



Question of privilege regarding use of intrusive powers within the parliamentary precinct

Report of the Privileges Committee

Fiftieth Parliament
(Hon Christopher Finlayson QC,
Chairperson)
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Presented to the House of Representatives

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Question of privilege regarding use of intrusive powers within the parliamentary precinct

Summary of recommendations

We recommend that the House adopt the *Protocol for release of information from parliamentary information and security systems* (page 14).

We recommend that the Government update the Cabinet Manual to reflect that where an inquiry is established under the Inquiries Act 2013, the exercise of powers in relation to members of Parliament and the parliamentary agencies will require recognition of parliamentary privilege; and develop some standard terms of reference for use in any inquiry where it appears that powers may be exercised in relation to members and the parliamentary agencies (page 16).

1 Introduction

On 11 July 2013 the Speaker ruled that a question of privilege arose from issues raised in a letter to him from Dr Russel Norman. The issues related to the exercise of intrusive powers against members, and the release of information from parliamentary information and security systems. The question consequently stood referred to this committee. The ruling is appended to this report.

The particular incident involved the release of information held on parliamentary information systems to the author of *Inquiry into the unauthorised release of information relating to the GCSB compliance review report: The leak of the Kitteridge report*. We were not asked to investigate this matter as a contempt of privilege. Nor were we asked to determine who was responsible for the release. Instead, we were tasked with examining the particular incident involving the release of information from parliamentary information and security systems that led to the question of privilege being referred, and the more general issue of appropriate principles for access to and release of information from parliamentary information and security systems.

In December 2013 we presented to the House our interim report on this question of privilege. Our interim report set out a summary of the facts surrounding the particular incident leading to the referral, which we ascertained following a request for submissions from interested parties and the hearing of oral evidence.

We also set out in our interim report key issues highlighted by the incident, which we signalled we would need to consider further when developing our guidance in this area. The incident raised important questions about protecting the privileges and immunities of the House, including the freedom of speech of members, and the ability of Parliament to maintain control within its precincts.

We have now considered these issues further, and set out in this report the principles and protocol we recommend should apply to such requests for information from parliamentary information and security systems.

2 Considerations relating to release of information

While on its face the question of who should have access to information held on parliamentary information and security systems, and when, may seem straightforward, it is not. The constitutional status of Parliament as an institution, the variety of roles that members of Parliament have, and the different types of information the systems contain, must all be considered carefully.

The complexity is exacerbated by the operating arrangements which exist in the New Zealand Parliament, where the Parliamentary Service is responsible for administering all information systems relating to members (including where members are acting in a Ministerial capacity, as part of the Executive), and all information for agencies operating in the parliamentary complex. It is not simple to discern which material held on the systems relates primarily to Parliament, which relates primarily to the Executive, and which relates primarily to other matters, such as parliamentary agencies, or individuals on the complex acting in a personal capacity.

Proceedings in Parliament

One important category of parliamentary information is proceedings in Parliament. Proceedings in Parliament are comprised of material which is integral of the work of the Parliament itself. These proceedings are protected by parliamentary privilege; the set of powers, rights, and immunities which exist to ensure that Parliament can function effectively. These privileges are grounded in the notion that Parliament must be able to exercise control of its own proceedings, and that the work of the Parliament must be free from external interference or influence. Proceedings in Parliament must not be inadvertently released, or otherwise dealt with, in a way that does not accord with the protection afforded them by parliamentary privilege. Proceedings protected by parliamentary privilege must never be casually released.

The protections accorded from parliamentary privilege belong to Parliament as an institution, not its individual members. While members of Parliament often experience the protection of privilege, it is notable that not only parliamentarians generate, receive, or possess, proceedings in Parliament. Parliamentary proceedings can comprise information generated by, for example, ministerial staff, or staff specifically assisting Parliament or parliamentarians to carry out their parliamentary duties. Whether material is protected by parliamentary privilege is determined by the content and purpose of the information, not by who received it or generated it.

Other parliamentary information

Proceedings in Parliament are only one of the types of information contained in the parliamentary information and security systems. The systems also contain a range of other types of information which is not protected by parliamentary privilege. While this information is not entitled to the same level of protection as proceedings in Parliament, release of it still needs to be considered carefully, and in the context of how it contributes to a functioning democracy.

Information generated or received by Members

Not all information created, received, or possessed by members of Parliament will be a proceeding in Parliament. Aside from their duties as parliamentarians, members may also have roles in the Executive as Ministers, as electorate representatives, as political party members, and as private individuals. Parliamentary information and security systems include information generated for or by members in each of these capacities. The suitable level of protection for each of these different sets of information may differ, according to the nature of the information.

