



AUSTRALIAN SENATE

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By: SENATOR EGGLESTON

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Senator Alan Eggleston
Deputy Chair
Senate Standing Committee on Economics
Parliament House
CANBERRA ACT 2600

Dear Senator Eggleston

You have asked for advice on whether there are any restrictions on committees asking about advice to ministers.

Standing order 26(5) provides that "committees may ask for explanations from ministers in the Senate, or officers, relating to the items of proposed expenditure".

There are no restrictions on committees asking about advice to ministers, the preparation of which is a major function of the Australian Public Service and a large number of statutory authorities. The Senate has on many occasions* reaffirmed the principle 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. The Senate has not expressly provided otherwise, and witnesses are reminded of this principle in the opening statements made by all committee chairs at all estimates hearings.

The Senate has empowered its legislative and general purpose standing committees to require the giving of evidence and the production of documents. Any refusal by a witness to comply with a requirement to produce information is reported to the Senate in accordance with the Privilege Resolutions. In so far as ministers are concerned, it is acknowledged that there is some information held by government which ought not to be disclosed for a variety of reasons which are commonly described by the term "public interest immunity". If a minister declines to answer a question, the minister should do so only on a recognised ground of public interest immunity. A claim of

* See, for example, resolutions of the Senate of 9/12/1971, J.846, 23/10/1974, J.283, 16/9/1980, J.1563, 4/6/1984, J.902, 25/6/1998, J.4075, all of which are published in *Standing and other orders of the Senate*, under Resolutions expressing opinions of the Senate

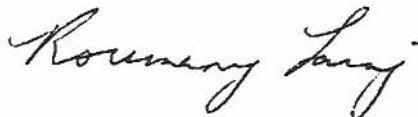
public interest immunity remains a claim only, and it is up to the Senate to determine whether to enforce a demand for information or whether to accept a particular claim.

A paper by the Clerk of the Senate on potentially acceptable and unacceptable grounds of public interest immunity has been circulated to members of committees on several occasions since 2005. A copy is attached to this advice.

In summary, committees may ask ministers and officers about advice to ministers (noting that, under Privilege Resolution 1(16), officers are entitled to refer questions to a superior officer or a minister). Any refusal to provide information to a committee must be made by a minister (not an officer), on an established ground of public interest immunity. It is up to the Senate to determine whether the proffered ground is acceptable.

Please let me know if I can be of any further assistance.

Yours sincerely



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THE SENATE

GROUNDINGS FOR PUBLIC INTEREST IMMUNITY CLAIMS

This is a list of potentially acceptable and unacceptable grounds for claims of public interest immunity, that is, claims that information should not be provided to the Senate or in the course of an inquiry in a Senate committee.

The list is based on precedents of the Senate arising from cases in the Senate and actions and attitudes adopted by the Senate in those cases. The major cases are set out in *Odgers' Australian Senate Practice*, 11th ed, 2004, pp 464-484.

The most significant principle drawn from Senate precedents is that the Senate has insisted that a claim that information should not be produced remains merely a claim unless and until determined by the Senate. Any agreement by a committee to accept a claim is subject to a determination by the Senate, which may be initiated by any senator.

Particular claims must be assessed in their particular circumstances. It is in the nature of the process that, short of the Senate compelling the production of the information concerned, there can never be complete assurance that a particular claim is justified. The scope and basis of a claim may be clarified, however, by appropriate questions. The following list suggests the issues which have to be clarified and the questions which should be asked in relation to particular grounds for claims.

The terminology "public interest immunity" is significant. The Senate has made it clear that a claim that particular information should not be produced must be based on a particular ground that disclosure of the information would be harmful to the public interest in a particular way. A statement that the holder of information does not wish to produce it, or that the information is confidential, is not a proper claim for public interest immunity.

It is open to the Senate to determine that any risk of harm to the public interest by disclosure of information is outweighed by the benefit to the public interest in the provision of the information.

The Senate has also made it clear that claims in relation to information held by government must be made by ministers. The government's guidelines for public servants appearing before parliamentary committees also emphasise this principle.

Any claim by an officer that information should not be produced should, if contested by any senator, be referred to a minister for a decision on whether to maintain the claim. Where a claim is made by a statutory body which has independence from the government, the decision to raise a claim should be made by the governing authority of that statutory body as a deliberate and properly communicated decision.

