

Handling of Members' records and documents

Common Questions

The responses to these commonly asked questions are based on the Infosheet, *Questions and answers on parliamentary privilege*¹ and on guidelines for Members on the status and handling of their records and correspondence, developed by the House of Representatives Standing Committee of Privileges².

These responses relate to records and documents held by Members of Parliament as a consequence of their work as a Member.

If you are in doubt about a matter relating to your records contact the Clerk of the House for assistance or seek legal advice.

What is parliamentary privilege?

Parliamentary privilege is the special legal rights which apply to each House of Parliament, its committees and Members.

The special powers and protections are in place to ensure that the Parliament can carry out its functions properly, for example, debate matters of importance freely, discuss grievances and conduct investigations effectively without interference from government, the courts or anybody else.

The special rights and immunities of parliamentary privilege are not the prerogative of Members in their personal capacities. They apply to Members insofar as they are intended to allow Members to carry out their responsibilities to the House and their constituents without obstruction or fear of prosecution. For information about parliamentary privilege and what it covers refer to the Infosheet, *Questions and answers on parliamentary privilege*.

What are the main features of parliamentary privilege?

- Each House, its committees and Members enjoy certain **rights** and **immunities** (exemptions from the ordinary law) such as the ability to speak freely in Parliament without fear of prosecution;
- Each House has the power to deal with offences (**contempts**) which interfere with its functioning;

¹ A copy of the Infosheet can be accessed at:

<http://www.aph.gov.au/house/info/infosheets/is05.pdf>

² A copy of the guidelines can be accessed at

<http://www.aph.gov.au/house/committee/priv/index.htm>

- Each House has the power to **reprimand, imprison or impose fines** for offences; and
- **Complaints are dealt with internally** (within the Parliament).

How does parliamentary privilege affect Members' records and documents?

Parliamentary privilege is relevant to Members' records and documents as some of the records and documents may enjoy the protection of parliamentary privilege. If certain records are covered by parliamentary privilege there are restrictions on legal action that could be taken in relation to those records (for example, there could be immunity from action in respect of defamatory statements made in the records). There also could be restrictions on the use of those records in any court or other legal proceedings.

What types of documents do Members generally hold?

Documents held by Members may include:

- personal records;
- party records;
- parliamentary related records (for example copies of speeches made in Parliament, copies of questions on notice, evidence given to parliamentary committees);
- reference material;
- copies of correspondence with Ministers; and
- electorate records (including copies of correspondence with constituents).

Only some of these will be covered by parliamentary privilege.

Records may be in paper or electronic form.

What Members' records and documents may be covered by parliamentary privilege?

Issues to be considered

In order for records or documents to be covered by parliamentary privilege, they must be '**proceedings in parliament**' as defined in the *Parliamentary Privileges Act 1987*. Two questions need to be considered to determine whether records or documents fall within the definition of proceedings in Parliament.

- has an act been done (in this instance by a member or someone acting on his or her behalf) in relation to the records or correspondence 'in the course of, or for purposes of or incidental to' the transacting of the business of a House or committee? Broadly speaking, if the records and correspondence in the possession of the member are used in some way to transact the business of a House or a committee, then parliamentary privilege would likely attach; and

- if the answer to the first question is ‘yes’, then a second question arises: does the use that is proposed to be made of the records amount to ‘impeaching’ or ‘questioning’ those proceedings in Parliament? A member may have some difficulty in persuading a court or tribunal that an order which simply required that documents be disclosed or produced to a court or tribunal amounted to impeaching or questioning.³

In summary, to claim immunity from an order to produce documents, you would need to satisfy a court that:

- the documents fell within the definition of ‘proceedings in Parliament’ and so were not subject to impeachment or question; and
- the order to produce the documents amounted to such an impeaching or questioning.

While some records and correspondence of Members would be seen by a court or tribunal to attract the protection of parliamentary privilege, for example, when they have been the subject of debate or a question in the House, it is clear that much of it, including most electorate correspondence and the correspondence by Members to Ministers and their departments, would not. **The matter is one for interpretation by the courts or tribunals.**⁴

What should I do if I receive a court order to produce documents or appear as a witness?