However, the office to which members are elected has a considerable amount of legal freedom guaranteed to it so that members themselves have the capacity to carry out the duties of the office as they see fit.¹ While not all information generated, received, or possessed by members will be entitled to the high level of protection accorded to proceedings in Parliament, it will still require protection from arbitrary release, if members are to be able to carry out the duties of their office.

Information relating to the media

Given the facts of the incident that led to the referral of this question, we have considered closely the special status of the media, and how information held on parliamentary security and information systems which relates to them should be treated. The media have an important role in ensuring transparency and accountability in our democracy; they are the primary conduit through which the public receive information about Parliament and the Executive. Their ability to act as the “fourth estate” should not be hindered by offhand release of information relating to them as they undertake this function.

Other parliamentary information

There is a wealth of other parliamentary information also held on parliamentary information and security systems. For example, the staff or others operating in the parliamentary precinct may generate information, held on these systems, which relates to only their particular organisation, or to matters unrelated to Parliament directly. Again, this information will not be protected by parliamentary privilege. But, again, protection may be necessary because of either the special nature of the precinct and the institution it houses, or other considerations such as privacy concerns.

Understanding the context and applying principles

In our interim report, we expressed our grave concern at the seeming lack of regard that those involved in the release seemed to have for the separation of the Executive from Parliament, the need for confidentiality of parliamentary proceedings and sensitive information, or the freedom of the press. Good decisions about the release of information from parliamentary information and security systems can only be made where these matters have been considered carefully. While we accept that the question of who should have access to information held on parliamentary information and security systems, and when, is not a straightforward one, it is clear to us that the answer is not that it should be at the sole discretion of a Chief Executive or a staff member of the organisation that holds this information. Decisions about release must be based on sound principle.

We continue to be troubled that the incident arose, particularly as there are clear protocols guiding the release of information from these systems to the New Zealand Police, the New

¹ McGee, David, *Parliamentary Practice in New Zealand*, 3rd ed., Dunmore Publishing Ltd, Wellington 2005, p. 34.

Zealand Security Intelligence Service, and the Minister in charge of the New Zealand Security Intelligence Service. It seems peculiar to us that information from these systems was more easily accessed through a request from the Executive (which the Parliament is responsible for holding to account), than it would have been had the New Zealand Police been investigating a criminal act.

The incident drew attention to significant gaps in the policies and principles guiding the Parliamentary Service in relation to the information it holds. The principles and protocol we set out in this report will assist the Parliamentary Service to determine the appropriate response when approached with requests to release information from these systems.

3 Protocol for the release of information

We have developed a protocol which takes account of the distinct roles and functions of all key groups who operate within the parliamentary precinct, and the different categories of information held on parliamentary information and security systems. A copy of our recommended protocol is attached to this report. In developing the protocol, we have considered the principles underlying legislation relating to the release of information (such as the Official Information Act 1982, the Privacy Act 1993, and the Evidence Act 2006). While these Acts do not apply to Parliament, the principles underpinning them are relevant to this question.

We have also developed a set of key principles that we consider should guide any release of information from parliamentary information and security systems. These principles are set out in this chapter, along with an explanation of our protocol: how it works, when it applies, and how it addresses key issues.

Key principles

Members must be able to perform their duties in order to advance the interests of democracy, and the interests of Parliament and protection of its proceedings must be paramount. To this end, we consider that:

- There should be a presumption that information held on parliamentary information and security systems should not be released.
- Individual members should retain complete control over the release of any information that relates to them. That is, material relating to individual members should only be released where that member specifically agrees to its release.
- Journalists working in the parliamentary precinct should retain complete control over the release of any information that relates to them. That is, material relating to a journalist or group of journalists who work in the parliamentary precinct should only be released with their specific authorisation.
- For information requests that do not relate to an individual member, the Speaker of the House of Representatives should be the ultimate decision-maker.

We acknowledge that these principles, and the protocol, must be subject to any statutory requirement, court order, or other lawful authority to release information. They must also be subject to arrangements set out in other protocols guiding the release of information in particular circumstances. However, in the absence of other specific guidance or lawful authority we expect these principles, and the protocol, to be the primary reference point from which to determine whether or not information should be released.

Protocol for the release of information from the parliamentary information, communication and security systems

While the issues underlying the protocol are complex, our protocol is simple, clear, and straightforward. One of its key features is a requirement for written consent from the affected individual or party to be given prior to information release.

It specifically sets out the presumption that information about members of Parliament and the members of the Parliamentary Press Gallery must not be released unless one of the following applies:

- the individual concerned has consented in writing to the release of his or her information; or
- disclosure of the information is required or compelled by law, for example, by a search warrant, a court order, or under an enactment such as the Inquiries Act 2013 or the Ombudsmen Act 1975.

