Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council

Sharon Ohnesorge and Beverly Duffy*

The Egan cases confirmed the power of the New South Wales Legislative Council to order the production of state papers, with the exception of documents revealing the actual deliberations of cabinet – "true" cabinet documents. At present, the Council remains largely unaware of how many documents are being withheld by the Executive on this basis, let alone whether the documents withheld are "true" cabinet documents. With this scrutiny gap in mind, this article examines the manner in which courts and tribunals deal with cabinet documents in the context of public interest immunity claims, before making a case, on constitutional grounds, for the Council to have access to all cabinet documents. Finally, while acknowledging that there is no easy solution, the article proposes some potential options for reform, such as a role for the independent legal arbiter, to ensure that the Council is able to exercise fully its constitutional role holding the Executive to account. Recent controversies regarding cabinet documents in other Australian jurisdictions, as well as the publication of "The Cabinet Files" by the ABC in February 2018, make this discussion particularly relevant.

INTRODUCTION

In the lead up to the last State election, the New South Wales government announced its intention to move the Powerhouse Museum from the centre of the city to Sydney's west. In mid-2016 an upper house inquiry was established to examine the proposal. At a public hearing for the inquiry in early 2017, witnesses declined to answer questions about the business case for the museum's relocation, on the grounds of cabinet confidentiality:

> Mr DAVID SHOEBRIDGE: ... As part of your considerations for the preliminary business case, were you looking at the impacts on the Powerhouse site and the loss of value from the Powerhouse site as a result of a relocation?
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> Mr BROOKE: I am going to sound a bit like a broken record and a boring old accountant, but the contents of the preliminary business case are, I am advised, Cabinet in confidence ...[1]
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> Mr DAVID SHOEBRIDGE: What is the estimated cost of the relocation of the collection? What sort of figures are we talking about?
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> Mr ROOT: As I said in my opening statement I am informed that that information is Cabinet in confidence and is therefore privileged.[2]

* Sharon Ohnesorge, Acting Director, Committees, New South Wales Legislative Council.

Beverly Duffy, Clerk Assistant, Procedure, New South Wales Legislative Council.

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[1] Evidence to Portfolio Committee No 4 – Legal Affairs, Parliament of New South Wales, *Inquiry into Museums and Galleries*, 17 February 2017, 20 (Mr Graham Brooke, Partner, KPMG).

[2] Evidence to Portfolio Committee No 4 – Legal Affairs, Parliament of New South Wales, *Inquiry into Museums and Galleries*, 17 February 2017, 31 (Mr Peter Root, Managing Director, Root Projects Australia).

After the hearing the committee sought advice from the Clerk of the Parliaments about pursuing the desired documents. One option canvassed was to initiate an order for papers under Standing Order 52.[3] The Clerk advised that in taking this course members would need to be aware of the opposing positions of the Executive and the Legislative Council regarding cabinet documents – in other words, such an order would most likely be resisted. In further advice regarding what steps they could take to enforce the order, the Clerk suggested it would involve several unknowns. Would the House support pursuit of the documents? If a member was suspended for not providing the documents, would that member challenge the suspension in court? And if so, would the court read down the powers of the Legislative Council?[4]

Almost 20 years after *Egan v Chadwick*,[5] and in light of recent controversies between the Executive and parliaments regarding access to cabinet documents, it is timely to grapple with the following questions:

1) Should the Council have access to all cabinet documents?
2) Are only "true" cabinet documents being withheld from the Legislative Council?
3) What can be done to address the scrutiny gap?

These questions form the structure of this article. The first part outlines the current state of the law regarding the Council's right to access cabinet documents in response to an order for papers – namely, that "true" cabinet documents are exempt from production. It then traces the development of how cabinet information has been dealt with by the courts in the context of public interest immunity law. The authors suggest that there are sound constitutional grounds for arguing that the Council *should* have access to all cabinet documents, including "true" cabinet documents. The part concludes by briefly touching on developments in other jurisdictions.

The second part of the article is focused on what happens *in practice*: cabinet documents, including but not limited to "true" cabinet documents, are being withheld from scrutiny by the Legislative Council, reflecting the disparate views between the Executive and the Council regarding the definition of a cabinet document. With neither the documents nor an index of documents provided, the Council has no way of knowing how many documents are being excluded on cabinet-in-confidence grounds. The final part considers the way forward, outlining steps the Council could take to address the scrutiny gap.

While these questions are of particular relevance for the New South Wales Legislative Council, parliaments in other Australian jurisdictions grapple with similar issues from time to time. Therefore, while this article focuses on the Legislative Council's unique orders for papers process, the question of access to cabinet documents is relevant for all Australian houses of parliament – particularly upper houses, where Governments generally do not hold the balance of power.

SHOULD THE COUNCIL HAVE ACCESS TO ALL CABINET DOCUMENTS?

The current state of the law in New South Wales is that documents disclosing the *actual* deliberations of cabinet are not required to be produced to the Legislative Council in response to an order for papers, in accordance with the majority in *Egan v Chadwick*.[6] According to Spigelman CJ, with whom Meagher JA agreed, this is because the production of such documents would be inconsistent with the doctrine of ministerial responsibility, which his Honour recognised as an element of responsible government, a concept fundamental to Australia's constitutional system of government.[7]

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[3] Standing Order 52 regulates the common law power of the Legislative Council to order the production of state papers, and includes an arbitration mechanism for dealing with privilege claims.

[4] Advice to General Purpose Standing Committee No 4, Parliament of New South Wales, 27 February 2017, 28 March 2017 (Clerk of the Parliaments) <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2403#tab-otherdocuments>.

[5] The High Court in *Egan v Willis* (1998) 195 CLR 424 clearly affirmed the power of the Council to order the production of state papers, but did not consider the production of papers subject to a claim of privilege by the Executive. *Egan v Chadwick* (1999) 46 NSWLR 563 confirmed the Council's power to order documents subject to claims of public interest immunity and legal professional privilege, but did not adjudge that this power extended to "true" cabinet documents. This case is discussed further below.

