

PROTOCOL

**For the execution of searches relating to the Legislative
Council and House of Assembly
and
Determination of claims of immunity from production by
reason of parliamentary privilege
between
Integrity Commission of Tasmania
and
Parliament of Tasmania**

2023

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1. Preamble

1.1. Scope

- [1] This protocol between the Legislative Council of Tasmania, the House of Assembly of Tasmania and the Tasmanian Integrity Commission establishes the process to be followed for:
- a) the exercise of the power to obtain any record, information, material or thing pursuant to a Notice given under sections 47 and 71 of the *Integrity Commission Act 2009* where there are likely to be records, information, material or things captured by the Notice that may be immune from production by reason of parliamentary privilege;
 - b) the execution of searches under sections 50, 51, 72 and 73 of the *Integrity Commission Act 2009* on premises occupied or used by a Member where there are likely to be records, information, material or things that may be protected by reason of parliamentary privilege; and
 - c) the determination of claims of parliamentary privilege over any record, information, material or thing that has been seized during a search or is the subject of a Notice.

1.2. Purpose

- [2] This Protocol is designed to ensure that:
- a) evidentiary material is not placed beyond the reach of the Commission simply because it is held by a Member or is on premises used or occupied by a Member;
 - b) the Presiding Officers and the Commission can work cooperatively to reach agreement on how records, information, material or things will be managed, reviewed and released such that the Commission can fulfil its statutory functions and obligations under the *Integrity Commission Act 2009* whilst respecting parliamentary privilege;
 - c) searches are executed without improperly interfering with the functioning of Parliament or the Commission;
 - d) searches are executed in a way that does not amount to a contempt of Parliament;
 - e) records, information, material or things are produced to the Commission pursuant to a Notice in a timely manner; and
 - f) Members, their staff and the Houses are given a proper opportunity to raise claims of immunity from production by reason of parliamentary privilege in relation to any record, information, material or thing that may be subject to lawful seizure following a search or subject to production in response to a Notice.

1.3. Definitions

Word or phrase	Definition
Authorised person	Is a person authorised under section 21 of the <i>Integrity Commission Act 2009</i> .
Clerk	The Clerk of the Legislative Council or the Clerk of the House of Assembly, as relevant.

Word or phrase	Definition
	In circumstances where the Clerk is incapacitated or unavailable or it is considered by the Chief Executive Officer of the Integrity Commission that the involvement of the Clerk as set out in the Protocol will compromise the assessment, investigation or inquiry under the <i>Integrity Commission Act 2009</i> , references in this Protocol to the Clerk should be read as a reference to the relevant Deputy Clerk or other person designated by the relevant Presiding Officer.
Commission	The Integrity Commission as defined in section 4 of the <i>Integrity Commission Act 2009</i> .
Deputy Presiding Officer	The Chair of Committees of the relevant House, also known as the Deputy President of the Legislative Council or the Deputy Speaker of the House of Assembly.
House	The House of Assembly or the Legislative Council, as relevant
Member	A sitting or former member of a House of the Tasmanian Parliament.
Notice	A notice to produce records, information, material or things given under section 47 or 71 of the <i>Integrity Commission Act 2009</i> .
Operation Leader	The Integrity Commission employee or authorised person in charge of a search.
Parliamentary officer	A person appointed under section 3 of the <i>Parliamentary Privilege Act 1898</i> .
Parliamentary sitting day	Includes a day on which either House or a Parliamentary Committee is scheduled to meet.
Premises	Includes: <ul style="list-style-type: none"> a) the office of a Member within the parliamentary precinct; b) the ministerial office of a Member who is a minister; c) an electorate office of a Member; and d) any other premises used by a Member for personal, private or official purposes at which there are reasonable grounds to believe that material that may be the subject of parliamentary privilege is located. Premises of the public authority is defined in the Act to mean the premises at which the business or operations of the public authority are conducted.
Presiding Officer	The President of the Legislative Council or the Speaker of the House of Assembly, as relevant. In circumstances where the Presiding Officer is incapacitated or unavailable or it is considered by the Chief Executive Officer of the Integrity Commission that contacting the Presiding Officer will compromise the assessment, investigation or inquiry under the <i>Integrity Commission Act 2009</i> , references in this Protocol to Presiding Officer should be read as a reference to the relevant Deputy Presiding Officer.
Privilege Determinator	The Presiding Officer or any other person, entity or Committee authorised by the relevant House of Parliament.
Proceeding in Parliament	Has the meaning provided by section 4 of the <i>Integrity Commission Act 2009</i> .
Search	Is a search of premises conducted under section 50, 51, 72 or 73 of the <i>Integrity Commission 2009</i> .
The Act	<i>Integrity Commission Act 2009</i> .