Accepted grounds

The following grounds for public interest immunity claims have achieved some measure of acceptance by the Senate in the past.

(1) *Prejudice to legal proceedings*

This could arise in two forms. There may be a reasonable apprehension that disclosure of some information could prejudice a trial which is in the offing by influencing magistrates, jurors or witnesses in their evidence or decision-making. A case involving only questions of law before superior court judges is not likely to be influenced and therefore is unlikely to provide a basis for this ground. Secondly, production of information to a committee could create material which, by reason that it is unexaminable in court proceedings because of parliamentary privilege, could create difficulties in pending court proceedings. To invoke this ground, there should be set out the nature of the pending proceedings and the relationship of the information sought to those proceedings.

(2) *Prejudice to law enforcement investigations*

For this ground to be invoked it should be established that there are investigations in progress by a law enforcement agency, such as the police, and the provision of the information sought could interfere with those investigations. As this is a matter for the law enforcement agency concerned to assess, this ground should normally be raised directly by the law enforcement agency, not by some other official who can merely speculate about the relationship of the information to the investigation.

(3) *Damage to commercial interests*

The provision of some information could damage the commercial interests of commercial traders in the market place, including the Commonwealth. This is the well-known "commercial confidentiality" ground. The most obvious form of this is the disclosure of tenders for a contract before the call for tenders is closed. The Senate has made it clear in its resolution of 30 October 2003 that a claim on this ground must be based on specified potential harm to commercial interests, and in relation to

information held by government must be raised by a minister. Statements that information is commercial and therefore confidential are clearly not acceptable.

(4) *Unreasonable invasion of privacy*

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.

On some occasions it has been claimed that fees paid to lawyers or consultants should not be disclosed, usually on the privacy ground but sometimes on the commercial confidentiality ground. The claim has not been consistently raised, and information on such fees has been readily provided in some cases. The Senate has since 1980 asserted its right to inquire into such fees.

It is sometimes claimed that information has been collected on the condition that it would be treated as confidential, and therefore the information cannot be disclosed. This is not in itself a ground for a public interest immunity claim. It must still be established that some particular harm may be apprehended by the disclosure of the information. Those who provided the information may not be concerned about its disclosure, and their approval for the disclosure may be sought.

(5) *Disclosure of Executive Council or cabinet deliberations*

It is accepted that deliberations of the Executive Council and of the cabinet should be able to be conducted in secrecy so as to preserve the freedom of deliberation of those bodies. This ground, however, relates only to disclosure of deliberations. There has been a tendency for governments to claim that anything with a connection to cabinet is confidential. According to a famous story about a state government, trolley loads of documents were wheeled through the cabinet room so that it could be claimed that they were all "cabinet-in-confidence", a story which serves to illustrate the abuse of this ground. A claim that a document is a cabinet document should not be accepted; it has to be established that disclosure of the document would reveal cabinet deliberations. The claim cannot be made simply because a document has the word "cabinet" in or on it.

Neither legislatures nor courts have conceded that internal deliberations of government departments and agencies are entitled to the same protection.

(6) *Prejudice to national security or defence*

This claim should be raised in the form of a deliberate statement by a minister that disclosure of particular information would be prejudicial to the security or defence of the Commonwealth. It is usually self-evident whether the claim can legitimately be raised. It has not actually been used extensively before Senate committees.

The ground may be extended to internal security matters. For example, disclosure of information about security precautions to be taken at some forthcoming public event could well be resisted on this ground.

(7) *Prejudice to Australia's international relations*

There are two bases for a claim on this ground. Disclosure of particular information could sour Australia's relations with other countries. The raising of a claim on this basis would seem to cause the harm which it is apprehended disclosure of the information would cause; foreign governments can thereby conclude that something has been said or written that they would not like. Perhaps that is why it is seldom raised. Disclosure of some information could also weaken Australia's bargaining position in international negotiations, and this would seem to be a stronger basis for a claim on this ground. It would have to be established that there are negotiations in prospect for it to be raised.