[6] *Egan v Chadwick* (1999) 46 NSWLR 563.

[7] *Egan v Chadwick* (1999) 46 NSWLR 563, 574.

In his decision, Spigelman CJ noted that the courts have always recognised the significance of cabinet confidentiality as an application of the principle of collective responsibility, itself rooted in the principle of responsible government, when the issue of access to cabinet documents has arisen in the context of claims for public interest immunity in the course of litigation. However, his Honour went on to note that the courts have distinguished between "documents which disclose the actual deliberations within Cabinet" ("true" cabinet documents) and "those which are described as 'Cabinet documents', but which are in the nature of reports or submissions prepared for the assistance of Cabinet".[8] With respect to the documents in the former category, Spigelman CJ quoted from the decision of the High Court in *Commonwealth v Northern Land Council*:

> It has never been doubted that it is in the public interest that deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. ... Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government.[9]

Accordingly, his Honour concluded that the Council's power to call for documents should be restricted to documents that do not, directly or indirectly, reveal the deliberations of cabinet, so as to "avoid inconsistency between the power to call for documents and one of the bases on which it has been determined that the power is reasonably necessary (namely executive accountability derived from responsible government)".[10] This is effectively the legal position as it currently stands.

However, in the authors' view there is a reasonable argument that cabinet documents, including those revealing the actual deliberations of cabinet, should not be exempt from production to the Legislative Council, contrary to the majority in *Egan v Chadwick*. This argument is based on two grounds: first, the Council's constitutional role in scrutinising the Executive in a system of responsible government; and secondly, the power of the courts to order the production of cabinet documents in legal proceedings.[11] A third reason – namely, that governments are inclined to "draw a long bow" when it comes to withholding cabinet documents – is discussed further below.

Before considering the argument in detail, however, it is useful to trace the development of how cabinet information has been dealt with under public interest immunity law over the last 50 or so years. This development reflects the wider move in modern democracies towards the concept of open government – ie from a traditional approach that was "intensely deferential to cabinet secrecy"[12] to a position where cabinet documents (even "true" cabinet documents) are no longer subject to absolute immunity from disclosure. As one commentator has observed:

> ... [T]he development of a public interest balancing test under the doctrine of [public interest immunity] and the movement away from conferring absolute immunity from disclosure on classes of documents are both key features of the phase of liberal democracy which is also typified by FOI legislation and the philosophy of open government.[13]

[8] *Egan v Chadwick* (1999) 46 NSWLR 563, 574. Unlike Spigelman CJ, Meagher JA did not distinguish between different types of cabinet documents, finding that the immunity of cabinet documents from production was "complete" (at 597). The core of agreement between the two judgments relates to the immunity from production to the Legislative Council of documents disclosing the actual deliberations of cabinet.

[9] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

[10] *Egan v Chadwick* (1999) 46 NSWLR 563, 576 (Spigelman CJ).

[11] See Bret Walker, Transcript of Keynote Address to the *C25 Seminar*, Parliament of New South Wales, 20 September 2013 <https://www.parliament.nsw.gov.au/lc/seminars/Documents/C25%20Seminar%20-%20Uncorrected.pdf>.

[12] Walker, n 11, 10.

[13] A Cossins, "Revisiting Open Government: Recent Developments in Shifting the Boundaries of Government Secrecy Under Public Interest Immunity and Freedom of Information Law" (1995) 23 *Federal Law Review* 226, 227.

The Evolution of Public Interest Immunity Law Concerning Cabinet Documents

The common law provides for various privileges and immunities that confer a right to resist disclosure of information in legal proceedings. This includes public interest immunity.[14] Public interest immunity prevents the production of a document in legal proceedings, although relevant and otherwise admissible, if disclosure of that document would be "injurious to the public interest".[15] As Gibbs ACJ stated in the seminal case of *Sankey v Whitlam*, the public interest has two aspects that may conflict – namely, "the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents" on the one hand, and "the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done" on the other.[16] It is the role of the court, and not the Executive, to undertake this balancing exercise and determine whether the document should be produced.[17] The common law position is reflected in the *Evidence Act 1995* (NSW)[18] and is similar to that in the UK[19] and Canada.[20]

Cabinet information, along with defence secrets and information about diplomatic relations with foreign governments, has traditionally been seen as the archetypal public interest immunity claim.[21] As recognised by Spigelman CJ in *Egan v Chadwick*, this is based on the doctrine of collective ministerial responsibility and the associated convention of cabinet confidentiality.[22]

The doctrine of public interest immunity, previously known as Crown privilege, and particularly the treatment of cabinet information, has evolved significantly since the first half of the 20th century.

The first key case in that evolution is *Duncan v Cammell, Laird and Co Ltd*,[23] decided in 1942 during World War II. The cabinet documents subject to the immunity claim in that case contained information about a torpedo system built for the British Admiralty. In its decision, the UK House of Lords drew a distinction between claims of public interest immunity based on the contents of a particular document, and claims based on the document belonging to a class, which, in the public interest, must *as a class* be withheld from production, regardless of the contents of the document.[24] Cabinet documents, it was held, fell into the latter category. Importantly, the House of Lords also held that a certificate from a minister certifying that a document was a cabinet document and therefore should not be disclosed in the public interest, was conclusive and non-examinable by a court.[25]

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[14] In addition to public interest immunity, privileges available at common law include, for example, legal professional privilege. Interestingly, claims of "privilege" by the Executive in response to orders for papers have been made not only on the basis of these privileges and immunities, but also on other bases that are not themselves recognised heads of privilege, such as "commercial in confidence" (in reference to a contractual confidentiality requirement that could not in itself ground a legitimate public interest immunity claim) or "privacy": see, eg Hon Keith Mason AC QC, "Report Under Standing Order 52 on Disputed Claim of Privilege: WestConnex Business Case" (8 August 2014) 10–11.

