



# LEGISLATIVE ASSEMBLY

## FOR THE AUSTRALIAN CAPITAL TERRITORY

OFFICE OF THE CLERK

Ms Julie Thompson  
Committee Secretary  
Legislative Council  
Parliament House  
HOBART TAS 7000

Dear Ms Thompson

I am writing to you in relation to the Legislative Council Select Committee inquiry into:

***The options for an agreed process to resolve disputes that arise regarding the production of papers, documents and records between the Government and the Legislative Council and its Committees including Joint Committees where Members of the Legislative Council have membership.***

The ACT Legislative Assembly's Standing Orders set out the process of what happens with an order for the production of documents held by the Executive. Standing order 213A outlines the steps that must be taken.

### Order for the production of documents held by the Executive

- 213A. (a) A Member may lodge a notice of motion seeking the Assembly to order a document or documents to be tabled in the Assembly. If agreed to, the Clerk is to communicate to the Chief Minister's Directorate all orders for a document or documents made by the Assembly.
- (b) When returned, the document or documents (where no claim of privilege is made by the Chief Minister) will be laid on the Table by the Clerk.
- (c) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document or documents, a description of the document or documents and the author of the document or documents.
- (d) If at the time the document or documents are required to be tabled the Assembly is not sitting, the document or documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to have been presented to the Assembly and authorised for publication with the Clerk circulating the document or documents to all Members as soon as practicable.
- (e) Where a document or documents is considered by the Chief Minister to be privileged, a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege.

- (f) Where the Assembly requires a document or documents to be returned, either the document or documents requested or a claim of privilege must be given to the Clerk within 14 calendar days of the date of the order by the Assembly.
- (g) Any Member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents within seven calendar days of the receipt of the claim of privilege. On receipt of such communication, the Clerk will advise the Chief Minister's Directorate, who will provide to the Clerk, within seven calendar days of receipt of the dispute of validity claim, copies of the disputed document or documents. The Clerk is authorised to provide the disputed document or documents to an independent legal arbiter as Standing Orders and Continuing Resolutions of the Assembly soon as practicable, for evaluation and report within 10 calendar days as to the validity of the claim.
- (h) The Clerk is also authorised to provide to the independent legal arbiter and to all Members, submissions from any Member in relation to the claim of privilege.
- (i) The independent legal arbiter is to be appointed by the Speaker and must be a retired Supreme Court, Federal Court or High Court Judge.
- (j) A report from the independent legal arbiter is to be lodged with the Clerk and:
  - (i) made available only to Members of the Assembly; and
  - (ii) not published or copied without an order of the Assembly.
- (k) If the independent legal arbiter upholds the claim of privilege, the Clerk shall return the document or documents to the Chief Minister's Directorate.
- (l) If the independent legal arbiter does not uphold the claim of privilege, the Clerk will table the document or documents that has been the subject of the claim of privilege. In the event that the Assembly is not sitting, the Clerk is authorised to provide the document or documents to any Member upon request, however, the document or documents do not attract absolute privilege until tabled by the Clerk at the next sitting of the Assembly.
- (m) Other persons requesting to examine the document or documents may do so with the Clerk maintaining a register showing the name of any person examining the document or documents tabled under this order. (Amended 21 September 2017)

This process has been invoked on three occasions in the current Assembly. On all three occasions, the Speaker tabled the Report of the Independent Arbiter and a motion was passed authorising the publication of those reports. The decisions of the independent legal arbiter are briefly outlined below:

1. The Chief Minister claimed privilege over a two-volume report, the ACT Health Infrastructure Asset Condition report and Minor Works Priorities, on the basis that it:

*"was prepared solely to Cabinet and decision by Cabinet. It was presented to Cabinet in circumstances of complete confidentiality and its contents underpinned the choices presented to Cabinet and the substantive reasoning upon which the decisions of Cabinet were based. Disclosure of the Report will inevitably disclose the reasoning that Cabinet adopted in making its decisions."*

While acknowledging that the documents could disclose the position adopted by a single minister in such a way as to lead to the identification of the competing stances taken by ministers in an ensuing Cabinet decision, and could to a degree, disclose the longer term strategies of the present government regarding health, the independent legal arbiter did not uphold the claim of privilege.

2. The Chief Minister claimed privilege over a number of documents prepared by the Public Housing Renewal Steering Committee because, among other things, the committee's deliberations were directed to the task of Cabinet in its oversight and approval of the Public Housing Renewal Program, and to the preparation of business cases for approval by the portfolio minister and the consideration of Cabinet for decisions.

In this case, the independent legal arbiter upheld the claim of privilege in respect of the documents that were produced in response to the Assembly's resolution.

3. The Assembly was advised that the Executive was not able to compel the production of certain Icon Water contracts because they were not in the Executive's possession. A more comprehensive motion was moved to direct Icon Water to produce the documents, and in the event that a claim for privilege or public interest immunity was made, that the claim be referred to an independent legal arbiter along the lines of Standing Order 213A.

Icon Water provided the documents to the Clerk and claimed public interest immunity, which was disputed by the Leader of the Opposition. Given Icon Water is a Territory-owned Corporation, the independent legal arbiter considered whether the procedure applied in this situation. He decided that it did.

The independent legal arbiter found that certain parts of the documents were immune for production on the ground of public interest immunity as claimed by Icon Water, but that other parts for which that immunity had been claimed were not immune as claimed.

I hope this is of assistance to you. Please do not hesitate to contact me if you would like any further information.

Yours sincerely



Tom Duncan  
Clerk of the Legislative Assembly for the ACT

3 July 2019

