



THE SENATE

**ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE**

9 October 2023

Mr David Fredericks  
Secretary  
Department of Climate Change, Energy, the Environment and Water

*By email:*

*cc:*

Dear Mr Fredericks,

**Re: responses to questions on notice for Budget Estimates 2023-24**

As you would be aware, the Senate Environment and Communications Legislation Committee (the committee) lodged questions on notice (QoNs) with the Department of Climate Change, Energy, the Environment and Water (the department) relating to its hearings into Budget Estimates 2023-24. Responses to these questions on notice were received between 5 July and 25 August 2023.

In the committee's assessment, several of the answers provided by your department constitute refusals to provide information. The Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Parliament or its committees, unless the Parliament has expressly provided otherwise.<sup>1</sup> However, the Senate has long acknowledged that the disclosure of some information may result in harm to the public interest, and proscribed a process by which witnesses can make such claims ([Procedural Order 10](#)). To make a Public Interest Immunity (PII claim), the witness must state the grounds on which it is made, and the harm that could result from the disclosure. It is then for the committee and ultimately the Senate, to determine whether it will accept the claim.

Question on notice SQ23-001152 from Senator Peter Whish-Wilson asked the department whether it would make PII claims in relation to four QoNs (SQ23-000725, SQ23-000726, SQ23-000727 and SQ23-000728) taken on notice during Supplementary Budget Estimates 2022-23. The answers to three of these questions included refusals to provide information on the basis that the department had claimed under the *Freedom of Information Act 1982* (FOI Act) that the information was exempt from disclosure. The response to the fourth question (SQ23-000728) contained a refusal on the basis that the information requested was 'private' and would reveal 'department operational compliance methodology'.

The Senate has expressly rejected PII claims based on FOI exemptions as not a legitimate basis

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<sup>1</sup> *Oggers Australian Senate Practice*, 14<sup>th</sup> ed, p. 655.

in a parliamentary forum.<sup>2</sup> Similarly, revealing a 'departmental operational compliance methodology' has not been recognised by the Senate as an acceptable ground for a PII claim.<sup>3</sup> Furthermore, in these four answers, the department did not specify the harm to the public interest that could result from the disclosure of the information or document.

In the response to QoN SQ23-001152, the department reiterated its refusal of information on the grounds of FOI exemptions, declined to make PII claims, and referred the committee to the Minister as the person responsible for making such claims.

Responses to questions from several other Senators also included refusals to provide information:

- Response to QoN SQ23-000833 from Senator Sarah Hanson-Young, regarding Mr King's potential conflict of interest concerning his appointment as Chair of GreenCollar: on the basis that 'in accordance with the long standing practice of successive Australian governments, it would not be appropriate to disclose the content of any legal advice received' by the department.
- Response to QoN SQ23-000904 from Senator Dorinda Cox, regarding an application under section 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) at Murujuga: on the basis that the information concerns 'an active application'.
- Response to QoN SQ23-000964 from Senator Perin Davey, regarding the budget allocated for the replacement and transfer of ownership of flood warning infrastructure to the Bureau of Meteorology: on the basis that the 'information formed part of cabinet deliberations'.
- Response to QoN SQ23-001123 from Senator Sarah Hanson-Young, regarding the investigation of certain breaches of the EPBC Act: on the basis that 'the matter is ongoing'.
- Response to QoN SQ23-001241 from Senator Jane Hume, regarding policy proposals provided to the Minister: on the basis that 'the deliberations of Cabinet and its Committees are confidential'.

In relation to the questions referred to above, if the department is refusing to provide information to the committee it must adhere to the Senate's PII claims resolution ([Procedural Order 10](#)), which is provided below. If the department believes that it may not be in the public interest to disclose the information or document to the committee, in the first instance the department shall state the *ground* on which the department believes that it may not be in the public interest to disclose the information or document to the committee, and specify the *harm* to the public interest that could result from the disclosure of the information or document. This information should be set out in the department's answer. As detailed below, the department has not done this adequately in the above examples.

Once such a statement is received from the department, the committee or a senator may request the department refer the question of the disclosure to a responsible minister.

It is then the department's responsibility to liaise with the Minister's office to facilitate the incorporation of the Minister's formal PII claims into responses to questions on notice, or for the Minister to respond directly to the committee.

*Odgers' Australian Senate Practice* sets out various grounds for public interest immunity claims that have been accepted by the Senate, and those that have not.<sup>4</sup>

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<sup>2</sup> *Odgers Australian Senate Practice*, 14<sup>th</sup> ed, pp. 669–670.

<sup>3</sup> *Odgers Australian Senate Practice*, 14<sup>th</sup> ed, pp. 662–667.

<sup>4</sup> *Odgers Australian Senate Practice*, 14<sup>th</sup> ed, pp. 662–670.

The committee notes that with the exception of disclosure of Executive Council or cabinet deliberations, none of the reasons for refusal of information provided in relation to the above questions have been accepted as grounds for refusal of information in a parliamentary forum. Odgers makes clear the limitation of this ground. It relates only to the disclosure of deliberations.<sup>5</sup> In those instances where this ground has been provided, the department has not set out the harm to the public interest that could result from the disclosure of the information or document.

Accordingly, the committee requires the department to:

- provide the information that Senators requested in the questions on notice referenced in this letter; or
- provide the material in a form that satisfies Senators' requests and does not raise the perceived problem (noting that all the committee's estimates proceeding must be conducted in public, although the committee may agree to a briefing outside the estimates process); or
- submit a response which includes a statement of the ground and the harm to the public interest which the department envisions could be caused by disclosure.

Given that the next round of Estimates begins on 23 October 2023, the committee would appreciate responses by 16 October 2023.

Please contact Mr Stephen Palethorpe, Committee Secretary on \_\_\_\_\_ if you would like to discuss the matter.

Yours sincerely

Senator Karen Grogan

Committee Chair

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<sup>5</sup> *Odgers Australian Senate Practice*, 14<sup>th</sup> ed, pp. 665–666.

# 10 Public interest immunity claims

That the Senate—

- a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;
- b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;
- c) orders that the following operate as an order of continuing effect:
  1. If:
    - a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and
    - b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee,

the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

2. If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.
3. If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.
4. A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.
5. If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.
6. A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

7. A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).
8. If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3)...