[15] *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ).

[16] *Sankey v Whitlam* (1978) 142 CLR 1, 38, quoting *Conway v Rimmer* [1968] AC 910, 940 (Lord Reid).

[17] *Sankey v Whitlam* (1978) 142 CLR 1, 38–39 (Gibbs ACJ).

[18] *Evidence Act 1995* (NSW) s 130(1).

[19] *Conway v Rimmer* [1968] AC 910; *R v Chief Constable of the West Midlands Police, Ex p Wiley* [1995] 1 AC 274.

[20] *Carey v Ontario* [1986] 2 SCR 637.

[21] *Sankey v Whitlam* (1978) 142 CLR 1, 57 (Stephen J).

[22] *Egan v Chadwick* (1999) 46 NSWLR 563, 574. The convention of cabinet confidentiality encompasses what is referred to in the case law as the "candour" argument, ie the notion that proper decisions at high levels of government can only be made if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions, and that the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them: *Sankey v Whitlam* (1978) 142 CLR 1, 40 (Gibbs ACJ).

[23] *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624.

[24] *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624, 636 (Lord Chancellor).

[25] *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624, 636 (Lord Chancellor).

This position changed in 1968, with the House of Lords ruling in *Conway v Rimmer* that it was for the *courts*, and not a *minister*, to balance the public interest and decide whether a claim of public interest immunity should be granted.[26] However, the Court maintained the distinction between contents and class-based claims, and recognised cabinet documents as indisputably belonging to a class absolutely protected from disclosure.[27]

The position shifted again in 1978 with *Sankey*. That case concerned an action for conspiracy brought by a private citizen against former Prime Minister Gough Whitlam and three members of his cabinet in relation to the so-called "loans affair". The applicant sought access to a range of cabinet documents and other state papers concerning high-level policy decisions.

In its decision the High Court maintained, consistent with *Conway*, that the public interest in withholding cabinet documents from production is based on their status as such (and the associated damage to cabinet confidentiality that disclosure would entail) and not their actual contents. However, the Court rejected the principle expounded in *Conway* that cabinet documents as a class should be absolutely immune from disclosure in the public interest: "It is impossible to accept that the public interest requires that all [such documents] should be kept secret for ever, or until they are only of historical interest."[28]

Importantly, the Court found that not all cabinet documents are worthy of the same protection. Gibbs ACJ in particular considered that the subject matter of the documents was relevant in balancing the competing public interests:

> ... [A]lthough there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, *the protection is not absolute*, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with especial care, giving full weight to the reasons for preserving the secrecy of documents of this class, but it *will not treat all such documents as entitled to the same measure of protection* – the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned.[29]

In determining that the documents sought (or extracts thereof) should be produced, the Court took into account: (a) the fact that their subject matter was of "no continuing significance from the point of view of the national interest" and that disclosure could not affect any present activity of government;[30] and (b) that upholding the immunity claim would deny the informant the opportunity to present his case that the defendants committed criminal offences while carrying out their ministerial duties, with the result that "a rule of evidence designed to serve the public interest will instead have become a shield to protect wrongdoing by Ministers in the execution of their office".[31]

The decision in *Sankey* to take into account the subject matter of a cabinet document in balancing the public interest led some commentators to suggest that the High Court had actually swept aside class-based protection of cabinet documents in favour of contents-based claims.[32] However, this suggestion was not borne out in *Northern Land Council*,[33] the final case in the evolution of the common law relating to public interest immunity and its application to cabinet information. The case concerned an action by the Northern Land Council to rescind an agreement with the Commonwealth in relation to uranium

[26] *Conway v Rimmer* [1968] AC 910.

[27] *Conway v Rimmer* [1968J AC 910, 952 (Lord Reid).

[28] *Sankey v Whitlam* (1978) 142 CLR 1, 41–42 (Gibbs ACJ), see also 58–62 (Stephen J), 95–96 (Mason J).

[29] *Sankey v Whitlam* (1978) 142 CLR 1, 43 (emphasis added).

[30] *Sankey v Whitlam* (1978) 142 CLR 1, 46 (Gibbs ACJ).

[31] *Sankey v Whitlam* (1978) 142 CLR 1, 46–47 (Gibbs ACJ), 56 (Stephen J).

[32] See, eg M Ryan and G Fell, "Public Interest Immunity for Cabinet Documents: Harbours Corporation of Queensland v Vessey Chemicals Pty Ltd" (1988) 11 *Sydney Law Review* 602.

[33] *Commonwealth v Northern Land Council* (1993) 176 CLR 604.

mining in the Ranger Project Area on the ground of alleged unconscionable conduct. In the course of the proceedings, the Northern Land Council sought the production of 126 notebooks recording discussions at cabinet meetings concerning the pre-contractual negotiations between the parties.

In upholding the Commonwealth's public interest immunity claim, the High Court affirmed that the immunity of cabinet documents as a class was not absolute, "even if, as in the case of records of Cabinet deliberations, the highest degree of protection against disclosure is warranted".[34] Documents recording the deliberations of cabinet were nevertheless found to fall within a class for which there are "strong considerations of public policy militating against disclosure, whatever their contents", with the Court concluding that the public interest in their disclosure would prevail only in the most exceptional circumstances.[35]

Factors identified by the Court as relevant in balancing the public interest in claims relating to cabinet documents include whether the documents concern matters that remain current or controversial, and whether the immunity claim is made in the context of a civil or a criminal proceeding, with the majority remarking:

> [W]e doubt whether the disclosure of the records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings. The public interest in avoiding serious damage to the proper working of government at the highest level must prevail over the interests of a litigant seeking to vindicate private rights. In criminal proceedings the position may be different.[36]

