



26 February 2018

Senator James Paterson
Chair, Finance and Public Administration Legislation Committee
The Senate
Parliament House
Canberra ACT 2604

Dear Senator Paterson

Estimates hearings – withholding information

You have asked for advice on whether the response from the Department of Finance forms reasonable grounds for not answering your questions at last October's Supplementary Budget Estimates.

In relation to legislation committees considering estimates, the Senate has resolved 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 Senate or its committees unless expressly provided otherwise.

The Senate has always acknowledged that there is information that it would not be in the public interest to disclose. In respect of such information, however, it has long insisted that a person seeking to withhold relevant information should make a public interest claim on a recognised ground and that it is for the Senate to determine whether that ground is acceptable.

The order of the Senate of 13 May 2009 sets out how a public interest immunity claim should be made. It provides, in essence, that any refusal to provide a committee with information must be made by a minister and must include a statement by the minister that it would not be in the public interest to disclose the requested information. The minister is required to provide to the committee a statement of the grounds for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information. It is then a matter for the senator seeking the information, the committee and – ultimately – the Senate to determine whether to accept the claim.

Privacy

With the above in mind, the claim by the Department of Finance that it is prevented from releasing the required information by the operation of the *Privacy Act 1988* remains simply that: a claim. The

statute does not restrict parliamentary committees in seeking information or the provision of information to such committees.

If the department seeks to withhold the information then, in accordance with the 2009 order, the responsible minister would need to state the grounds on which the information should be withheld and the harm to the public interest that would result from its disclosure. It would then be a matter for the committee to determine whether the statement justifies the withholding of the information. If the committee does not consider the statement sufficiently justifies the withholding of the information, it may report the matter to the Senate.

The committee may well conclude that it is in the public interest that private information about individuals not be *unreasonably* disclosed. If the department is concerned about the privacy of senators and members, it may wish to demonstrate what, if any, steps it has undertaken to ascertain from such senators or members whether they have concerns about being identified in connection with this matter.

In any case, it may be possible to overcome the problem by receiving information in general terms without the identity of those to whom it relates. For instance the department could be asked to consider identifying the number of parliamentarians in question in the first instance rather than naming them, as well as providing a breakdown of spending.

Independent Broad-based Anti-corruption Commission investigation

Similarly, in the second matter, the committee may well be dissatisfied with department's claim that it would be inappropriate to comment IBAC investigations. Again, this is a bare claim that is required to be developed by the minister for consideration by the committee.

A possible ground for seeking to withhold such information, accepted by the Senate in other circumstances, might be the risk of prejudice to law enforcement investigations. However, for this ground to be invoked, it should be established that there are investigations in progress by an investigative agency and that the provision of the information sought could interfere with those investigations.

Before closing, I should point out that the *Government Guidelines for Official Witnesses* stipulate 'that there be the freest flow of information between the public sector and the parliament.' (4.1.1) You may wish to weigh the department's response against this criterion.

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

Yours sincerely

(Richard Pye)