




Speech By
Hon. Stirling Hinchliffe

MEMBER FOR SANDGATE

Record of Proceedings, 25 May 2017

MOTION

Amendments to Standing Orders

 **Hon. SJ HINCHLIFFE** (Sandgate—ALP) (Leader of the House) (10.15 am), by leave, without notice: I move—

- (1) That the House endorse the Protocol for custodians in the possession or control of members' documents as circulated in my name;
- (2) That the Standing Rules and Orders of the Legislative Assembly be amended by inserting a new Schedule 10—Protocols for Committees Regarding the Documents and Records of a Member as circulated in my name and commencing immediately; and
- (3) That the Standing Rules and Orders of the Legislative Assembly be amended by inserting a new Standing Order 211B Confidentiality of proceedings—Ethics Committee as circulated in my name and commencing immediately.

Protocol for custodians in the possession or control of members' documents

Application

This protocol applies to custodians who are in the possession or control of members' documents. ("Applicable custodians")

Who are likely to be "applicable custodians"?

Applicable custodians are likely to include:

- The Clerk of Parliament and their delegates and other Parliamentary staff
- Electorate Office staff
- Ministerial Service Branch staff
- Directors' General and departmental staff

Documents over which applicable custodian likely to have control and possession?

Applicable custodian

The Clerk of Parliament and their delegates and other Parliamentary staff

Electorate Office staff

Documents likely to be within control and possession

Electronic communications (emails of/to members on email servers)

Electorate Office documents on parliamentary servers

Briefings/advices to members

Correspondence to and from Members

Correspondence of members

Research or planning documents

Other documents created within the Electorate Office

Ministerial Service Branch staff	Electronic communications (emails of/to Leader of the Opposition and Ministers on email servers) Ministerial Office and Office of the leader of the Opposition documents on parliamentary servers
Directors' General and departmental staff	Ministerial briefings for parliamentary proceedings (for example, possible parliamentary questions, estimates briefing material, draft ministerial statements, etc.)

The proper approach for custodians

Applicable custodians should not publish or release control or possession of members' documents, without the consent of the member unless it is in accordance with law, for example:

- Right to information applications—in which case the views of the member should be sought in accordance with Chapter 3, Division 3 of the *Right to Information Act 2009*.
- For the purposes of an audit or report required under the *Auditor General Act 2009* and/or the *Financial Accountability Act 2009*.
- Pursuant to a coercive process such as a court order, a notice or a summons.

The proper approach for applicable custodians, should they be summoned by a non-parliamentary body (courts, commission of inquiry, Queensland Police Service, Crime and Corruption Commission) to produce documents is as follows:

Firstly, the custodian should seek the consent of the Member/Minister to release the documents to the investigating body. A custodian should only not seek the consent of the Member/Minister if the court order, notice or summons requires the custodian to not disclose the matter.

Secondly, if the Member/Minister consents, the documents should be provided.¹

Thirdly, if the Member/Minister does not consent, the summons should be challenged if it appears that the document is a proceeding in parliament² and release of the document is likely to infringe the privileges of the member,³ a committee or the Legislative Assembly. The challenge should be in accordance with the relevant legislation or otherwise in accordance with law. The ultimate claim will be determined by the courts in accordance with the law.

The proper approach for applicable custodians, should they be summoned by a parliamentary body (parliamentary committee or Legislative Assembly), is to comply with the summons and any relevant Standing Order.

In addition, the custodians should consent to the attendance of a committee appointed observer (i.e. either a person nominated by the relevant Member or a senior parliamentary officer) to be present with the custodian or delegate during the conduct of any searches under the summons with a view to ensuring that the conduct of the search complies with the strict search parameters and that there is no interference with the privileges of the Member outside of those strict parameters.

Advice and assistance

Applicable custodians can obtain advice from the Office of the Speaker and/or the Clerk of the Parliament.

The Speaker is the traditional guardian of the privileges of the Legislative Assembly, its committees and members and may in some instances seek to intervene in a matter or appear in a matter as a friend of the court.

¹ Note that the provision of the documents to the non-parliamentary body will not affect the protection afforded the documents by s 9 of the Parliament of Queensland Act 2001 as proceedings in the Assembly. That is, if they are a proceeding in parliament they will still not be able to be impeached or questioned in the absence of an overriding statutory provision applying.

² In Queensland s 9 of the Parliament of Queensland Act 2001 provides the definition of proceedings in Parliament:

- 9 Meaning of "proceedings in the Assembly"
- (1) "Proceedings in the Assembly" include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.
 - (2) Without limiting subsection (1), "proceedings in the Assembly" include—
 - (a) giving evidence before the Assembly, a committee or an inquiry; and
 - (b) evidence given before the Assembly, a committee or an inquiry; and
 - (c) presenting or submitting a document to the Assembly, a committee or an inquiry; and
 - (d) a document tabled in, or presented or submitted to, the Assembly, a committee or an inquiry; and
 - (e) preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c); and
 - (f) preparing, making or publishing a document (including a report) under the authority of the Assembly or a committee; and
 - (g) a document (including a report) prepared, made or published under the authority of the Assembly or a committee.