The protocol would apply to every request for information about or in relation to a member of Parliament, including in his or her capacity as a member, or as a member or leader of a parliamentary party. It also applies to requests for information in relation to a parliamentary party; a member of the press gallery; proceedings in Parliament; and parliamentary administration.

However, it would not apply to requests for official information under the Official Information Act 1982 or those for personal information under the Privacy Act 1993 (which does not apply to Parliament).

Information requests concerning identifiable individuals or parties

Under the protocol, where a request is made for information concerning particular members of Parliament, a parliamentary party, or a member of the press gallery, the information requested could not be disclosed without the written consent of the member, leader or whip of the party, or journalist concerned.

This requirement for written consent ensures that the affected individual or party retains control over release of information that relates to them. The protocol makes no distinction between the type of information being requested; so—for example—requests for the metadata of emails or security pass records which relate to a member would be treated in the same way as a request for that member's emails. This addresses our concern about arbitrary decisions being made about different types of information sets, based not on principle, but on the particular information sets being requested. The protocol also draws no distinction between information generated by a member, or information generated by others. As long as the material in question relates to an identifiable member of Parliament, a parliamentary party, or a member of the press gallery, the consent of that particular individual (or party leader or whip in the case of a parliamentary party) will be required.

Consent will not be required where disclosure of this information is compelled by law; in these circumstances (such as where access to information is sought subject to legal authority such as a search warrant, a court order, or an enactment), the protocol suggests that the request should be treated in accordance with the *Protocol for the Execution of Search Warrants on Premises Occupied or Used by Members of Parliament*² in so far as it is possible.

Information requests concerning journalists

The issues leading to the referral of this question of privilege arose regarding requests for information related to a journalist: who she had been in contact with, when, and how, in the days leading up to the release of the Kitteridge report. In making its decisions about

² An agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of Police, October 2006.

release, the Parliamentary Service made some effort to treat information relating to a member differently, initially attempting to seek the consent of the member involved before agreeing to a release. However, the Parliamentary Service made no attempt to seek consent of the journalist involved, and did not seem to consider the role of a journalist when making its decisions about releases.

Journalists have a special role in our democracy. They report on the matters of the day, informing the public about the issues that might affect them as they arise. Their role in sharing information makes Parliament more transparent and accountable. To allow them to carry out this role effectively, journalists can claim certain protections; under the Evidence Act 2006, and in common law, they have a right to protect their sources. This journalistic privilege allows sources to share information of public interest freely with journalists without threat of reprisal. The Search and Surveillance Act 2012 recognises that journalists may claim this privilege in relation to a search executed by the Police under warrant (section 136).

Our protocol acknowledges the special role of journalists in strengthening democracy. It provides that, where information is requested regarding an individual member of the press, the consent of the journalist will be required before the information is released. Furthermore, where disclosure of information relating to an identifiable member of the press gallery is required or compelled by law, the protocol requires that regard be given to the rights of journalists at law to protect certain sources. Where disclosure is required, the right of a journalist to claim privilege, as set out in the Search and Surveillance Act, must be acknowledged.

We note that the New Zealand Police have operational guidelines to steer their actions when executing search warrants or court orders in respect of information held by a media organisation. Among other things, these guidelines require the rights of journalists in law to be acknowledged, and oblige the Police to offer the media organisation (or its lawyer) an opportunity to claim journalistic privilege in accordance with the Search and Surveillance Act. We have not included reference to these operational guidelines in our protocol, but we note that the protocol indicates that the Parliamentary Service should devise its own detailed guidelines for dealing with requests for information about parliamentary administration. We consider that the operational guidelines of the New Zealand Police might be a useful reference document for the Parliamentary Service when developing its own detailed guidelines, where these guidelines touch on the way information relating to a journalist should be treated.

Role of the Speaker of the House of Representatives: requests for general information or requests made under lawful authority

In our examination of the incident leading to the referral of this question of privilege, we were surprised and disappointed to find that the Speaker of the House was not consulted or informed about requests and releases of parliamentary information.

As the Minister responsible for the Parliamentary Service, where the information was held, it seems appropriate that the Speaker be involved. The Speaker is also the representative of members of Parliament, and could have given considered advice on whether requests and releases were appropriate.