(8) *Prejudice to relations between the Commonwealth and the states*

Again, raising this ground, on one basis, would seem to do the apprehended harm. This ground, however, has appeared frequently in recent times in the following form: the information concerned belongs to the states as well as to the Commonwealth, and therefore cannot be disclosed without the approval of the states. The obvious response to this is that the agreement of the states to disclose the information should be sought and they should be invited to give reasons for any objection.

There are also some lesser grounds of very limited scope for legitimate claims. Undermining public revenue or the economy may be apprehended in disclosure of some information. For example, proposed tariff increases cannot be disclosed in advance of their legislative implementation, usually in the annual budget. Some information about interest rates and action to support the dollar also falls into this category. It should be self-evident whether claims on these kinds of grounds are legitimately raised.

Unacceptable grounds

The following grounds have not been accepted by the Senate in the past.

(1) *A freedom of information request has been or could be refused*

The Senate comprehensively dealt with this suggestion in 1992, and it was formally established, and conceded by the then government, that the fact that a freedom of information request for the same information has been or could be refused under the Freedom of Information Act is not a legitimate basis for a claim of public interest immunity in a parliamentary forum. Some ground acceptable in such a forum must be independently raised and sustained.

Similarly, the fact that an exemption under the Freedom of Information Act applies to some information is not a legitimate basis for a claim in a parliamentary forum.

(2) *Legal professional privilege*

It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides a ground for a refusal of information in a parliamentary forum. The first question in response to any such claim is: to whom does the legal advice belong, to the Commonwealth or some other party? Usually it belongs to the Commonwealth. Legal advice to the federal government, however, is often disclosed by the government itself. Therefore, the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought.

(3) *Advice to government*

As with legal advice, the mere fact that information consists of advice to government is not a ground for refusing to disclose it. Again, some harm to the public interest must be established, such as prejudice to legal proceedings, disclosure of cabinet deliberations or prejudice to the Commonwealth's position in negotiations. Any general claim that advice should not be disclosed is defeated by the frequency with which governments disclose advice when they choose to do so.

(4) *Secrecy provisions in statutes*

It is now well established that a secrecy provision in a statute prohibiting the disclosure of particular information does not prevent the provision of that information

in a parliamentary forum. Government legal advisers have accepted this position, and most departments and agencies now realise that they cannot raise a claim merely on this basis. Some other ground must be raised for not disclosing the information. That ground may be reflected in the statutory secrecy provision, but must be independently raised.

(5) *Working documents*

The fact that a document is a "working document" says nothing about its content or status. The great majority of documents in the possession of government could be made out to be working documents. As always, the question is: what is the particular harm to the public interest to be apprehended by its disclosure? The fact that the document may contain something embarrassing to government or its departments or agencies is not a basis for a public interest immunity claim.

(6) *"Confusing the public debate" and "prejudicing policy consideration"*

The Senate formally resolved in 1999 that this is not an acceptable ground for not producing documents in response to a Senate order for documents.

A coherent formulation of this ground would seem to be as follows: the Senate and the public should not find out about matters which are under consideration by the government because they would then debate those matters to the detriment of the government. This is closely related to the "working document" claim, and indeed appears to be the real basis of that claim in many instances.

Often in committee hearings general indications of reluctance or refusal to provide particular information are given. In response to these sorts of statements the question should be asked: is a minister raising a public interest immunity claim, and, if so, on what particular, known ground?

Only when that question is answered can the basis of a claim be explored and considered. A statement by a minister, for example, that "I am not going to provide that information" is not a claim of public interest immunity.

The grounds for public interest immunity claims which have gained some acceptability in the Senate and comparable legislatures are also those to which the courts have given weight in determining claims for public interest immunity in legal proceedings. Conversely, a claim which would not be entertained in a court should not carry much weight in the legislature.

In relation to all claims it must also be established whether the claim is made against *production* of the information or *publication* of the information. Production of information to

a Senate committee, except in estimates hearings, does not automatically involve publication of the information. It is open to a committee, except in estimates hearings, to avoid any apprehended harm to the public interest by receiving information on an in camera basis. Estimates hearings are required by the rules of the Senate to receive all information in public, but in those hearings the possibility of a committee receiving information other than in estimates hearings can be explored.

Other compromises may be made to allow information to be provided while avoiding the apprehended harm. Reference has been made to the deletion of identifying details where privacy is the issue. Other processes for "sanitising" information have been used.

Harry Evans
Clerk of the Senate