



LEGISLATIVE COUNCIL

MEMORANDUM

To	Public Accountability Committee
From	Mr David Blunt, Clerk of the Parliaments
Subject	Inquiry into the impact of the CBD and South East Light Rail – objections to answering questions on the basis of commercial and Cabinet confidentiality
Date	14 November 2018
Reference	D18/40299

Background

At a public hearing for the Public Accountability Committee inquiry into the impact of the CBD and South East Light Rail Project, held on 4 October 2018, a number of witnesses declined to answer questions in relation to the cost of the project, on the grounds that answering these questions would breach commercial-in-confidence considerations.¹

A number of questions were taken on notice by Transport for NSW. In response to two of these questions, Transport for NSW declined to answer based on claims of commercial and Cabinet confidentiality:

2. The Hon. DANIEL MOOKHEY: How much money has been spent to date on the CBD and South East Light Rail project?

Mr TROUGHTON: I will have to take that on notice. It probably is commercial-in-confidence anyway.

Response: This is commercial-in-confidence.²

3. The Hon. DANIEL MOOKHEY: I refer to the monthly contract delivery progress reports. Were they examined by Mr Jock Murray in his reports?

Mr TROUGHTON: I am not aware of that.

The Hon. DANIEL MOOKHEY: Were they all examined in Gateway Review and Health Check report No. 3 dated 25 October 2016, or were any other health checks undertaken by Infrastructure NSW under the Infrastructure Investor Assurance Framework?

Mr TROUGHTON: I do not know what Mr Jock Murray has reviewed or not reviewed. I will take that question on notice.

Response: The Infrastructure NSW Health Checks are Cabinet-in-confidence.³

¹ Evidence, Mr James Bramley, Chairman, ALTRAC Light Rail, 4 October 2018, p 32; Evidence, Mr Stephen Troughton, Deputy Secretary, Infrastructure and Services, Transport for NSW, 4 October 2018, p 42.

² Answers to questions on notice, Transport for NSW, 4 November 2018, p 3.

³ Answers to questions on notice, Transport for NSW, 4 November 2018, p 4.

The issue of whether the information sought can be considered Cabinet-in-confidence was the subject of a recent decision of the NSW Civil and Administrative Tribunal (NCAT). In 2016, the Hon Adam Searle MLC applied to Transport for NSW under the *Government Information (Public Access) Act 2009* (GIPA Act) for access to the Health Check Reports and Gateway Reviews relating to the CBD Light Rail project. Transport for NSW refused access to all of the information requested on the basis that the information is Cabinet information (as defined in the GIPA Act). Mr Searle subsequently applied to NCAT for review of Transport for NSW's decision.⁴

In its review of Transport for NSW's decision not to provide the documents, NCAT found that 'there are no reasonable grounds for the claim that the dominant purpose of preparing the Documents was their being submitted to Cabinet or a Cabinet committee for Cabinet's consideration'. While NCAT considered other public interest considerations against disclosure, NCAT ultimately determined that Transport for NSW should provide access to the information, with the exception of certain sections as listed in the determination.⁵ Transport for NSW appealed NCAT's decision, however the appeal 'did not involve a challenge to the Tribunal's conclusion that the information was not Cabinet information'.⁶

The committee subsequently resolved that:

- the Clerk provide written advice to the committee on the committee's powers to seek information from Transport for NSW on matters in which they claim commercial or Cabinet confidentiality in their responses to questions taken on notice arising from the hearing on 4 October 2018, particularly in light of the NCAT decisions in 2017 and 2018 involving Transport for NSW and the Hon Adam Searle MLC
- following the distribution of written advice, the Clerk be invited to attend a committee meeting to provide a briefing to members in person.

Advice

Under the *Parliamentary Evidence Act 1901*, committees have the power to compel a witness to answer a 'lawful question'.⁷ As Lovelock and Evans explain, a lawful question is considered to be a question of fact, as opposed to opinion, relevant to the committee's terms of reference.⁸

While it is not unusual for witnesses to object to the provision of information on the grounds of public interest immunity, including commercial confidentiality, these claims generally have no application to parliamentary inquiries other than as a consideration to take evidence *in camera*. However, claims of privilege on the basis of Cabinet confidentiality are a somewhat different proposition as discussed below.