The role of the Speaker is an important one; the Speaker is the highest officer elected by the House. Electing a Speaker, to preside over the House, is the first task of members in a

newly elected Parliament.³ The Speaker embodies the House in its relations with the Crown, laying claim before the Governor-General to the House's privileges.⁴ While the Speaker does not become a non-member of a political party when appointed, they do not play a politically partisan role, and they must be prepared to assert an independence from the Government so as to ensure that the rights of all sides of the House are protected in the course of the parliamentary process.⁵

As the elected officer of the House, the embodiment of the House in its interactions with others, and the Minister responsible for the agencies that are responsible for parliamentary information and security systems, the Speaker of the House is the most appropriate point of contact for decisions needed about how to treat material held on those systems where the information is not identifiable to any particular member, party, or member of the press gallery. The protocol affirms our view that the Speaker should play a part in relation to such requests.

Requests for general information

In the case of an information request that relates generally to members, parliamentary parties, or members of the press gallery, the Speaker of the House of Representatives will be the decision-maker. He or she would be assisted by the parliamentary agencies (through both advice, and administrative support) when considering how to deal with such a request.

Requests made under lawful authority

The protocol suggests that, where access to information is sought subject to lawful authority, the request must be treated in accordance with the *Protocol for the Execution of Search Warrants on Premises Occupied or Used by Members of Parliament* ("search warrants agreement") to the extent possible. A request under a lawful authority would include a request made under the Commissions of Inquiry Act 1908, the Ombudsmen Act 1975, and the Inquiries Act 2013. It would also include requests made under a court order, a search warrant, a rule of law, or any other lawful authority.

An indication of the procedure that could be followed is set out in our protocol as a guide for how we expect a request might be treated in accordance with the search warrants agreement. The process involves the Speaker of the House being notified, a member being able to claim parliamentary privilege over certain information, and the issue of a certificate by the Speaker of the House indicating that the claim of privilege is sustainable (which allows this information to be excluded from release). However, the inclusion of the process steps we set out in this protocol is not intended to limit other elements of the search warrants agreement being applied, wherever appropriate.

The search warrants agreement recognises clearly that some information is definitively protected from release by parliamentary privilege. A member concerned can claim privilege, and a signal from the Speaker that a matter is privileged determines the matter conclusively. We believe that these approaches are appropriate to apply to any request for information made under any lawful authority.

³ Constitution Act 1986, s.12.

⁴ McGee, David, *Parliamentary Practice in New Zealand*, 3rd ed., Dunmore Publishing Ltd, Wellington 2005, p. 52.

⁵ McGee, David, *Parliamentary Practice in New Zealand*, 3rd ed., Dunmore Publishing Ltd, Wellington 2005, p. 53.

⁶ An agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of Police, October 2006.

Administrative requests

The protocol also contains a short direction, to the parliamentary agencies, that they should develop guidance for dealing with requests for information about parliamentary administration. This provision would apply to the small set of potential requests for information held on parliamentary information and security systems that would not be covered by the provisions discussed above. Such requests might include a request for information about organisation policies for the agencies which operate within the parliamentary precinct, or the like. This guidance should be developed with a view to balancing openness and transparency, privacy principles, and parliamentary independence.

Our protocol provides that any guidance developed should be approved by the Speaker of the House.

Recommendation

We recommend that the House adopt the *Protocol for release of information from parliamentary information and security systems*.

4 Requests under certain lawful authorities: the Inquiries Act and the Ombudsmen Act

As discussed in our previous chapter, where a request for information is made under lawful authority, we consider that the request should be treated in accordance with the search warrants agreement, to the extent possible. There are two particular types of lawful authority that we make additional recommendations in regard to. These are discussed below.

Inquiries Act 2013

The Inquiries Act 2013 reformed and modernised the law relating to inquiries, following recommendations made by the Law Commission in 2008.⁷ The Act replaces the Commissions of Inquiries Act 1908 and provides for two types of inquiries: public inquiries and government inquiries. All types of inquiries will have the same level of powers and protections available to them. These are similar to the powers and protections previously contained in the Commissions of Inquiries Act 1908.

Section 20 of the Inquiries Act 2013 gives an inquiry broad power to obtain information, including requiring any person to produce documents or other information in that person's possession or control.⁸ An inquiry may also examine any information for which privilege or confidentiality is claimed, or refer the information to an independent person to determine whether there is a justifiable reason for maintaining the privilege or confidentiality, or whether the information should be disclosed.⁹

How this broad power interacts with parliamentary privilege and the approach we recommend to the release of information from parliamentary information and security systems, needs to be clarified. We note that, had the Inquiries Act been in force at the time, the Henry Inquiry (as a government inquiry) would have had the broad powers conferred by section 20.

Parliamentary privilege is not referred to in the Inquiries Act. This is not surprising as parliamentary privilege is part of the general law of New Zealand and is to be taken notice of by the courts without being specifically pleaded.¹⁰ As with other requests made under lawful authority, we expect that requests made under the auspices of the Inquiries Act will also be treated, in so far as possible, in accordance with the processes set out in the search warrants agreement. However, we intend to examine again the search warrants agreement in the light of the Inquiries Act, as we consider the existence of this Act may warrant either a change to the agreement itself, or the development of additional, separate, guidelines which set out the process for external authorities to follow where statutory powers are exercised in respect of parliamentary information.