³ It is important at all times to note the distinction between the use of a document (that is, if it is a proceeding in Parliament) and the release of the document to third parties. Whether a matter is a proceeding in Parliament does not necessarily mean it is protected from an order from a competent tribunal for production—for example, if the document is already public.

SCHEDULE 10—PROTOCOLS FOR COMMITTEES REGARDING THE DOCUMENTS AND RECORDS OF A MEMBER

- (1) When the documents and records of a member of the Legislative Assembly are sought by an investigative body 'outside parliament', the protections of parliamentary privilege may apply to the documents and records. Parliamentary privilege does not apply to protect the documents and records against proceedings 'in parliament', such as committee proceedings. These protocols seek to provide protection to the documents or records of a member of the Legislative Assembly from proceedings 'in parliament'.
- (2) These protocols apply when, in the course of a committee of the Legislative Assembly's inquiry, there is a need or desire to obtain the documents or records of a member of the Legislative Assembly.
- (3) The committee shall in the first instance determine whether the documents or records of the member are relevant to the inquiry and likely to assist the committee in its inquiry.
- (4) If the committee determines that the documents or records of the member are relevant to the inquiry and likely to assist the committee in its inquiry, the committee should invite the Member to provide the documents and records to the committee within a reasonable time
- (5) If the documents or records are owned by a member but are in the possession or control of a third party ("custodian"), the committee should invite the Member to either:
 - (a) obtain the documents or records from the custodian and provide the documents or records to the committee; or
 - (b) consent to the custodian to provide the documents or records to the committee.
- (6) The committee should only summon the production of the documents or records of a member in the possession or control of a custodian if:
 - (a) the steps above have been undertaken by the committee and the member or custodian declines to provide the material voluntarily within a reasonable time; or
 - (b) the committee suspects, based on reasonable grounds that there is a risk to evidence being lost or destroyed; or
 - (c) the committee suspects, based on reasonable grounds that there has not been a complete disclosure of information.
- (7) If the committee decides to summon the production of documents or records of a member in the possession or control of a custodian, the committee shall:
 - (a) develop specific parameters, such as search terms and dates, with a view to ensuring that documents identified in the search are strictly relevant to the committee's investigation;
 - (b) appoint an independent observer either nominated by the relevant member (i.e. the member the subject of the search) or, if the member does not nominate an observer in a reasonable period of time, a senior parliamentary officer, with a view to ensuring that the conduct of the search complies with the strict search parameters;
 - (c) settle any disputes between the custodian undertaking the search and the independent observer as to whether the document or record meets the parameters of the search.
- (8) In these protocols "documents or records" include:
 - (a) any paper or other material on which there is writing or information; and/or
 - (b) a record of information held by way of a mechanical, electronic or other device.
- (9) In these protocols "documents or records of a member" are documents created by or for a member or directed to a member and which would generally be regarded as the property of the member and confidential and includes:
 - (a) Correspondence, including emails, texts or other messages to and from a member;
 - (b) Briefings, information papers, draft reports or notes produced by or for a member; and
 - (c) Possible questions or answers for use in parliamentary proceedings produced by or for a member.

211B. Confidentiality of proceedings—Ethics Committee

(1) *The proceedings of the Ethics Committee or a subcommittee of that committee on a matter before the Committee that is not open to the public or authorised to be published remains strictly confidential to the committee until the committee has reported to the House or otherwise published the proceedings.*

(2) *No member shall in the House refer to any proceedings of a committee in (1), until the committee has finally reported to the House or otherwise published the proceedings.*

(3) *When the Ethics Committee makes its final report to the House on a matter, the Committee shall at the same time, table in the House:*

- (a) *The minutes of its proceedings relevant to the matter; and*
- (b) *Any submissions received or evidence taken in respect of the matter (including transcripts of hearings)*

unless the committee resolves that some or all of its proceedings remain confidential.

(4) *The Ethics Committee shall only resolve that some or all of its proceedings remain confidential if valid grounds exist, such as:*

- (a) *Publication of the proceedings is not in the public interest;*
- (b) *Publication of the proceedings would be procedurally unfair to any person; or*
- (c) *Publication of the proceedings is irrelevant to the matter.*

(5) *Any member of the committee is able to refer to any proceeding of the committee in a dissenting report or statement of reservation, unless the committee has resolved in accordance with (3).*

By way of explanation, following a letter of referral from the Ethics Committee in April 2016, the CLA has conducted an inquiry into matters concerning members' documents, including electronic documents, in the possession or control of the third-party custodians. The CLA surveyed presiding officers of other Australian jurisdictions and took advice from the Clerk of the Parliament as well as independent advice from Mr Bret Walker SC on the issue.

As a result of its inquiries, the CLA has resolved to place before the House the following documents for its approval: protocols for the guidance of third-party custodians in possession or control of members' documents; a new schedule 10 for standing orders containing protocols for parliamentary committees who find a need or desire to obtain the documents or records of a member; and a new standing order 211B which provides as a default position the publication of the minutes of the Ethics Committee's proceedings and any submissions received or evidence taken relevant to the matter, including transcripts of hearings, with Ethics Committee reports, unless the Ethics Committee decides otherwise. I urge the House to support the motion.