

**INQUIRY INTO EXAMINATION, PUBLICATION AND USE
OF CABINET DOCUMENTS BY LEGISLATIVE COUNCIL
COMMITTEES**

Organisation: Department of Premier and Cabinet
Date Received: 19 January 2022

Mr Peter Primrose MLC
Chair, Privileges Committee
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: privilege@parliament.nsw.gov.au

Dear Chair

I refer to the Committee's inquiry into the examination, publication and use of Cabinet documents by Legislative Council committees.

I note that, in discussions between the A/Deputy Secretary, General Counsel of the Department of Premier and Cabinet, and Ms Jenelle Moore of the Committee's Secretariat on 14 January 2022, the Department requested a short extension of time for the Department to lodge this submission. I am advised that this request was accepted, for which I am grateful.

As the custodian of the official Cabinet records of the State, the Department wishes to make a whole of government submission in the form of **Annexures A and B** to this letter.

Annexures A and B are copies of submissions made by the Department to the Public Accountability Committee's inquiry into the Transport Asset Holding Entity (the **TAHE Inquiry**). The submissions were made in circumstances where the Department had become aware of the publication and use of certain Cabinet documents that been disclosed without the authority of the Premier or Cabinet.

Neither the House nor any of its committees has the power to call for production of Cabinet documents. If Cabinet documents are disclosed to a committee without the authorisation of the Premier or Cabinet, they should be immediately returned to the Department of Premier and Cabinet as the custodian of the official Cabinet records of the State.

In the Department's submissions to the Public Accountability Committee, the Department requested that copies of certain Cabinet documents be removed from the Parliament's website, and any copies returned to the Department. In its *Special report on the examination, publication and use of Cabinet documents by Legislative Council committees as part of an inquiry* dated November 2021, the Public Accountability Committee stated that it had not resolved to agree to the request, pending further consideration of the matter by the Privileges Committee.

The Department's request in relation to the documents identified in the Secretary's letter dated 22 October 2021 therefore remains outstanding. I am taking the opportunity to repeat the Department's request that those Cabinet documents be removed from the Parliament's website, and for all digital copies to be destroyed and hard copies returned to the Department.

This submission is not confidential and may be published.

Should you require any clarification, or to make arrangements for the return of hard copies, please contact Ms Kate Boyd, Deputy Secretary, General Counsel on

Yours sincerely

Michael Coutts-Trotter
Secretary

19 January 2022

Ref: A5152927

The Hon David Shoebridge MLC
Chair, Public Accountability Committee
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: public.accountability@parliament.nsw.gov.au

Dear Chair

It has come to my attention that Cabinet documents have been used and disclosed in connection with the Public Accountability Committee's inquiry into the Transport Asset Holding Entity (the **Inquiry**).

In particular, the following Cabinet documents, tabled by the Hon Daniel Mookhey MLC, have been published on the NSW Parliament's website for the Inquiry:

- draft Cabinet submission entitled 'Establishment of Transport Asset Holding Entity' dated May 2016 (described on the Committee's website as 'Transport Tender 002' and 'Treasury Tender 003');
- Treasury presentation entitled 'Transport Asset Holding Entity ("TAHE") – Treasury update' (described as 'Treasury Tender 001'); and
- KPMG report entitled 'TAHE: Long-term operating model assessment' dated 8 November 2020 (described as 'TAHE Tender 003', 'Transport Tender 003' and 'Treasury Tender 004').

The collective responsibility of Ministers for government decisions is a convention at the core of the Cabinet system. The unauthorised disclosure of Cabinet documents, including draft Cabinet documents, undermines collective ministerial responsibility and the convention of Cabinet confidentiality.

Each of the documents identified above is subject to Cabinet confidentiality. I understand that their disclosure to the Committee, directly or indirectly, was not authorised by the Premier or the Cabinet.

I therefore request that you arrange for the Cabinet documents identified above to be immediately removed from the Parliament's website, and for all digital copies to be destroyed and hard copies returned to the Department. I also request that the Cabinet documents not be further used or disclosed as part of the Inquiry.

I would be grateful if you could confirm that these steps have been taken by return letter as soon as possible.