Finally, the Court held that where, in exceptional circumstances, there is a significant likelihood of the public interest in favour of disclosure outweighing that against disclosure, the appropriate course is for the judge to inspect the documents for the purpose of deciding whether the relevance of the material to the proceedings is sufficient, even in those exceptional circumstances, to justify disclosure.[37]

Today, *Sankey* and *Northern Land Council* remain the leading cases on public interest immunity and its application to cabinet documents in Australia, despite some academic criticism of the *Northern Land Council* decision.[38] More recent case law from New South Wales[39] demonstrates that, while cabinet documents do fall into a class of documents afforded protection on the basis of their status rather than their contents, a court assessing a claim for public interest immunity over such documents will take into account a range of factors in balancing the public interest, applying the general principles set down in *Sankey* and *Northern Land Council*. These factors include: the nature of the cabinet document, eg whether it discloses the actual deliberations of cabinet or was merely submitted to cabinet; the subject matter of the document, including whether that subject matter concerns policy development or a commercial dispute; the importance of the document to the proceedings; whether the proceedings are civil or criminal in nature; the circumstances in which the document was prepared, including any applicable statutory scheme; and whether the document was prepared by a consultant external to government. The weight accorded to any one of these factors will vary according to the circumstance of the case. If necessary, the court will inspect the documents in determining the claim.[40]

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[34] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 617–618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

[35] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

[36] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

[37] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 619 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

[38] See, eg Cossins, n 13.

[39] See, eg *State of New South Wales v Public Transport Ticketing Corp* [2011] NSWCA 60; *R v Obeid (No 9)* [2016] NSWSC 520; *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* (2017) 95 NSWLR 1.

[40] See, eg *State of New South Wales v Public Transport Ticketing Corp* [2011] NSWCA 60; *R v Obeid (No 9)* [2016] NSWSC 520.

The Case for the Council Having the Right to Access All Cabinet Documents

As observed by Sir Anthony Mason in a significant paper published in 2014, the central proposition of Spigelman CJ's judgment in *Egan v Chadwick* is that the power of the Council to require production of documents is derived "in significant degree" from its constitutional role within a system of responsible government.[41] In *Egan v Willis*, the High Court made the following observations about responsible government:

> A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'. The point was made by Mill, writing in 1861, who spoke of the task of the legislature 'to watch and control the government: to throw the light of publicity on its acts'. It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that 'to secure accountability of government activity is the very essence of responsible government'.[42]

This passage (not mentioned by the majority in *Egan v Chadwick*) makes clear that securing the accountability of government activities is the "very essence" of responsible government.[43] Mason therefore argues that, while cabinet confidentiality is an important element of, and conducive to, promoting and maintaining full and frank deliberations in cabinet

> [t]o say, as the majority in *Egan v Chadwick* did, that this element of ministerial responsibility is to prevail over the role of a House in securing accountability of government, *inverts the true order of constitutional priorities* and the right of the public to be fully informed about the activities of its government, and have those activities scrutinised by their elected representatives. ... As the Executive is responsible and answerable to the Legislature, the confidentiality of Cabinet deliberations cannot stand as a reason for denying to the Council the existence of a power that is necessary for achieving one of its constitutional functions when the Council considers that it needs access to Cabinet deliberations in order to review executive activity.[44]

In other words, in any conflict between the preservation of cabinet confidentiality and parliamentary scrutiny of executive activity, constitutionally speaking the latter should prevail over the former.[45]

Bret Walker SC has also pointed to the Council's constitutional role in a system of responsible government in arguing that it should have full access to cabinet documents:

> Responsible government is another facet of the same proposition by which the representatives, according to a ballot on the floor of the popular Chamber, will make or break the government. ... What in short is the special aspect of Cabinet documents which could keep them from the compulsory power hitherto declared for State papers to be produced to a House ... given that it is after all in the name of and for the people and through their representatives that the account is being held?[46]

In addition to these constitutional arguments, a number of judges and commentators have pointed out the obvious incongruity between the position of the courts and the Legislative Council vis-à-vis access to "true" cabinet documents, and have suggested that the majority in *Egan v Chadwick* was wrong to deny the right of the Council to order their production. For example, Walker has described this state of affairs as "extremely dubious and problematic", arguing:

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[41] A Mason, "The Parliament, the Executive and the Solicitor-General" in G Appleby, P Keyzer and JM Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate, 2014) 60.

[42] *Egan v Willis* (1998) 195 CLR 424, 451 (Gaudron, Gummow and Hayne JJ).

[43] Mason, n 41, 64.

[44] Mason, n 41, 64 (emphasis added).

[45] See also G Griffith, "Parliamentary Privilege: Major Developments and Current Issues" (NSW Parliamentary Library Research Service, Background Paper No 1/07, April 2007) 32; Walker, n 11, 7–8.

[46] Walker, n 11, 8.

> If that is good enough for the administration of justice one asks what is it either of its nature or *a priori* which says that the accountability of the Executive, one of the bulwarks of democracy, is categorically less important so that not by an ad hoc judgement or a specific weighing of factors in the particular circumstances but that they are automatically immune in every case.[47]

Similarly, Mason has pointed out that the majority judgments proceed as if the position articulated in the modern case law on public interest immunity did not exist. As the former Chief Justice succinctly put it: "If claims for privilege for such documents are not treated as conclusive in the courts, why should they be treated differently in Parliament?"[48]

Indeed, in his dissenting judgment in *Egan v Chadwick*, Priestley JA made the point that the case for the existence of the power in the Council is stronger than that in the courts, given the Council's high constitutional functions:

> So, if in the adversary situations in which the case law has established public interest immunity may attach, a branch of government other than the Executive is trusted with the power to compel the production of documents for which the Executive claims such immunity, equally there should be no objection in the different situation that arises between the Executive and a House of Parliament, to the possession by another branch of government other than the Executive, of the same power; *the more so when the power is necessary for the proper carrying out of the function of that branch of government.*
>
> The function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity.[49]