⁷ The Law Commission, *A New Inquiries Act*, NZLC R102, May 2008, AJHR E31(102).

⁸ Section 20(a).

⁹ Section 20(c).

¹⁰ Legislature Act 1908, s. 242.

In addition, we recommend that the Cabinet Manual be updated to reflect that where an inquiry is established under the Inquiries Act, the exercise of powers in relation to members of Parliament and the parliamentary agencies will require recognition of parliamentary privilege and confidential communications between members and constituents, and that inquiries should ensure they follow a process to allow for such claims of privilege and confidentiality to be dealt with.

Our final recommendation is that the Government develop some standard terms of reference for use in any inquiry where it appears that powers may be exercised in relation to members and the parliamentary agencies. Section 14 of the Inquiries Act provides that an inquiry may conduct its inquiry as it considers appropriate, unless otherwise specified in its terms of reference. Where an inquiry might involve accessing information held by members, a general provision could be inserted into the terms of reference requiring notification of the Speaker of the House and the Clerk of the House. This approach allows the broad power of an inquiry to sit comfortably with the processes we consider should apply to requests for release of information from parliamentary information and security systems.

Recommendation

We recommend that the Government update the Cabinet Manual to reflect that where an inquiry is established under the Inquiries Act 2013, the exercise of powers in relation to members of Parliament and the parliamentary agencies will require recognition of parliamentary privilege; and develop some standard terms of reference for use in any inquiry where it appears that powers may be exercised in relation to members and the parliamentary agencies.

Ombudsmen Act 1975

During the course of our consideration, it came to our attention that there is the possibility of tension between the powers available to the Ombudsman under section 19 of the Ombudsmen Act 1975, and the protection afforded by parliamentary privilege and the fundamental principles and protocols we consider should apply to requests for information from parliamentary information and security systems.

The Ombudsman handles complaints and investigates the administrative conduct of state sector agencies, including in relation to official information requests. The Executive, including Ministers of the Crown and state sector departments and agencies, are within the jurisdiction of the Ombudsman. Section 19 of the Ombudsmen Act gives the Ombudsman extensive powers to require information and documents to be produced, where in the Ombudsman's opinion it may relate to a matter under investigation. This section also applies where that information is held on parliamentary information and security systems.

In the protocol, we have tried to reconcile this broad power of the Ombudsman with the principles we suggest must be applied in a parliamentary context. Our ability to do so is specifically provided for in section 15 of the Ombudsmen Act.

Our protocol therefore provides guidance for an Ombudsman when deciding whether to exercise his or her powers under section 19 of the Ombudsmen Act, where a Minister claims information that he or she holds is not held in an official capacity as a Minister. Under the protocol, the Ombudsman would need to be satisfied that the requested information has a reasonable connection to the member's official capacity. Where urgent access to information is required, the approval of the Speaker of the House and the

member concerned could need to be obtained for access to this information on a sitting day (without it amounting to a contempt). In such instances, the procedures for urgent access set out in the *Agreement covering Policing Functions within the Parliamentary Precincts*¹¹ should be followed. We consider this approach should resolve any potential uncertainty about how the Ombudsman's power interacts with the approach to requests we recommend.

¹¹ An agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of the New Zealand Police, December 2007.

5 Guidance to supplement search warrants agreement

Our protocol suggests that the application of principles and processes from the search warrants agreement are appropriate to guide more generally releases of information from parliamentary information and security systems. However, we note that the search warrants agreement is a specific accord entered into by the Speaker of the House of Representatives and the New Zealand Police. While the processes it sets out are certainly capable of more general application, this particular agreement binds only the current signatories to it, but not other agencies who may exercise powers of search and seizure.

This situation reveals an opportunity; we suggest that the Speaker of the House consider whether general guidance for others who possess intrusive powers by law could be drawn up, in a way that is consistent with the principles and processes contained in the search warrants agreement.

Appendix A

Committee procedure

We have been meeting on this matter since July 2013. The evidence and advice received by the committee has been published on www.parliament.nz.

We received advice from Debra Angus, Deputy Clerk of the House of Representatives.