1.4. Application

[3] The Protocol applies subject to any overriding law or legal requirement in a particular case.

- [4] The Protocol applies to the exercise of the power to obtain any record, information, material or thing pursuant to a Notice where there are likely to be records, information, material or things captured by the Notice that may be immune from production by reason of parliamentary privilege.
- [5] The Protocol applies when the Commission is executing a search under the Act at a premises where there are likely to be records, information, material or things that may be protected by reason of parliamentary privilege.

1.5. Parliamentary privilege

- [6] Parliamentary privilege is preserved by section 12 of the *Parliamentary Privileges Act 1858* and is part of Tasmanian law by virtue of section 24 of the *Australian Courts Act 1828* (Imp). The privilege is described in Article 9 of the *Bill of Rights 1688* (UK), which provides that ‘the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’.¹
- [7] The principles of parliamentary privilege bestow on Members and other parliamentary participants ‘immunity from legal liability for things said or done in the course of parliamentary proceedings’.² Records, information, material and things subject to parliamentary privilege cannot be seized by the Commission during a search or produced under compulsory Notice, as this would be a use of the record, information, material of thing.
- [8] The statutory definition of ‘proceeding in Parliament’ contained in the Act has been adopted in this protocol.
- [9] Any person may make a claim of immunity from production by reason of parliamentary privilege in respect of any record, information, material or thing.

2. Notices

2.1. Procedure for giving Notices

- [10] The Commission will inform the Presiding Officer as soon as is reasonably practicable on a confidential basis if:
- a) it is aware or is advised by the person to whom a Notice is given that the Notice requires, or is likely to require, the production of a record, information, material or thing that may be immune from production by reason of parliamentary privilege; or
 - b) after the signing of this Protocol, it receives a record, information, material or thing that may be immune from production by reason of parliamentary privilege.
- [11] Without limiting the terms of any agreement that may be reached in any particular matter, the following procedure will be adopted as far as practicable before the records, information, material or things are produced to the Commission in accordance with the Notice.

¹ Modern spelling has been adopted.

² Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003) 1.

- [12] Where a small number of records, information, material or things are required to be produced to the Commission:
- a) a copy of the record, information, material or thing will be made;
 - b) the original record, information, material or thing and the copy of the record, information, material or thing will be placed in separate sealed bags or storage containers;
 - c) the sealed bags or storage containers containing the original record, information, material or thing will be delivered to the Clerk; and
 - d) the person to whom the Notice was given will retain the sealed bags or storage containers containing the copy of the record, information, material or thing.