Developments in Other Jurisdictions

It is interesting to note that certain other Australian houses of parliament have challenged Executive resistance to release of cabinet documents (or purported cabinet documents). For instance, the Western Australian Parliament has given the Auditor General the role of expressing an opinion as to whether it is reasonable and appropriate for a minister not to provide information to Parliament.[50] In a recent 2016 report, the Auditor General found that decisions by three ministers to withhold information from Parliament due to cabinet confidentiality were not reasonable, including on the basis that some of the requested information were publicly available statistics, and were not prepared solely for the purpose of cabinet deliberations.[51]

Another very recent example of a parliament seeking access to cabinet documents occurred in Tasmania. In March 2016, the Standing Committee of Public Accounts, a joint committee of the Parliament of Tasmania, commenced an inquiry into the financial position and performance of government-owned energy entities.[52] During the inquiry, the committee sought a copy of a 2015 letter from the Treasurer to the Minister for Energy concerning the sale of the Tamar Valley Power Station. The government provided a redacted copy but resisted the committee's repeated requests for an unredacted copy of the letter, claiming public interest immunity on the grounds that the document was cabinet-in-confidence.

The committee subsequently issued a summons for the Treasurer to provide the document but again he refused to provide the letter. On 5 April 2017 the committee made a special report to Parliament, which included legal advice disputing the grounds upon which the Premier refused to comply.[53]

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[47] Walker, n 11, 7, 8.

[48] Mason, n 41, 63.

[49] *Egan v Chadwick* (1999) 46 NSWLR 563, 594 (emphasis added).

[50] *Auditor General Act 2006* (WA) s 24.

[51] Western Australian Auditor General's Report, "Opinions on Ministerial Notifications" (August 2016) 8–14.

[52] Standing Committee of Public Accounts, Parliament of Tasmania, "The Financial Position and Performance of Government Owned Energy Entities", Report No 16 (2017).

[53] Standing Committee of Public Accounts, Parliament of Tasmania, "Failure to Comply with Summons", Special Report No 5 (2017).

On 23 May 2017 the chair of the committee, the Hon Ivan Dean MLC, moved a motion in the Legislative Council calling on the Treasurer to reconsider his refusal to comply with the summons, noting that the principle of parliamentary accountability is embodied in a system of responsible government and suggesting that the letter be provided to an independent and suitably qualified third party as arbiter to assess the validity of the claim to immunity (referencing the arbitration system provided for in New South Wales under Standing Order 52).[54] The motion was agreed to but was not debated or voted on in the House of Assembly and so the matter remains unresolved.

ARE ONLY "TRUE" CABINET DOCUMENTS BEING WITHHELD FROM THE LEGISLATIVE COUNCIL?

The Legislative Council and the Executive hold disparate views regarding what constitutes a cabinet document.

As noted above, in *Egan v Chadwick* Spigelman CJ distinguished between documents that disclose the actual deliberations of cabinet ("true" cabinet documents) and those that are in the nature of reports or submissions prepared for the assistance of cabinet, which may not be "true" cabinet documents. However, in responding to orders for papers the New South Wales Department of Premier and Cabinet (DPC) relies on the definition of cabinet documents in the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act).[55] This definition includes not only official records *of* cabinet but also documents prepared *for* cabinet.[56] While DPC acknowledges that this definition may not be entirely consistent with the views of the majority in *Egan v Chadwick* it is nevertheless its preferred definition. Indeed, in 2013 DPC proposed that for the sake of consistency and clarity the Legislative Council should incorporate this definition into Standing Order 52.[57]

The Legislative Council rejects the definition of cabinet documents in the GIPA Act, as noted by the Privileges Committee in 2013 and the Council in 2014.[58] According to the Clerk of the Parliaments, this definition is much broader in scope than the position articulated by Spigelman CJ in *Egan v Chadwick* and, if adopted, would have a deleterious impact on the Council's scrutiny function:

> While it is understood that uniformity of terms and expressions would assist agencies, limiting the power of the Legislative Council to order the production of State papers by reference to the terms, definition or tests contained in GIPA could have a significant and detrimental impact on the ability of the House to hold the executive government to account.[59]

According to the Clerk, the test proposed by an independent legal arbiter in 2005, which is consistent with the majority judgments in *Egan v Chadwick*, is to be preferred:[60]

> In assessing a claim for public interest immunity in relation to "Cabinet documents", a distinction is to be drawn between:
>
> (a) true Cabinet documents, that is, those documents which disclose the actual deliberations of Cabinet; and
> (b) Cabinet documents, that is, reports or submissions prepared for the assistance of Cabinet.[61]

[54] Tasmania, *Parliamentary Debates*, Legislative Council, 23 May 2017.

[55] Privileges Committee, NSW Legislative Council, *The 2009 Mt Penny Return to Order* (2013) 78–79.

[56] Privileges Committee, n 55, 79.

[57] Supplementary Submission 8a to Privileges Committee, *Inquiry into the 2009 Mt Penny Return to Order*, July 2013, 11 (Department of Premier and Cabinet).

[58] Privileges Committee, n 55, 93; New South Wales, *Minutes*, Legislative Council, 19 November 2014, 340–341.

[59] Submission 11 to Privileges Committee, *Inquiry into the 2009 Mt Penny Return to Order*, August 2013, 6 (Clerk of the Parliaments).

[60] Privileges Committee, n 55, 80.

[61] T Cole, "Disputed Claim for Privilege: Desalination Plant, Report of the Independent Arbiter" (22 December 2005) 3–4.

