



DEPARTMENT
OF THE SENATE

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Senator Kim Carr
Suite S1.44
Parliament House

By email: senator.carr@aph.gov.au

Dear Senator Carr

Senate powers, privilege and non-disclosure agreements

You have asked for advice about questions that might arise during Senate estimates proceedings concerning non-disclosure clauses contained in financial settlements. The settlements were reported yesterday, and are between the Commonwealth and three women whose claims of sexual harassment against former High Court judge Dyson Heydon were upheld by an independent investigation.

Typically, confidentiality clauses are enforceable through courts and tribunals. Estimates proceedings form part of 'proceedings in parliament' under section 16 of the *Parliamentary Privileges Act 1987*. That section prevents the admission or use in courts and tribunals of evidence concerning proceedings in parliament for a wide range of forensic purposes. Generally speaking, a court or a tribunal would readily exclude evidence arising in the course of estimates hearings, with the result that neither the Commonwealth nor the individuals concerned would be able to use evidence given in those estimates proceedings to enforce their rights under the agreement.

You have asked in particular whether an agency would be entitled to withhold information from an estimates hearing on the basis of such a confidentiality clause.

As you know, the Senate has always insisted on its right to determine what information it requires to undertake its work and to determine for itself any claim from the government that information should be withheld. Agencies have no independent discretion to withhold information. Claims to withhold information may only be raised on established public interest immunity grounds. Such claims must be supported by a statement specifying the harm to the public interest that could result from the disclosure of the information. The Senate resolution of 13 May 2009 dealing with public interest immunity claims sets out the relevant procedures.

In my view, the only recognised public interest immunity claim directly relevant to the matter you raise would be the risk of unreasonable invasion of privacy. As noted in *Odgers' Australian Senate Practice*:

The disclosure of some information may unreasonably infringe the privacy of individuals who have provided the information. It is in the public interest that private information about individuals not be unreasonably disclosed. It is usually self-evident whether there is a reasonable apprehension of this form of harm. It is also usually possible to overcome the problem by disclosing information in general terms without the identity of those to whom it relates. [14th edition, pp. 664-5]

In the context of the current matter, I understand that your interest is in agencies accounting for the aggregate amount of the settlements, which in itself would reduce the risk to the privacy of individuals. The other main way in which any apprehended harm may be mitigated would be to ascertain whether the individuals involved have any objection to the information being provided. In essence, their approval for the disclosure may be sought.

Let me know if I can be of any further assistance.

Yours sincerely

(Richard Pye)