2.2. Procedure for determining claims of parliamentary privilege (Notices)

- [13] If a claim of privilege is made by the person who received the Notice over records, information, material or things the Commission will ask the person to explain the basis for the claim to a level sufficient to satisfy a reasonable person that there may be substance to the claim.
- [14] The person who has received the Notice has 7 days from date of the Notice to notify the Commission either that the claim has been abandoned, or that they have informed the Clerk that a ruling is sought on the claim.
- [15] If the person who has received the Notice does not advise the Commission within 14 days that they have informed the Clerk that a ruling is sought on the claim, the Commission will be entitled to assume the claim for parliamentary privilege has been abandoned. Following this, the Clerk must then deliver the material to the Commission within 7 days (or other agreed period).
- [16] Where a ruling is sought, the Clerk will provide the subject material to the Privilege Determinator within 7 days for the claim to be determined.
- [17] Where a large number of records, information, material or things on an electronic device, file or folder (including a mailbox account) are required to be produced to the Commission, the procedure set out in Part 4.2 (clauses 38–42) may be followed at the discretion of the Presiding Officer.
- [18] The Privilege Determinator will use their best endeavours to assess and determine the claim within 7 days of receiving the record, information, material or thing, or other reasonable period agreed with the Commission, having regard to the number of items and the complexity of issues involved, and section 54(1) of the Act.
- [19] Any material determined by the Privilege Determinator not to be subject to parliamentary privilege must be released to the Commission by the Clerk within 7 days (or other agreed period) of the determination being made.
- [20] Where this process exceeds the 14 days specified in section 54(1) of the Act, the Commission employee who gave the notice may withdraw it and give a new notice to the recipient.

3. Searches

3.1. Procedure prior to executing a search

- [21] Unless compliance will affect the integrity of the assessment, investigation or inquiry, at least one day prior to the search the Commission will inform the Clerk on a confidential basis of the intention to conduct the search. Subject to instructions not to do so from the Commission, the Clerk must inform the Presiding Officer at the earliest opportunity. Neither the Clerk nor the Presiding Officer will communicate that the Commission intends to execute a search to any person other than:
- a) as allowable under the law, for example if they have a 'reasonable excuse' in accordance with a Notice given to them;
 - b) a legal practitioner for the purpose of obtaining legal advice relating to the search;
 - c) a parliamentary officer agreed with the Commission for the purpose of obtaining advice as to parliamentary privilege; or
 - d) any other person as agreed with the Commission.
- [22] If the matter requires the Presiding Officers of both Houses to act jointly, the Presiding Officer who has been notified of the search will request the Commission to also inform the other Presiding Officer.

3.2. Procedure for executing a search of premises

- [23] When conducting a search the Commission must not improperly interfere with the free exercise by the Member of the performance of their duties, or the authority or function of a House or its Committees.
- [24] As far as reasonably practicable, the Operation Leader will comply with the following procedures unless compliance will affect the integrity of the assessment, investigation or inquiry:
- a) a search will not be executed on a parliamentary sitting day;
 - b) subject to clause 26, a search will be executed at a time when the person in charge or occupant of the premises is able to be present at the premises; and
 - c) if it is in the parliamentary precinct, the Clerk or their delegate will be given the opportunity to attend the search, unless the Member asks for them not to be given that opportunity.
- [25] The Commission may ask the Presiding Officer or Clerk to arrange for the premises to be sealed and secured pending the execution of the search.
- [26] The Commission may execute the search without the presence of the person in charge or occupant of the premises (or their delegate) or the Clerk (or their delegate) if the delay is unreasonable or will cause the warrant or authorisation to expire before any search has been completed.
- [27] The Operation Leader will inform the person in charge, occupant or Clerk (as relevant) that they:
- a) may claim parliamentary privilege over any record, information, material or thing sought to be seized or copied during a search; and

- b) must specify the record, information, material or thing over which they are making a claim or, in relation to an electronic device, identify insofar as is practicable the existence of record, information, material or thing over which they are making a claim.

[28] Even if no claim of privilege is made, when practicable the Commission should take all reasonable steps to limit the amount of material that is examined during the search. As part of that process, the Operation Leader will consider inviting the person in charge or occupant of the premises to identify where in the premises material is located that falls within the scope of the search.

3.3. Procedure for securing materials where parliamentary privilege is claimed

3.4. Records, information, material and things

[29] If a claim of privilege is made over records, information, material or things (excluding electronic devices):

- a) the Commission will ask the person in charge, occupant or Clerk (as relevant) to verbally explain the basis for the claim, to a level sufficient to satisfy a reasonable person that there may be substance to the claim;
- b) in the presence of the Commission, the person in charge, occupant or Clerk (as relevant), will assist the Commission to make a list of the items;
- c) in the presence of the person in charge, occupant or Clerk (as relevant), the items – or an electronic copy of them – will be placed in a secure container by the Commission; and
- d) the secure container will be delivered into the safekeeping of the Clerk who will secure it in a manner and location agreed between the Clerk and the Operation Leader. As agreed, this may be at a location independent of both Parliament and the Integrity Commission.