Given the disparate views between the Executive and the Council regarding the definition of cabinet documents, it follows that documents the Council considers it should have access to through orders for papers are being withheld. However, the extent of this practice is difficult to measure, as the Clerk explained in a submission to the Privileges Committee in 2013:

> The Legislative Council remains largely unaware of the extent to which the Government withholds documents on the basis that they are Cabinet documents. There are occasionally indications that the Executive Government has withheld documents explicitly on the grounds of Cabinet confidentiality, but this is rare.[62]

As noted by the Clerk, in most cases the Council is only aware that a cabinet document is not being provided if it has made a request for a specific document that is known to be, or is subsequently identified by the Executive to be, a cabinet document. But, in most cases, orders for papers are couched in broad terms and specific documents are not requested. Notwithstanding the requirement under Standing Order 52 to provide an index detailing any documents over which a claim of privilege is made, including cabinet documents, agencies are advised by DPC not to comply with the Standing Order: "Cabinet documents should not be produced or referred to in responding to the Resolution."[63] The requirement for an index to be provided is discussed further below.

There is no doubt that agencies are following these instructions, as reference to cabinet documents is rarely included in returns to orders. As the following email from the Sydney Catchment Authority (SCA) to DPC relating to a 2014 order for papers demonstrates, such references are removed if inadvertently included: "... document PG94 is a Cabinet document, please remove reference to the document in the SCA index list of documents and remove the document PG94 from material provided to the Legislative Council".[64]

As a consequence, the Council has no idea whether or how many documents are being held back on cabinet-in-confidence grounds, a predicament noted by the Leader of the Opposition, the Hon Luke Foley, in 2013:

> I can report that last night the Legislative Council received returned papers from the Executive Government that were subject to an order carried a couple of sitting weeks ago. I can report that there is an assertion there that Cabinet documents have not been provided. We cannot refer that to [independent arbiter] Sir Laurence Street as if it were a dispute about whether a particular document ought to be privileged or not privileged; it is simply an assertion. We do not know what the documents are that have not been provided ... What is to be done?[65]

The Hollowmen Effect?

Are governments ascribing cabinet status to documents for the sole purpose of evading scrutiny even beyond the boundaries of the GIPA Act, thus increasing the quantum of material withheld in response to an order for papers? John Hannaford, the Leader of the Opposition during the *Egan* litigation, suspects so: "Do I suspect that reports are generated and marked as for a cabinet committee for the purposes of protecting these documents? Yes I do, I believe that is accurate."[66] A member of the Legislative Council, the Hon Catherine Cusack, frustrated by repeated instances of supposed cabinet documents being excluded from returns, said in 2004:

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[62] Submission 11 to Privileges Committee, *Inquiry into the 2009 Mt Penny Return to Order*, August 2013, 12 (Clerk of the Parliaments).

[63] Privileges Committee, n 55, 107.

[64] Email from Mr Andrew Bryan (Acting Executive Director Policy and Governance, Sydney Catchment Authority) to Emanuel Sklavounos (NSW Premier's Department, Standing Order 52 – Tallowa Dam), 14 September 2004.

[65] L Foley, Transcript of Key Note Address to the *C25 Seminar*, Parliament of New South Wales, 20 September 2013, 14 <https://www.parliament.nsw.gov.au/lc/seminars/Documents/C25%20Seminar%20-%20Uncorrected.pdf>.

[66] J Hannaford, *The Legislative Council and Responsible Government: Egan v Willis and Egan v Chadwick: A Commemorative Monograph* (2017) 40.

> The Executive must not be allowed to escape accountability by stapling photocopies to the back of a Cabinet Minute ... it is a deliberate attempt by a Minister to fetter the powers of this House to perform its duty in making the Executive accountable. It is a serious matter and our responsibility to pursue it is crystal clear.[67]

In 2009, the then Clerk of the Parliaments, Lynn Lovelock, observed:

> There are also occasionally signs that appear to validate suspicions that the Executive Government may have used Cabinet confidentiality as a cloak against the production of documents to the Council. In September 2005, the Director General of the Premier's Department issued a memorandum to all departmental chief executive officers advising that all documents prepared for the 2005-2006 Budget Estimates hearings should be prepared for submission to and consideration by the Cabinet Standing Committee on Public Administration.[68]

In 2017, her predecessor, John Evans, said:

> Lots of reports and documents are prepared by public servants that end up as submissions to cabinet. The Department of Premier and Cabinet seem to think that you could put all those things in a wheelbarrow and claim them as being part of the deliberations of cabinet.[69]

These members and former clerks were referring to the alleged practice, parodied by the television series *The Hollowmen*, whereby documents are put into a wheelbarrow (or indeed a tea trolley) and wheeled through a cabinet room so that the government can claim that the documents are cabinet-in-confidence. Lovelock suggested that the practice may have been first observed in Queensland:

> ... with reference to the former freedom of information legislation in Queensland, it has been claimed that 'boxes of documents [were] wheeled in and out of the Cabinet room on trolleys to give them protected status', 'that the "Cabinet tea trolley exemption" ... allow[ed] a document to be exempted as a cabinet document if it had even been in the cabinet room' ...[70]

Twomey is sceptical about such stories, which she has described as "apocryphal":

> There were allegations that during Joh Bjelke Petersen's time they used to wheel documents through the cabinet room but at least that was while cabinet was sitting. In The Hollowmen they wheeled them through the room when no-one was in it. Personally, I have never actually known it to happen.[71]

While the practice is unlikely to be as brazen as that presented in *The Hollowmen*, there is sufficient anecdotal evidence to suggest that it is not a complete fiction, further exemplifying the gulf between the Executive and the Council with regards to the definition of a cabinet document.

The Requirement to Provide an Index

The Council would be in a better position to gauge the volume of documents *not* provided on cabinet grounds if the Executive provided an index of *all* privileged documents, including cabinet documents.

Under Standing Order 52, where a document is considered to be privileged an index is to be prepared showing the date of creation of the document, a description of the document, the author and the reasons for the claim of privilege. However, as adverted to above, governments not only withhold supposed cabinet documents, but information in relation to these documents is rarely, if ever, provided. Noting in 2005 the increasing frequency with which the government was withholding documents from orders for

[67] New South Wales, *Parliamentary Debates*, Legislative Council, 28 October 2004, 12188 (Catherine Cusack).