Committee members

Hon Christopher Finlayson QC (Chairperson)

Hon Gerry Brownlee

Dr Kennedy Graham

Chris Hipkins

Hon Murray McCully

Hon David Parker

Rt Hon Winston Peters

Grant Robertson

Hon Anne Tolley

Hon Tariana Turia

Committee advisers and staff

Debra Angus, Deputy Clerk of the House

Meipara Poata, Clerk of the Committee

Appendix B

Speaker's ruling

I have received a letter from Dr Russel Norman raising as a matter of privilege statements made by Rt Hon John Key, Prime Minister, in the House in reply to supplementary questions to question 4 on 2 July 2013, concerning the release of information from parliamentary information and security systems.

Standing Order 400 requires an allegation of contempt to be formulated as precisely as possible so as to give the member or person against whom it is made full opportunity to respond. An allegation of contempt against the Rt Hon John Key in regard to the statements made is not clearly made out.

However, the member's letter raises serious issues.

The exercise of intrusive powers against members threatens members' freedom to carry out their functions as elected representatives and the House's power to control its own proceedings and precincts, without outside interference.

The release of information from parliamentary information and security systems relating to the movements of journalists within the parliamentary precincts has also been questioned. Although the media do not necessarily participate directly in parliamentary proceedings, they are critical to informing the public about what Parliament is doing and public confidence in Parliament. Actions that may put at risk journalists' ability to report freely are a significant concern.

The parliamentary precincts are also a workplace for both parliamentary employees and the employees of government departments. Access to parliamentary information and security systems data of any sort must, therefore, also have regard to the respective rights of employers and employees, and the role of the Speaker as a responsible Minister, and the Prime Minister and his ministers.

I believe some sort of common understanding is required to ensure on the one hand that the functioning of the House and the discharge of members' duties is not obstructed or impeded, but on the other that the maintenance of law and order and the ability to investigate and prosecute offences committed within the parliamentary precincts is preserved.

The concerns raised are ones that should be looked at by the Privileges Committee. It is the body the House has established to investigate such matters. It has the power to hear evidence and formulate recommendations for the House that will provide guidance for the future.

Consequently I have determined that a general question of privilege does arise. The question therefore stands referred to the Privileges Committee.

Appendix C

Protocol for the release of information from the parliamentary information, communication and security systems

Part 1—Introduction

Background

Openness and transparency in public affairs have an important role to play in balancing the power of executive Government. In the parliamentary environment, however, openness and transparency must be balanced against parliamentary independence. It is the collection of powers, rights, and immunities known as parliamentary privilege that underpins the independence of Parliament.

Parliamentary privilege is generally recognised to be so fundamental to our system of representative parliamentary democracy that it takes priority when balanced against competing public interests.¹ It operates to enable the House, its committees and its members to fulfil their functions without fear of coercion or punishment and without impediment. It is part of the law of New Zealand. The courts have regard to it, without it being specifically pleaded.² There are three fundamental privileges: freedom of speech, the right of the House to control its own operations, and the power to punish for contempt.

This protocol addresses the balance between parliamentary privilege and the public interest in Parliament's openness and transparency. It has its genesis in on-going calls for Parliament to be subject to the Official Information Act 1982. In 2011, the Standing Orders Committee³ addressed the issue and considered that high-level freedom of information principles might be established in legislation, but that their implementation be a matter for Parliament through rules adopted by the House or published by the Speaker. In the following year, the Law Commission⁴ recommended that the Official Information Act be applied to the parliamentary agencies, but with a limited definition of official information that mitigated concern about any adverse effect on the ability of the House to maintain control of its own proceedings and safeguarded member and party information.

This protocol brings together these earlier considerations into a series of principles for the disclosure of parliamentary information. It is expected that the parliamentary agencies (the Office of the Clerk of the House of Representatives and the Parliamentary Service) will develop detailed policies to assist their staff and members' staff in dealing with requests for information held in the parliamentary information, communication and security systems.

¹ *Prebble v Television New Zealand* [1994] 3, NZLR 1.

² *Legislature Act 1908 s.242(2)*.

³ Report of the Standing Orders Committee, *Review of the Standing Orders*, I.18B, September 2011, pp. 63-65.

⁴ *The Public's Right to Know: Review of the Official Information Legislation*, NZLC R125.

Coverage

Members of Parliament perform a central role in New Zealand's system of representative parliamentary democracy. They dedicate much of their time and effort to concerns and issues raised by the community or the general public. In the course of their work, they receive and handle a great deal of information, some of which may be personal information about their constituents and other New Zealanders, or information relating to proceedings in Parliament. Members may also retain information in relation to their roles as members of parties recognised for parliamentary purposes.

Members of the Parliamentary Press Gallery perform an important role in ensuring the transparency and openness of New Zealand's system of democratic government. Subject to any applicable rules, such as the *Rules of the Parliamentary Press Gallery* and the *Protocol for interviewing members, filming, and photographing in Parliament Buildings*, they have free general access to most public areas within the parliamentary precinct for the purpose of carrying out their functions and duties.