In the course of litigation, a court may issue orders for parties to litigation to identify and make available for inspection documents that are relevant to the issues of the case. While you may not be a party to such litigation, documents you hold may be subject to this process and be required to be disclosed, and possibly later produced to the court, and admitted into evidence. Members may be served with a subpoena to produce documents that are relevant to a matter before the court, and possibly for the member to appear at the same time. Members are generally subject to the law in this area.

If you think the documents called for may be covered by parliamentary privilege or should not be required to be produced in court **seek advice from the Clerk or a legal adviser.**

³ For a discussion of the reasoning behind these questions see the report by the House of Representatives Standing Committee of Privileges, *Report of the inquiry into the status of the records and correspondence of Members*, November 2000, paragraphs 2.16-2.23.

⁴ For relevant case law see Guidelines for Members on the status and handling of their records and correspondence.

Issues to be considered

First consider the **type and content of the documents** called for. **Does parliamentary privilege apply (ie. do the documents fall within the definition of ‘proceedings in Parliament’?)** If so they would be protected absolutely from being impeached or questioned in a court or tribunal having the power to examine witnesses under oath, such as Royal Commissions and commissions of inquiry.

How to respond to an order to produce documents if they might be covered by privilege

- If you wish to resist an order to produce documents on the ground of parliamentary privilege you should respond to the order and formally claim that the documents arise from a privileged occasion.
- The most appropriate time to claim formally that the documents arise from a privileged occasion, and so seek an order from the court or tribunal that the documents need not be produced, would be the first date set for the documents to be disclosed or produced to the court or tribunal.
- At any stage before then you may wish to approach the court or tribunal or the solicitor for the party on whose behalf the order has been issued and seek to discuss the difficulties that the order raises.
- If you are faced with such an order, you are encouraged to contact the Clerk of the House and the Speaker and make them aware of the situation. If there is an issue of parliamentary privilege, the Speaker may wish to intervene to assert the protection of parliamentary privilege.

The issue of **temporary immunity** may also come into play if a member is called to appear before a court in a civil case. Section 14 of the Privileges Act provides that a member shall not be required to attend before a court or tribunal or be arrested or detained in a civil cause on a day on which the House meets or a day on which a committee of which the member is a member meets, or within five days before or after the House or the committee meets.

Are there other legal protections available for Members' records and documents?

Yes. If the records are not likely to be considered ‘proceedings in Parliament’ and there is a possibility that their disclosure may result in a defamation action against the member or the person who supplied the information, then the common law defence of **qualified privilege** may be claimed.

This privilege is not related to parliamentary privilege. To raise this defence the defendant would need to show that the person who made the defamatory statement had an interest or legal, moral, or social duty to make it to the receiver of the information, and the person who received it had a corresponding interest or duty to receive it. The claim would be defeated if the plaintiff could prove that the

communication was made maliciously or without good faith⁵, for example, if it involved some dishonest purpose or improper motive. While there are no reported cases in Australia in which a member's records and correspondence were considered to be protected by qualified privilege, the English High court found that a member who had received a letter from a constituent seeking assistance in advising a Minister of improper conduct by a public official had sufficient interest in the subject matter of the complaint to make the occasion of publication a privileged one.⁶

Can a search warrant be executed in relation to a member's records and documents?

Yes. There is **no immunity** under the law of parliamentary privilege that would exempt Members' records and documents from the execution of search warrants. Search warrants could be executed on a member's electorate office or home or on the home of a member's staff. Search warrants may also be issued in respect of Members' Parliament House offices. In this case the Speaker's permission would be sought before a search warrant would be executed in Parliament House.

Members may wish to seek to protect **sensitive or confidential information** from inappropriate disclosure or seizure. A member could argue to a court that records should not be seized or removed because of their association with 'proceedings in Parliament' and that the seizure or removal amounts to impeaching or questioning those 'proceedings in Parliament' (see above).

The difficulty that arises is a practical one—the first **opportunity to argue** the issue of privilege would likely be in an application for an injunction against the officers who seized the material. You might also argue that the execution of the warrant falls within section 4 of the Privileges Act and amounts to a contempt of the Parliament (see below). Again, this claim is not likely to be made until the warrant has been executed.

In the case of **warrants to be executed in Parliament House** the requirement for police to first seek the permission of the Speaker would provide an **opportunity for Members to seek advice** and raise concerns about the documents liable to be seized or disclosed during a search.