[68] L Lovelock, "The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the Egan Decisions Ten Years On" (2009) 24(2) *Australasian Parliamentary Review* 209.

[69] D Clune, *The Legislative Council and Responsible Government: Egan v Willis and Egan and Chadwick: A Commemorative Monograph* (2017) 40.

[70] Answer to Question on Notice, Finance and Public Administration References Committee, *Independent Arbitration of Public Interest Immunity Claims*, 18 December 2009, February 2010 (Ms Lynn Lovelock, Clerk of the Parliaments).

[71] Finance and Public Administration References Committee, Australian Senate, *Independent Arbitration of Public Interest Immunity Claims* (2010) 27.

papers on the basis of cabinet confidentiality, the Legislative Council attempted to address this trend by resolving that an index be provided of *all* documents *not* returned,[72] as can be seen from the following paragraph in a further order relating to grey nurse sharks in 2005:

> That, if any document falling within the scope of this order is not produced as part of the return to order on the grounds that it formed part of a Cabinet Minute, or was held for consideration as part of Cabinet deliberations, a return be prepared showing the date of creation of the document, a description of the document, the author of the document and the reasons why the production of the document would 'disclose the deliberations of Cabinet' as discussed by the Court of Appeal in *Egan v Chadwick* [1999] NSWCA 176.[73]

In response, DPC advised that the index would not be provided, based on legal advice that the Council did not have the power to impose such a requirement – a view that has been vigorously disputed by the Council.[74] A year later, in May 2006, a notice of motion from an Opposition member listed instances over the past eight months where documents were not provided on cabinet grounds and asserted the need for the Council to be informed of the nature of any document claimed to be a cabinet document:

> [T]here must be a proper limitation on the Executive's power to deny the electors and their representatives information concerning the conduct of the executive branch of government, including a limitation on the unrestrained and unexplained use of Cabinet confidentiality as a basis for claiming exemption from an order for the production of State papers, and that, if such a limitation is not adopted on the basis of the conventions of respect and comity between the arms of government, it may ultimately be imposed at law.[75]

The notice was interrupted by prorogation and never moved.[76]

And so with neither the documents nor an index being provided, the Executive is withholding from the Council a broad range of so-called cabinet documents, true or otherwise, as acknowledged by the New South Wales Privileges Committee in 2013:

> ... there is no mechanism for assessing the validity of the Cabinet immunity claimed over documents *as this judgement is made within the context of the departments' internal processes* – the documents are simply not provided to the Parliament.[77]

WHAT CAN BE DONE TO ADDRESS THE SCRUTINY GAP?

For more than a decade, the Legislative Council has exercised its powers to order state papers in a way few other jurisdictions could ever contemplate. But what is to be done about the most "obvious and glaring gap" in executive accountability in New South Wales – the withholding of cabinet documents from parliamentary scrutiny, contrary to the current state of the law?[78] This part looks at how the Council could fill the scrutiny gap, beginning with a brief overview of the arbitration process used by the Council to determine executive claims of privilege.

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[72] New South Wales, *Procedural Highlights No 20*, Legislative Council, January–June 2005, 5.

[73] New South Wales, *Minutes*, Legislative Council, 1 December 2005, 1813 (Grey Nurse Shark). The same paragraph was also included in notices of motion under Standing Order 52 regarding the CBD and South East Light Rail Project (New South Wales, *Notice Paper*, Legislative Council, 6 November 2014, 1258) and the Inquiry into Museums and Galleries (New South Wales, *Notice Paper*, Legislative Council, 24 May 2017, 8803).

[74] Lovelock, n 68, 215.

[75] New South Wales, *Minutes*, Legislative Council, 1813 (Grey Nurse Shark).

[76] L Lovelock and J Evans, *NSW Legislative Council Practice* (Federation Press, 2008) 485.

[77] Privileges Committee, NSW Legislative Council, *Possible Non-compliance with the 2009 Mt Penny Order for Papers* (2013) 10 (emphasis added).

[78] Walker, n 11, 11.

The Arbitration Process Under Standing Order 52

In accordance with Standing Order 52, a claim of privilege may be made by the Executive over documents returned in response to an order for papers. Documents subject to a claim of privilege are kept in the custody of the Clerk and made available for inspection by members of the Legislative Council only. If a member disputes a claim of privilege, the President authorises the Clerk to appoint an independent legal arbiter to report on the validity of the claim. The arbiter's report informs members, but the ultimate decision as to whether the claim of privilege should be overturned is made by the Council. Since the *Egan* decisions, a total of four independent arbiters have reported on 52 disputes in relation to more than 360 returns to order.[79] Over this time, there has not been a single breach of the confidentiality of privileged documents.[80] As noted above, the arbiter is rarely called on to arbitrate privilege claims in relation to cabinet documents because neither the documents, nor an index of the documents, are provided. The following section makes some preliminary suggestions about how to address this situation, noting that these options themselves raise complex issues that go beyond the remit of this article.

Arbitration Process for Cabinet Documents

The first resolutions passed by the Legislative Council setting out procedures for orders for papers in the wake of *Egan v Willis* envisaged a role for the arbiter in adjudicating cabinet exemption claims, but did not propose for members to have access to these documents prior to such adjudication. For example, the first resolution, passed in October 1998, included the following provision:

> Any document for which privilege is claimed and which is identified as a Cabinet document shall not be made available to a Member of the Legislative Council. *The legal arbiter may be requested to evaluate any such claim.*[81]

The wording was varied slightly in a subsequent resolution passed in November 1998, but still assumed a role for the adjudicator and reiterated that members would *not* have access to cabinet documents:

> Where any documents for which privilege is claimed is identified as a Cabinet document the document must not be made available to a Member of the Legislative Council. The Clerk is authorised to release the documents to the independent arbiter for evaluation and report under paragraph 5.[82]

By 2003, following the 1999 decision in *Egan v Chadwick*, the sessional order preceding Standing Order 52 omitted any reference to cabinet documents and the role of the arbiter in assessing claims based on cabinet confidentiality, as does the current Standing Order.[83] Therefore, in future, the Council could consider asserting the requirement under the Standing Order that cabinet documents be produced in just the same way as other privileged documents.

