom the order is directed is identified. This is usually a minister but orders have also been directed to statutory authorities or office holders. If the relevant minister is a member of the House of Representatives, the order is directed to the Senate minister representing that portfolio. If the recipient of the order is not specified, responsibility for acting on the order lies with the Leader of the Government in the Senate to whom all such orders are communicated by the Clerk under [standing order 164](#).
- A deadline for production of documents is specified. This is essential for the order to be effective. In specifying a deadline, the volume and nature of the documents requested should be taken into account. The deadline may be a specific time and date or contingent on another event occurring; for example, an Act commencing or a minister receiving a report. For a permanent order (otherwise known as an order of continuing effect), there may be an annual or biannual deadline.
- Finally, the documents are identified. They may be identified by title or by a description of individual (or classes of) documents. The order may specify **information**, rather than documents, which may require the respondent to create a document (or return) containing the information. In some cases, particular information is excluded from the order to make it clear that the Senate is not requiring publication of, for example, cabinet submissions or **genuinely** commercially sensitive information.

#### 4. What information can the Senate ask for?

There are no limits on the documents which may be ordered to be tabled. There are no exemptions or exceptions for cabinet submissions or national security documents or other classes of documents for which governments have traditionally claimed public interest immunity (for the meaning of this term, see below). There is also no requirement that a document be one that is already in existence.

#### 5. Public interest immunity claims

Ministers (and others to whom orders are directed) sometimes seek to withhold information sought by the Senate. The grounds for refusing to produce information are encapsulated in the generic term “public interest immunity”.

Public interest immunity, in the legal system, is a concept that recognises that it would be against the public interest for certain documents or information to be made public. It is the court’s duty to balance the public interest in non-disclosure against the public interest in the court having access to sufficient information to enable justice to be done, and to make determinations accordingly. The concept is also relevant to the relationship between parliament and the executive. It is acknowledged that some information held by government ought not to be disclosed. However, while ministers may make claims to withhold information, it is for the Senate to determine whether these claims are appropriate.

When refusing to produce all or part of the information sought by an order to produce documents, ministers (and others) are expected to explain to the Senate the grounds for their refusal and the harm that might be caused by producing the information, so that the Senate can assess the claims. The possibility that publication of a document may disclose cabinet deliberations, or prejudice national security or law enforcement operations, or adversely affect Commonwealth-State or international relations may be grounds for a claim by a minister of public interest immunity. These grounds may be accepted by the Senate. The Senate has resolved, however, that it does **not** accept

“confusing the public debate” or “prejudicing policy consideration” as grounds for public interest immunity claims or that all advice to ministers is “cabinet-in-confidence”. For the background to this resolution, see *The Senate and public interest immunity: early cases*, in [Chapter 19](#) of *Odgers’ Australian Senate Practice*.

On 7 December 2017, the Senate adopted a recommendation of the Procedure Committee that a report containing details of outstanding orders be tabled by the Leader of the Government in the Senate every 6 months. The report is also to provide a statement indicating whether resistance is maintained, and any changing circumstances that might allow reconsideration of earlier refusals (see Procedure Committee [report 1 of 2017](#)).

Other frequently-mentioned grounds for public interest immunity claims are as follows.

### **Commercial confidentiality**

As the level of interaction between governments and the private sector increases, particularly through contracting out of functions and projects, commercial confidentiality is being used more and more frequently as a ground for withholding information from the Senate and its committees. Although there is a broad public interest in governments being able to carry out their functions efficiently, including through arrangements with the private sector, commercial confidentiality claims were generally made to protect the interests of particular companies and individuals against potential competitors. The recent tendency, however, has been for claims of commercial confidentiality to be made in relation to **any** information that is vaguely commercial in nature, rather than in respect of information the disclosure of which could **harm** the commercial interests of a person. The Senate has not accepted such a broad interpretation of commercial confidentiality and made an order on 30 October 2003 for any claim of commercial confidentiality to be made by a minister and accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of the information. The Senate may then determine whether the claim is accepted.

### **Legal professional privilege**

Legal professional privilege is often claimed to avoid disclosure of advice given to ministers or public servants by the government’s legal advisers, but the Senate has not accepted that this category of immunity applies to the relationship between Parliament and the Executive. It applies in a very restricted sense in proceedings before the courts to protect the relationship between legal advisers and their clients.

