



PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
Urban Infrastructure,
Cities & the Arts

MS21-001186

Senator Susan McDonald
Chair
Rural and Regional Affairs and Transport Legislation Committee
Parliament House
Canberra ACT 2600

Dear Senator ^{Susan}

Public Interest Immunity Claim – Documents relating to the National Commuter Carpark Fund

I refer to letters to the Secretary of the Department of Infrastructure, Transport, Regional Development and Communications, Mr Simon Atkinson, from Senator Rice and Senator Sterle, requesting the tabling of legal advice and spreadsheets related to administration of the National Commuter Carpark Fund at the Rural and Regional Affairs and Transport Legislation Committee Hearing of 19 July 2021.

I understand that the Department has tabled information in response to Senator Rice's request for the Benefit Cost Ratio tool and details from the Infrastructure Management System on carpark projects.

Request for spreadsheets referred to in the Auditor General's Report no. 47 of 2020-21 'Administration of Commuter Car Park Projects within the Urban Congestion Fund'

I claim public interest immunity over the requested spreadsheets on the grounds that release of those spreadsheets would disclose the deliberations of Cabinet.

The confidence of Ministers now and into the future in the confidentiality of the Cabinet process would be diminished if the details of past Cabinet deliberations were to be disclosed prior to the open access period provided for in the *Archives Act 1983*. Disclosure of cabinet information prior to the open access period risks harm through a weakening of adherence by current and future Ministers to the formal process for confidentiality of policy proposals for consideration by Cabinet, draft and final Cabinet documents, briefing and record keeping of Cabinet.

Furthermore, unless Ministers can be assured of the confidentiality of Cabinet meetings, they may not speak freely or honestly between themselves and may be more likely to suppress their views on present policies that may be unpopular or politically challenging. Any of these outcomes would ultimately impact negatively on Australia's national interest.

Compromise of the confidentiality of Cabinet would cause current and future Ministers, as well as officials tasked to brief them about matters to be discussed, to apprehend that what was written for the purpose of Cabinet and what was discussed in meetings may not remain confidential, and therefore temper what they wrote or said in the course of Cabinet. This would undermine the process of decision-making and policy deployment in Australia, and could have a particularly chilling effect on the ability of Cabinet meetings to provide a forum in which comprehensive and candid discussion by Ministers could take place.

Request for legal advice received in relation to the treatment of carparks

I also claim public interest immunity over legal advice the Department has received in relation to the treatment of carparks under the *National Land Transport Act 2014*. These documents would be exempt from production in legal proceedings on the basis of legal professional privilege.

It has been the long-standing practice of successive Australian Governments not to disclose legal advice. This practice has previously been outlined by the Hon Gareth Evans QC:

...[n]or is it the practice or has it been the practice over the years for any government to make available legal advice from its legal advisers made in the course of normal decision making process of government, for good practical reasons associated with good government and also as a matter of fundamental principle... (Senate Hansard, 28 August 1995, page 466)

Then Senator, the Hon Joe Ludwig, put the position as follows:

To the extent that we are now going to go to the content of the advice, can I say that it has been a longstanding practice of both this government and successive governments not to disclose the content of advice. (Senate Legal and Constitutional Affairs Legislation Committee, Hansard of Estimates Hearing, 26 May 2011, page 161)

Similarly, the Hon Philip Ruddock MP stated:

...It is not the practice of the Attorney to comment on matters of legal advice to the Government. Any advice given, if it is given, is given to the Government... (House of Representatives Hansard, 29 March 2004, page 27405).

The Government maintains that it is not in the public interest to depart from this established position. It is essential that legal advice provided to the Commonwealth remains confidential. Access by Government to such confidential advice is, in practical terms, critical to the development of sound Commonwealth policy and robust law-making. Similarly, the disclosure of privileged legal advice may compromise the Commonwealth's legal position.

The specific harm that the doctrine of legal professional privilege seeks to prevent is the harm to the administration of justice that would result from the disclosure of confidential interactions between lawyer and client. Both the High Court of Australia and Federal Court of Australia have confirmed that legal professional privilege promotes the public interest by enhancing the administration of justice, facilitating freedom of consultation and encouraging full and frank disclosure between clients and their legal advisers.

Yours sincerely

Paul Fletcher

4 / 8 / 2021