3.5. Electronic devices

[30] If a claim of parliamentary privilege is made over records, information, material or things on an electronic device:

- a) the Commission will ask the person in charge, occupant or Clerk (as relevant) to verbally explain the basis for the claim, to a level sufficient to satisfy a reasonable person that there may be substance to the claim;
- b) the person in charge, occupant or Clerk (as relevant) will be given an opportunity to make copies of the items (excluding devices) in the presence of the Operation Leader before they are secured. The copying should be done in the presence of the Operation Leader;
- c) forensic preservation measures may be conducted on the device to ensure it cannot be remotely accessed or otherwise modified;
- d) in the presence of the person in charge, occupant or Clerk (as relevant), the device will then be placed in a secure container and sealed by the Commission; and
- e) the secure container containing the device will be delivered into the safekeeping of the Clerk who will secure it in a manner and location agreed between the Clerk and the

Operation Leader. As agreed, this may be at a location independent of both Parliament and the Integrity Commission.

3.6. Procedure for determining claims of parliamentary privilege (searches)

- [31] The person making the claim has 14 days (or other agreed period) from the execution of the search to notify the Operation Leader either that the claim has been abandoned, or that they have informed the Clerk that a ruling is sought on the claim.
- [32] If the person making the claim does not advise the Operation Leader within 14 days (or other agreed period) that they have informed the Clerk that a ruling is sought on the claim, the Operation Leader will be entitled to assume the claim for parliamentary privilege has been abandoned. Following this, the Clerk must then deliver the material to the Commission within 7 days (or other agreed period).
- [33] Where a ruling is sought, the Clerk will provide the subject material to the Privilege Determinator within 7 days for the claim to be determined.
- [34] Where a large number of records, information, material or things on an electronic device, file or folder (including a mailbox account) are seized by the Commission, the procedure set out in Part 4.2 (clauses 38–42) may be followed at the discretion of the Presiding Officer.
- [35] The Privilege Determinator will use their best endeavours to assess and determine the claim within 14 days of receiving the record, information, material or thing, or other reasonable period agreed with the Commission, having regard to the number of items and the complexity of issues involved.
- [36] Any material determined by the Privilege Determinator not to be subject to parliamentary privilege will be released to the Commission by the Clerk within 7 days (or other agreed period) of the determination being made.

4. Other procedures

4.1. Presiding Officer conflicted or unavailable

- [37] If the Presiding Officer is unavailable or the Chief Executive Officer of the Commission considers them unsuitable to determine privilege, for example due to involvement in the matter under investigation, the Commission may approach another Member of the House to move a motion in the House appointing an alternative privilege determinator, noting that the Presiding Officer cannot move such a motion themselves.

4.2. Additional procedure for claims of privilege over an electronic device, folder or file (including a mailbox account)

- [38] With a view to minimising the number of documents to be reviewed for parliamentary privilege, the Presiding Officer may appoint in writing a Commission employee or authorised person to assist in identifying material of relevance to the assessment, investigation or inquiry in an electronic device, folder or file (including a mailbox account).

- [39] The Commission employee or authorised person will identify relevant material by searching for relevant keywords, search terms or criteria.
- [40] Any data which satisfies the keywords, search terms or criteria will be automatically tagged and a report of all tagged data will be produced.
- [41] The Commission employee or authorised person will provide the report of tagged data to the Clerk as a well as a copy of the image or data extraction.
- [42] The Clerk will provide the report of the tagged data and the copy of the image or data extraction to the Privilege Determinator.

Chief Commissioner, Integrity Commission Tasmania

Date

President of the Legislative Council

Date

Speaker of the House of Assembly

Date

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