Issue 1: Commercial-in-confidence

The first issue is whether commercial-in-confidence considerations are a valid reason not to provide an answer as to the money spent to date on the CBD and South East Light Rail project. As noted in Lovelock and Evans (2008), 'any common law duty or commercial requirement of secrecy would not prevent Parliament or a parliamentary committee from obtaining information, even if it was in respect of private commercial dealings, provided that the disclosure of information was in the public interest and relevant to the inquiry terms of reference'.⁹

⁴ *Searle v Transport for NSW* (2017) NSWCATAD 256.

⁵ *Searle v Transport for NSW* (2017) NSWCATAD 256.

⁶ *Transport for NSW v Searle* (2018) NSWCATAP 93.

⁷ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 508.

⁸ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 508.

⁹ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 511.

When committees assert their power to seek information subject to commercial confidentiality such claims by witnesses should not be ignored. Any claim or right normally afforded in our legal system is usually given serious consideration by committees. Therefore, if a witness objects to the provision of information on the basis of commercial confidentiality, the committee should consider the reasons provided by the witness, whether the disclosure of information is in the public interest and any damage that could occur through the disclosure of commercially sensitive information. The committee has the option of resolving to take evidence *in camera* if it may assist in managing the witnesses' concerns.¹⁰

In short, the committee should carefully consider the commerciality concerns raised by witnesses and whether to hear their evidence *in camera*, but should Transport for NSW continue to refuse to disclose the money spent to date on the CBD and South East Light Rail project on the basis of commercial confidentiality, it could constitute a refusal to answer a lawful question, although.

Issue 2: Cabinet-in-confidence

The second issue is whether provision of information about the Health Checks and Gateway Reviews, or the documents themselves, can be declined on the basis they are Cabinet-in-confidence. It is relevant to note that issues pertaining to Cabinet confidentiality have been tested over many years in the context of the power of the House to order the production of documents under standing order 52.

Egan v Chadwick (1999) confirmed the Council's power to order documents subject to claims of public interest immunity and legal professional privilege, but did not adjudge that this power extended to Cabinet documents. However in his judgement, Spigelman CJ distinguished between documents which disclose the actual deliberations within Cabinet ('true' Cabinet documents) and those which are in the nature of reports or submissions prepared for the assistance of Cabinet, the latter which may or may not be covered by the prohibition.

Priestly JA came to a different conclusion, suggesting that like the courts, the Council has the power to compel the production of Cabinet documents. Bret Walker SC has expressed a similar view, suggesting that the automatic exclusion of Cabinet documents from scrutiny by the Council represents an 'extremely dubious and problematic state of the law'.¹¹

The Executive however takes the view expressed by Meagher JA who found in his judgement that 'the immunity from production is complete'. The Executive has consistently maintained that it is not required to produce Cabinet documents, even on the occasions when they have furnished such documents in response to an order under standing order 52, and has taken an expansive interpretation of the judgement in *Egan v Chadwick* (1999) in determining what is a 'Cabinet' document.¹²

This dispute between the Executive and the Council as to what constitutes a Cabinet document was also examined in the context of the inquiry by the Legislative Council Privileges Committee into the *The 2009 Mt Penny order for papers*. While the Executive tends to rely on the definition of Cabinet documents under the GIPA Act, the Privileges Committee report noted advice from the Clerk of the Parliaments that the definition of 'Cabinet documents' as defined in the GIPA Act 'is much broader in scope than the position articulated by Spigelman CJ in *Egan v Chadwick* and would have a deleterious impact on the capacity of the Council to hold the Executive to account through the orders for papers process'.¹³ However it is significant in the current instance that the Health Checks and Gateway Reviews were not considered Cabinet documents *even* under the expansive definition used in the GIPA Act.

¹⁰ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 512.

¹¹ C25: Marking 25 Years of the Committee system in the Legislative Council, 20 September 2013, pp 7-8.

¹² LC Minutes 26/5/2005, 1408.

¹³ Privileges Committee, Legislative Council, *The 2009 Mt Penny return to order*, 2013, pp 79-80.

Recent developments

There have been significant developments in 2018 regarding the power of the Legislative Council to require the production of documents which have been classified by the Executive as Cabinet-in-confidence. During this year, the House received several returns to orders which stated that there were no documents which were lawfully required to be produced according to the terms of the resolution. The documents were eventually produced and subsequently, on 21 June 2018, the House agreed to a motion noting, among other points, that:

- 'the Legislative Council rejects the proposition that the test in the *Government Information (Public Access) Act 2009* of what constitutes Cabinet information is applicable to Parliament'
- 'that this House asserts that it has the power to require the production of Cabinet documents ... and that the test to be applied in determining whether a document is a Cabinet document captured by an order of the House is, at a minimum, that articulated by Spigelman CJ in *Egan v Chadwick*'.¹⁴

In relation to the refusal of Transport for NSW to disclose information relating to the Health Checks and Gateway Reviews on the basis of Cabinet confidentiality, NCAT has found that the information cannot be considered Cabinet-in-confidence even under the expansive definition in the GIPA Act. Even if this were not the case, the Council asserts that the test to be applied in determining what is a Cabinet document is, at a minimum, that articulated by Spigelman CJ in *Egan v Chadwick* and under this test, information in the Health Checks and Gateway Reviews, and the documents themselves, would not be covered by Cabinet confidentiality.