The parliamentary agencies are not generally covered by the Official Information Act 1982 but this protocol recognises that ministerial information is also held in the parliamentary information, communication and security systems, and that such information will be subject to the Official Information Act. The protocol also recognises that much of the information held is held by the parliamentary agencies in the capacity of an agent on behalf of others.

Statutory and other disclosures

The public interest in the proper functioning of New Zealand's system of representative parliamentary democracy must, on occasions, be balanced against the need for openness and transparency in public life, in particular in relation to the expenditure of public funds. In this regard, the Members of Parliament (Remuneration and Services) Act 2013 requires the periodic disclosure of members' expenses, and the Standing Orders require annual disclosure of members' pecuniary and other interests. In addition, the parliamentary agencies are required to provide information on their Votes, appropriations, and operating intentions.

Furthermore, as the Standing Orders Committee noted in 2011, a great deal of parliamentary information is already available to the public through *Hansard*, the broadcasts of parliamentary proceedings, and the proactive release by select committees of all evidence received on an item of business.

This protocol does not limit or affect any of these disclosures of parliamentary information.

Other legal authority for access to information

The principle of exemption from legal liability for parliamentary conduct does not mean that criminal acts committed in a parliamentary environment are exempt from prosecution.⁵ The protocol for execution of search warrants within the parliamentary precinct⁶ applies where access to information is required under a search warrant.

⁵ *Parliamentary Practice in New Zealand*, David McGee, 3rd edition, p. 619.

⁶ *Protocol for the Execution of Search Warrants on Premises Occupied or Used by Members of Parliament*, An agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of Police, October 2006.

Where access to information is sought subject to other legal authority, the request for access must also, to the extent possible, be treated in accordance with the protocol for the execution of search warrants. This way the public interest in parliamentary independence can be balanced against the interest of maintaining the rule of law.

Part 2—Information protocol

Application of protocol

1 This protocol applies to every request for the disclosure of any information (including metadata) that is about, or in relation to,

- a) a member of Parliament in his or her capacity as such a member, or as a member or leader of a recognised parliamentary party
- b) a recognised parliamentary party
- c) a member of the Parliamentary Press Gallery
- d) proceedings in Parliament
- e) parliamentary administration.

2 This protocol does not apply to requests for official information under the Official Information Act 1982 or requests for access to personal information under the Privacy Act 1993.

Guiding principles

3 The fundamental principle is that the functioning of Parliament should not be interfered with. Members of Parliament must be able to perform their roles as democratically elected representatives and members of recognised parliamentary parties without impediment.

4 Other principles that must be taken into account in applying this protocol are as follows:

- a) parliamentary privilege provides the House with exclusive control of its operations, and protects parliamentary proceedings from questioning outside Parliament. Members of Parliament must have the ability to raise claims for parliamentary privilege in relation to requests for the disclosure of information:
- b) the House may punish for contempt any action that obstructs or impedes the House or a member of Parliament in the performance of their functions or has the tendency, directly or indirectly, to produce such a result:
- c) members of the Parliamentary Press Gallery must be able to carry out their functions and duties in order to advance the interests of democracy:
- d) members of Parliament and members of the Parliamentary Press Gallery should have complete control over the disclosure of any information held in the parliamentary information, communication and security systems that is about, or in relation to, them unless the disclosure is required or compelled by law:
- e) leaders or whips of recognised parliamentary parties should have complete control over the disclosure of any information held in the parliamentary

information, communication and security systems that is about, or in relation to, their parties unless the disclosure is required or compelled by law:

- f) if a request for information relates to members of Parliament, recognised parliamentary parties, or members of the Parliamentary Press Gallery generally and does not relate to an identifiable member of Parliament, a particular recognised parliamentary party, or an identifiable member of the Parliamentary Press Gallery, the Speaker of the House of Representatives should be the ultimate decision-maker as to whether the requested information is to be disclosed.

Requirements for requests for information

5 No information about a member of Parliament, a recognised parliamentary party, or a member of the Parliamentary Press Gallery may be disclosed unless—

- a) the disclosure, —
 - i. in the case of a request for information about, or in relation to, an identifiable member of Parliament, is made with the written consent of that member of Parliament; and
 - ii. in the case of a request for information about, or in relation to, a particular recognised parliamentary party, is made with the written consent of the leader or whip of that party; and
 - iii. in the case of a request for information about, or in relation to, an identifiable member of the Parliamentary Press Gallery, is made with the written consent of the relevant member of the Parliamentary Press Gallery; or
- b) the disclosure is required or compelled by—
 - i. a court order;
 - ii. a search warrant;
 - iii. an enactment (including, for example, the Commissions of Inquiry Act 1908, the Ombudsmen Act 1975, and the Inquiries Act 2013);
 - iv. a rule of law;
 - v. any other lawful authority that authorises access to or the disclosure of any information or compels the production of any evidence, documents, papers, or things.