Guidelines on the execution of search warrants

There is a draft of **guidelines for the execution of search warrants by the Australian Federal Police** on the electorate offices (and Parliament House offices with the prior consultation of the Presiding Officers) of Members of Parliament (see the Guidelines for Members on the status and handling of their records and correspondence for a copy of the draft AFP guidelines). While these guidelines do not have official status, they provide the basis on which Members might expect search warrants to be executed. The guidelines also do not apply formally to State and Territory police.

⁵ See Gillooly, Michael, *The Law of Defamation in Australia and New Zealand*, 1998, pp. 169-173.

⁶ *R. v. Rule* (1937) 2KB 375.

However, in the recent execution of a search warrant on the office of a Senator, the procedures of the Queensland Police were essentially in accord with the guidelines. Both the House and Senate Committees of Privileges have recommended that guidelines should cover State and Territory police.

Could the execution of a search warrant or an order for production of documents be a contempt of parliament?

In **some circumstances** a member might seek to resist the execution of a search warrant or an order for production of documents on the grounds that the action proposed in the warrant or order amounts to contempt of the Parliament. That is, you would claim that the actions, or elements of them, fall within the definition of section 4 of the Privileges Act which sets out the nature of conduct that constitutes an offence against a House.⁷ However it would be necessary to show that the seeking of the warrant or order or pressing for compliance with the warrant or order amounted to or was intended or likely to amount to an **improper interference** with the free performance by the member of the member's duties as a member.⁸

If a member considers that a constituent has been the subject of intimidation, punishment or harassment as a result of making representations to the member, this could be raised as a possible matter of contempt. The action would, of course, have to amount to an improper interference with the member in his or her duties as a member.⁹

Standing Orders 95, 96 and 97A refer to the means by which a matter of privilege such as the suggestion that certain action is a contempt may be raised.¹⁰

Can a freedom of information request be directed to a member?

No. The application of the *Freedom of Information Act 1982* is limited to records held by government, but see below.

7 Section 4: Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

8 For a detailed discussion of contempt, see *House of Representatives Practice*, 4th ed., p. 706.

9 For a case relevant to the execution of a search warrant on a member's electorate office see the Guidelines for Members on the status and handling of their records and correspondence.

10 See *House of Representatives Practice*, 4th ed., p. 723.

What about copies of letters held by Ministers and departments?

Ministers' offices and government agencies would hold copies of representations by Members on behalf of constituents and these may be sought for release under freedom of information legislation. A document **may be exempt** from disclosure if it would involve the **unreasonable disclosure of personal information** about any person.¹¹ However, the **decision as to whether disclosure is unreasonable is one for the agency**, and depends on the balance of privacy interests of the third party and the public interest in disclosure. The decision of an agency also is subject to review by the Administrative Appeals Tribunal.

What are some of the problems that can arise when handling correspondence or information?

Members will have their own systems for handling correspondence and documents, and their own styles of drafting correspondence. However, allegations made by constituents or information and documents provided may be **flawed or inaccurate** and when allegations or information are passed on by the member for advice or comment to other offices, it carries the **risk of damaging reputations**, sometimes undeservedly. There is also the possibility that once documents and allegations have been passed on by a member they will be **disclosed to other persons** than the one to which the member has directed them.

Some suggested precautions

There are some simple precautions about which you may wish to remind yourself and consider including in your office routine:

- ensure that you **understand** clearly any allegations made to you and check with the person making the allegation, and, where possible, independently, the accuracy of allegations before passing them on;
- rather than adopt statements or allegations by constituents as facts, you may prefer to note in their correspondence when they refer to allegations: **'I have been told that....'**;
- **clarify** with constituents the **purpose** for which the information has been provided to you, for example, so that it can be passed to a Minister, department, or authority, for comment and action. If the information is to be passed on, it should be **made clear** to the constituent that its **confidentiality cannot be guaranteed**;
- **record** the advice that has been given to constituents in this regard and their response to that advice;
- ensure that documents containing confidential information are **marked, handled and stored** appropriately; and

¹¹ See subsection 14(1), and a definition of 'personal information' in subsection 4(1).

- **be aware** that the correspondence you draft in response to receipt of sensitive information and allegations may become public at a later stage.

House of Representatives Standing Committee of Privileges

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