### **Sub judice convention**

The *sub judice* convention relates in a broader sense to legal proceedings. As practised in the Senate, it is a convention whereby the Senate agrees to limit debate or inquiry to avoid prejudicing proceedings that are before a court. For the convention to be invoked, there must be proceedings actually afoot or charges laid. There must be a real danger of prejudice to those proceedings by public canvassing of issues in the Senate, and the danger of prejudice must be weighed against the public interest in the issues being discussed. Danger of prejudice is considered greater where proceedings are being heard by a magistrate, or where a jury is involved. The preliminary nature of magistrates’ court proceedings and the perception that juries are less practised at ignoring public commentary about a case than judges are the reasons for this greater apprehension of danger. For further details, see [chapter 10](#) of *Odgers’ Australian Senate Practice*.

The *sub judice* convention may be invoked by a minister to avoid disclosing information relating to legal proceedings but, again, the claim is one to be determined by the Senate.

## Freedom of information

On occasion ministers and officials seek to apply freedom of information procedures to decisions about disclosure of information to the parliament and its committees. As noted in the [153rd Report](#) of the Privileges Committee, the Freedom of Information Act has no application to parliamentary inquiries. The Committee noted that any material which would be released under the Act should be produced or given to a parliamentary committee on request. It is also noted that due to the Executive's accountability to the Parliament, the public interest in providing information to a parliamentary inquiry may be greater than the public interest in releasing information under the Act.

Further, in a resolution agreed to on 25 June 2014, the Senate declared that declining to provide material on the basis that an FOI request for the information already existed was unacceptable and not supported by the Act.

## 6. What can the Senate do if a minister refuses to produce information?

It is clear that the Senate has the power to enforce its orders. (see Senate Committee of Privileges, [49th Report](#)) The refusal of a minister to comply with an order of the Senate may ultimately be dealt with as a contempt of the Senate, with penalties applied in accordance with the *Parliamentary Privileges Act 1987*. On most occasions, however, ministerial refusals to produce information are resolved through political means, according to the circumstances of the case.

There are many remedies available to senators to pursue information which governments are reluctant to disclose. These remedies fall broadly into two categories: punitive remedies and coercive remedies.

### Punitive remedies

Punitive remedies are those which make it more difficult for ministers to operate in the Senate and for a government's legislative program to be achieved. Examples include:

- impeding the progress of legislation through motions to postpone consideration of particular bills, including until after the requested information has been produced, or by taking up time that would otherwise be spent on government legislation
- censure motions
- motions restricting the ability of ministers to handle government business
- motions depriving ministers of procedural advantages they enjoy under the standing orders, such as the ability to rearrange business on any day or determine the order of government business on the *Notice Paper*; and
- motions to extend question time or other elements in the routine of business.

### Coercive remedies

Coercive remedies are those which use alternative means of obtaining all or part of the information to which access has been refused. Committees often play a major role in such remedies because of the ability of committee members to question ministers and officials directly, and because they can take evidence *in camera* (in private). Examples include:

- orders for the information or documents to be produced to a specified committee, including instructions to the committee about how the information is to be handled (received *in camera*, not published for a specified period etc)
- orders requiring particular committees to hold hearings and particular witnesses to attend for the purpose of answering questions about the information or documents

- further orders for production of the documents, perhaps refining the scope of the demand or excluding certain kinds of information to encourage compliance
- motions requiring ministers to make regular explanations to the Senate about the reasons for non-compliance with the previous order (or orders) and providing for motions to be moved, without notice, to take note of such explanations; and
- motions requesting the Auditor-General, or requiring another third party, to examine the contentious material and report to the Senate on the validity of the grounds claimed by the minister for non-production.

All such remedies require the support of a majority of the Senate to implement.

### **The 30-day rule**

Under [standing order 164](#), a senator may ask a minister for an explanation of that minister’s failure to comply with an order for production of documents within 30 days after the date specified for compliance.

The senator may then move – without notice – a motion to take note of the explanation or, if no explanation is provided, a motion in relation to the minister’s failure to provide either an answer or an explanation.

### **Need assistance?**

Advice on any of the matters covered by this guide is available from the Clerk of the Senate extension 3350 or [clerk.sen@aph.gov.au](mailto:clerk.sen@aph.gov.au), the Clerk Assistant (Table) extension 3020 or [ca.table.sen@aph.gov.au](mailto:ca.table.sen@aph.gov.au) (for ministers) or the Clerk Assistant (Procedure) extension 3380 or [ca.procedure.sen@aph.gov.au](mailto:ca.procedure.sen@aph.gov.au) (for non-government senators).

The Clerk Assistant (Procedure) is also available to assist with drafting notices of motion for orders for documents.

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