Disclosure of information required or compelled by law

6 Any disclosure of information under clause 5(b) must, to the extent possible, be in accordance with the applicable procedure for the execution of search warrants on premises occupied or used by members of Parliament (as set out in the agreement between the Speaker and the Commissioner of Police dated October 2006).

7 Without limiting the procedure for the execution of search warrants set out in the agreement referred to in clause 6, the applicable procedure under that agreement includes, among other things, the following steps:

- a) notifying the Speaker and the Clerk of the proposed access to information:
- b) informing the relevant member of Parliament that access to information is being sought under legal authority:
- c) allowing the relevant member of Parliament to be present or represented while access to the information is occurring:
- d) allowing the relevant member of Parliament to claim parliamentary privilege and making arrangements for any information in respect of which parliamentary privilege is claimed to be excluded and held by the Clerk:
- e) allowing the relevant member of Parliament to seek a certificate from the Speaker that proceedings in Parliament are in fact involved and the claim of privilege can be sustained:
- f) ensuring that access to the information does not take place at a time when the House is actually sitting or when a committee on which the relevant member of Parliament serves is actually meeting, so that the member can give full and undivided attention to parliamentary business.

8 Where urgent access is required at a time when the House is actually sitting or when a committee on which the relevant member of Parliament serves is actually meeting, the approval of the Speaker of the House of Representatives and the member involved must be sought, and the procedures for service of legal process contained in the *Agreement between the Speaker of the House of Representatives and the Commissioner of New Zealand Police* should be applied.

9 Where information required or compelled under clause 5(b) relates to an identifiable member of the Parliamentary Press Gallery, regard should be given to the rights of journalists to protect certain sources conferred under section 68 of the Evidence Act 2006. Any disclosure must, to the extent possible, be done in a way that recognises those rights and the requirements of the Search and Surveillance Act 2012 to allow a journalist who believes he or she may be able to claim a privilege, a reasonable opportunity to claim it.

Speaker to determine general requests for information

10 If a request for information relates to members of Parliament, recognised parliamentary parties, or members of the Parliamentary Press Gallery generally and does not relate to an identifiable individual or a particular recognised parliamentary party,—

- a) the Speaker must be promptly notified of the request; and
- b) the parliamentary agencies must provide the Speaker with any assistance that may be required to enable the Speaker to deal with the request (including the provision of advice and administrative support)
- c) the Speaker may, where he or she considers it appropriate, consult members of Parliament, leaders of recognised parliamentary parties or the chairperson of the Parliamentary Press Gallery about such requests.

11 The Speaker must decide whether a request for information referred to in clause 10 should be granted or refused.

Requests for information relating to parliamentary administration

12 As soon as practicable after the commencement of this protocol, the parliamentary agencies must—

- a) develop detailed guidelines for dealing with requests for information about parliamentary administration that balance openness and transparency, privacy principles, and parliamentary independence; and
- b) submit those guidelines to the Speaker for approval.

Guidance for Ombudsman exercising powers under section 19 of the Ombudsmen Act 1975

13 If an Ombudsman proposes to undertake an investigation into a complaint under the Official Information Act 1982 in respect of information held by a Minister of the Crown where the Minister is claiming that the information is not held in his or her official capacity as a Minister and is therefore not subject to that Act, the Ombudsman must, before exercising his or her powers under section 19 of the Ombudsmen Act 1975,—

- a) be satisfied that there is a reasonable likelihood that the information is held by the member of Parliament in his or her official capacity as a Minister of the Crown; and
- b) have regard to the following:
 - i. that a Minister's official capacity does not include matters that are carried out by the Minister in his or her capacity as a member of Parliament, a member of a recognised parliamentary party, or a leader of a recognised parliamentary party; and
 - ii. that the Official Information Act 1982 does not apply to members of Parliament or the parliamentary agencies generally, and that this protocol is based on the principle of member consent; and
 - iii. that the exercise of the power to require production of information under section 19 of the Ombudsmen Act 1975 cannot be used as a means of widening the scope of the Official Information Act 1982 to cover the parliamentary agencies.

Commencement and review

14 This protocol—

- a) comes into effect on the date of the Speaker's signature, following adoption by the House; and
- b) continues in force until termination.

15 This protocol—

- a) must be reviewed every three years by the Speaker; and
- b) may be amended, following consultation with the chairperson of the Parliamentary Press Gallery, with the agreement of members of Parliament.