Should you require any clarification, or to make arrangements for the return of hard copies, please contact Mr Mark Hare, A/Deputy Secretary, General Counsel on

Yours sincerely

Michael Coutts-Trotter
Secretary

22 October 2021

Ref: A5159073

Mr David Shoebridge MLC
Chair, Public Accountability Committee
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: public.accountability@parliament.nsw.gov.au

Dear Chair

Thank you for your letter dated 26 October 2021, received on 27 October 2021, inviting the Department to provide further information by way of written submissions in relation to the Department's request that certain Cabinet documents be removed from the Committee's website and not used or disclosed any further by the Committee.

In addition to the matters set out in my letter of 22 October 2021, the Department makes the following observations.

Each document identified in my letter of 22 October 2021 contains Cabinet information and is subject to Cabinet confidentiality.

I am advised that their disclosure to the Committee, directly or indirectly, was not authorised by the Premier or the Cabinet, who are the only persons who may authorise the disclosure of Cabinet documents.

The paramount importance of protecting the confidentiality of Cabinet documents is firmly established. In *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39 at 39, Gibbs ACJ stated:

[T]he law recognizes that there is a class of documents which in the public interest should be immune from disclosure. The class includes cabinet minutes and minutes of discussions between heads of departments . . . papers brought into existence for the purpose of preparing a submission to cabinet . . . and indeed any documents which relate to the framing of government policy at a high level. According to Lord Reid, the class would extend to 'all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies': *Conway v. Rimmer* [1968] AC 910 at 952.

In *Conway v Rimmer* [1968] AC 910 at 952, Lord Reid said:

I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest . . . To my mind the most important reason is that such disclosure would create or fan ill-informed or capricious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those with some axe to grind. And that must, in my view, apply to all documents concerned with policy making within departments . . .

In *Egan v Willis* (1998) 195 CLR 424 at 453-454, the High Court found that the Legislative Council had the power to order State papers based on constitutional principles relating to responsible government, the separation of powers and the rule of law. However, the majority judgment of Spigelman CJ and Meagher JA in *Egan v Chadwick* (1999) 46 NSWLR 563 found that the power of the Legislative Council to order the production of documents does not extend to ordering the production of Cabinet documents, as this would directly undermine the constitutional principle of collective Ministerial responsibility.

I note that Cabinet confidentiality, unlike legal professional privilege, cannot be waived.

In 2013, the High Court considered the appropriate action to be taken where privileged documents had been mistakenly produced to the opposing side during court-ordered discovery (*Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46). The High Court concluded that a court should ordinarily permit that mistake to be corrected and order the document's return. The High Court noted that the Australian Solicitors' Conduct Rules contain a duty of a solicitor to return material, which is known or reasonably suspected to be confidential, where a solicitor is aware that its disclosure was inadvertent. It concluded that such a rule should not be necessary, but provides "an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice".

An analogy may be drawn to the present case, in which the Committee has received confidential Cabinet documents in circumstances where the disclosure of those documents was not authorised.

In your letter, you mentioned that similar issues of Cabinet confidentiality were recently considered by the Independent Commission Against Corruption (ICAC), which I understand to be a reference to the Assistant Commissioner's ruling in relation to the use of Cabinet documents in the ICAC's Operation Keppel investigation. The Department respectfully submits that these are not comparable circumstances, given that the ICAC has the power to compel the production of Cabinet documents and information.¹ The Legislative Council does not.

For these reasons, the Committee should arrange for the relevant documents to be immediately removed from the Parliament's website, and for all digital copies to be destroyed and hard copies returned to the Department. The Committee should also ensure that the Cabinet documents not be further used or disclosed as part of its inquiry. I would be grateful if you could confirm that these steps have been taken by return letter as soon as possible.

This submission is made in the Department's capacity as custodian of official Cabinet records of the State. The submission is not confidential and may be published.

Should you require any clarification, or to make arrangements for the return of hard copies, please contact Ms Kate Boyd, Deputy Secretary, General Counsel on

Yours sincerely

Michael Coutts-Trotter
Secretary

2 November 2021

¹ Sections 24(3) and 37(2) of the *Independent Commission Against Corruption Act 1988*.