If this is a bridge too far, consideration could be given to reverting to the procedure originally envisaged in 1998, which involved an arbiter being asked to adjudicate on whether a privilege claim on cabinet documents should be upheld. The arbiter would receive the actual documents in order to make an assessment of whether the document was a "true" cabinet document and should therefore, in accordance with *Egan v Chadwick*, be excluded from the return.

Presumably, the idea that only an arbiter (and not members) would access supposed cabinet documents is based on the particular sensitivity of this class of documents and the risk of leaks, but it would not be difficult to see why some members may object to such a proposal: members are able to access other documents over which a claim of privilege is made, many of which are highly sensitive, and none of which have been leaked since the resurgence of orders for state papers in the

[79] Clune, n 69, Appendices 2, 3.

[80] J Moore, "The Challenge of Change: A Possible New Approach for the Independent Legal Arbiter in Assessing Orders for Papers?" (Paper presented at the *2015 ANZACATT Conference*, 2015) 2.

[81] New South Wales, *Minutes*, Legislative Council, 13 October 1998, 745 (emphasis added).

[82] New South Wales, *Minutes*, Legislative Council, 26 November 1998, 953.

[83] *Annotated Standing Orders of the NSW Legislative Council*, forthcoming.

late 1990s. And, as discussed above, the courts regularly inspect cabinet documents in determining public interest immunity claims. So why should members of the Legislative Council not be similarly entrusted? One response to this is that, unlike courts and independent arbiters, members have a political interest in the resolution of disputes about cabinet documents and so political factors will come into play, as opposed to a dispassionate assessment of the nature and significance of the document concerned.

Whatever approach the Council takes to the current scrutiny gap, it should at the very least continue to insist on receiving an index of all documents withheld on cabinet grounds, as emphasised in the 2005 and 2014 resolutions and notwithstanding the refusal of the Executive to provide details of cabinet documents to date. However, the limitations of such an index should also be kept in mind. Several commentators have noted that access to *documents* over which a claim of privilege has been made, rather than just an *index*, is fundamental to adjudicating claims of privilege. For instance, in 2010, Lovelock told the Senate Finance and Public Administration References Committee:

> I cannot see how the arbiter can make a valid assessment solely on the basis of the claim that the executive put forward. I think that it is impossible to do that without seeing what the documents are. I think it could end up with formulaic responses by the executive that would be impossible to dispute because they are formulated in such a way that they fall within any definition of what would be legal professional privilege.[84]

According to the former Clerk of the Senate, Harry Evans, it may not be necessary to look at documents over which a claim of privilege has been made; that could be left to the judgement of the arbiter, but "[i]f the arbiter comes back and says 'I'm not able to determine this matter because I really can't tell whether the claim is justified without seeing the documents', then the Senate could order the production of documents to the arbiter".[85] Of course nothing in the above discussion should be taken to suggest that the current practice, whereby privileged documents are provided to all members, should in any way be changed.

Articulating the Legislative Council Position

For Walker, the long-term solution to the "obvious and glaring gap" in the accountability of the Executive to Parliament lies in dispensing with the "fiction" of cabinet solidarity, which in his view will continue to be eroded by governments of the future – "fractious and internally divided" coalitions "where the rough welds are very obvious".[86] However, absent the Executive giving up its secrecy, he believes the disclosure of all cabinet documents to the Council is unlikely to be effected in the courts or by legislation. The best hope, Walker suggests, is for members to "shape" their powers by their conduct:

> Perhaps the only thing at the moment – but certainly the first thing to be done at the moment – is that the Council and thoughtful individual members of the Council, as well as the Council speaking collegiately, ought to say, 'We note that the return is deficient in this fashion; we deplore the deficiency; we maintain that *Egan v Chadwick* is wrong, and we move on'.[87]

Fifty years on, says Walker, someone will pull all of those statements together so that the position by the Legislative Council will be recognised as the "true state of affairs … because the way in which the law is made in this area is not as it is for any other area with which I am familiar. So it is partly what you do but what you do also includes what you say".[88]

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[84] Finance and Public Administration References Committee, n 71, 34.

[85] Finance and Public Administration References Committee, n 71, 36.

[86] Walker, n 11, 9.

[87] Walker, n 11, 14.

[88] Walker, n 11, 9.

CONCLUSION

While *Egan v Chadwick* is the current state of the law, Mason and Walker present a compelling case on constitutional grounds for the Council to have access to *all* cabinet documents. It is, however, also important to acknowledge that this is an issue on which reasonable minds differ; there will be many, particularly outside the institution of Parliament, who believe that cabinet confidentiality as an application of the principle of collective responsibility should prevail over Parliament's role scrutinising the Executive.

For this issue to be resolved, either politically or through litigation, it would need to be pursued by a majority of members who feel their ability to scrutinise the Executive is being compromised by the withholding of a cabinet document. To this end, the Council should consistently assert its position regarding cabinet documents, which should arguably go as far as that articulated by Priestley JA.

In the meantime, the test articulated by Spigelman CJ in *Egan v Chadwick* as to which cabinet documents should be withheld from the Council's scrutiny should be followed; the test under the GIPA Act employed by the Executive is inconsistent with the law and is creating a significant scrutiny gap.

The Council should continue to assert that the arbitration process under Standing Order 52 encompasses cabinet documents. Alternatively, the Council could consider implementing a procedure where, in the first instance, only the arbiter receives cabinet documents. Whatever approach the Council adopts, it should press the Executive to provide an index of *all* documents subject to a claim of privilege, with sufficient detail to enable an assessment of whether the government's claim that a document in question is a "true" cabinet document is valid.

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