Issue 3: Committee power to order the production of documents

A further issue that the committee may wish to consider is whether it has the power to order the production of the Health Check and Gateway Review documents, should Transport for NSW continue its refusal to answer questions relating to these documents.

Committees have the power to order the production of documents under standing order 208(c). Committee powers in this regard arose in the recent Auditor-General's *Report on State Finances 2018*, which contained as an appendix three legal opinions requested by the Auditor-General. Two of these legal opinions from the Crown Solicitor relate to the powers of parliamentary committees, including in respect of the production of documents. The Crown Solicitor noted that statutory secrecy provisions 'could not be relied upon to resist a summons, or other demand, from a committee to produce a document' and that in the Crown Solicitor's opinion 'it is more likely than not that a court would find a committee has power to require a witness to produce a document to it'.¹⁵

Recently, Portfolio Committee No. 4 – Legal Affairs issued a summons under section 4 of the *Parliamentary Evidence Act 1901* for a witness to attend and produce documents which the witnesses had previously refused to produce based on advice from the Acting Crown Solicitor, advice which appears to contradict the other two recent advices from the Crown Solicitor referred to above. The Clerk obtained initial verbal advice from Bret Walker SC who supported the Legislative Council's position that the committee has the power to order the production of documents, stating 'the suggestion that a committee is precluded from doing so (ie does not have power to do so by requiring the production of the document) is, however, not supported'.¹⁶ However, in the face of the (current) response of their witnesses, Portfolio Committee No. 4 has resolved to not immediately enforce the summons and has

¹⁴ LC Minutes 21 June 2018, 2798.

¹⁵ Auditor-General, *Report on State Finances 2018* (19 October 2018), p 32.

¹⁶ Advice from Mr David Blunt, Clerk of the Parliaments, Legislative Council, to Portfolio Committee No. 4, 25 October 2018.

sought further legal advice on this matter. This recent experiences illustrates some of the complexities involved in proceeding by way of summons under section 4 of the *Parliamentary Evidence Act*.

In this instance, the committee has the power under standing order 208(c) to order the production of the documents in question, namely the Health Checks and Gateway Reviews, or alternatively could seek to use the power under section 4 of the *Parliamentary Evidence Act*. As outlined earlier, these documents would not be considered Cabinet-in-confidence either under the expansive test in the GIPA Act or the Council's minimum test as articulated by Spigelman CJ.

Options

If the committee wishes to pursue the information sought in these questions on notice, the options include:

1. That the committee write to Transport for NSW to request that it reconsider its refusal to provide the information sought and assert the Legislative Council's position that:
 - the Council does not accept its objections on the basis of commercial and Cabinet confidentiality as a reason not to produce the information
 - in relation to Cabinet confidentiality, NCAT has determined that the Health Checks and Gateway Reviews cannot be considered to be Cabinet-in-confidence according to the expansive definition used in the GIPA Act, as they were not prepared for the dominant purpose of being submitted to Cabinet; and that in any case, the Legislative Council takes the view (as set out in the resolution of the House of 21 June 2018) that the test to be applied in determining whether a document is a Cabinet document is, at a minimum, that applied by Spigelman CJ in *Egan v Chadwick*, and the Health Checks and Gateway Reviews do not reach this threshold.

Further, that the committee advise Transport for NSW that if the information is not forthcoming, Transport for NSW may be recalled to attend a further hearing.

2. The committee recall Transport for NSW to appear at the public hearing on 29 November 2018 and consider whether to take the evidence *in camera*, in order to explore the basis of the claims for commercial and Cabinet confidentiality.
3. That subject to Transport for NSW's response to options 1 and 2, the committee pursue the production of the Health Checks and Gateway Reviews under standing order 208(c) or alternatively through the issuing of a summons to attend and produce documents according to section 4 of the *Parliamentary Evidence Act*.

I would welcome the opportunity to discuss these issues with the committee as it considers these matters.

Mr David Blunt
Clerk of the Parliaments