



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

Consideration of disputed claim
of privilege as referred by the
Clerk under standing order 54
(March 2024)



Report 95

March 2024

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Privileges Committee

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claim of privilege as referred
by the Clerk under standing
order 54
(March 2024)**

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Consideration of disputed claim of privileges as referred by the Clerk under standing order 54 (March 2024)

Chair: The Honourable Stephen Lawrence, MLC



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Role of the Privileges Committee

- 1.1** Standing order 52 regulates the operation of the Legislative Council's power to order the production of documents concerning the administration of the state from the Executive, government agencies and other statutory bodies. This includes the operation of a dispute process, under which an Independent Legal Arbiter is appointed to evaluate and report on the validity of any claims of privilege or personal information that are made over documents returned to an order, and which are disputed by members. It is then open to the House to order the publication of the Arbiter's report and any disputed document.
- 1.2** Under standing order 54, in instances where the Independent Legal Arbiter provides a report to the Clerk and it is more than three weeks before the next sitting of the House, the House has delegated its authority to publish reports, and any disputed documents, to the Privileges Committee.
- 1.3** Standing order 54 states:
- In instances where a report of the Independent Legal Arbiter appointed under standing order 52 is received by the Clerk more than three weeks before the next sitting of the House:
- (a) the Clerk is to refer the report to the Privileges Committee for consideration,
 - (b) the Privileges Committee is authorised to undertake the role usually performed by the House in deciding whether the report of the Independent Legal Arbiter and any documents the subject of the dispute are to be published,
 - (c) any document authorised to be published by the committee under this standing order is deemed to have been presented to the House and published by the authority of the House, and
 - (d) on the next sitting day, the committee is to report to the House what action, if any, it has taken under this resolution.¹
- 1.4** Information regarding orders for papers, including returned documents, is accessible via the NSW Parliament website, www.parliament.nsw.gov.au at: Legislative Council/Orders for Papers.

¹ Standing order 54.

Committee details

Committee members

Hon Stephen Lawrence MLC	Australian Labor Party	<i>Chair</i>
Hon Natasha Maclaren-Jones MLC	Liberal Party	<i>Deputy Chair</i>
Hon Wes Fang MLC	The Nationals	
Ms Sue Higginson MLC	The Greens	
Hon Cameron Murphy MLC	Australian Labor Party	
Hon Bob Nanva MLC	Australian Labor Party	
Hon Peter Primrose MLC	Australian Labor Party	
Hon Rod Roberts MLC	Independent	

Contact details

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Chair's foreword

I am pleased to present this report of the Privileges Committee which represents the first exercise of its powers under standing order 54 in the new Parliament. The purpose of the standing order is to delegate to the committee the role the House normally undertakes in relation to disputes of privilege under standing order 52 when the House is not sitting for a period of greater than three weeks. In this instance a report of the Independent Legal Arbiter was referred to the committee on Friday 16 February 2024, with the House not due to sit until 12 March 2024.

I would like to thank the members of the committee for their work in fulfilling their delegated role during a busy period of Budget Estimates hearings, and the secretariat for assisting the committee and compiling this report.



Hon Stephen Lawrence MLC
Committee Chair

Chapter 1 Disputed claim of privilege and report of the Independent Legal Arbiter

As required by standing order 54, this report documents the actions taken by the Privileges Committee in relation to a disputed claim of privilege over documents returned to an order for papers regarding Sydney Metro governance.

Sydney Metro governance

- 1.1 On Wednesday 24 January 2024, Ms Faehrmann disputed the validity of a claim of privilege on certain documents returned on Wednesday 1 November 2023, Thursday 2 November 2023 and Wednesday 20 December 2023 to an order for papers regarding Sydney Metro governance.
- 1.2 According to standing order 52, the Honourable Keith Mason AC KC was appointed as Independent Legal Arbiter to evaluate and report as to the validity of the claim of privilege, and the disputed documents were released to Mr Mason, who requested additional submissions from relevant agencies.
- 1.3 According to standing order 54, on Friday 16 February 2024 the report of the Independent Legal Arbiter, entitled 'Sydney Metro governance', dated 16 February 2024, together with submissions, was referred to the committee.
- 1.4 On Monday 19 February 2024, the committee met to consider the report and submissions.
- 1.5 At this meeting the committee noted that it had consistently adopted a two-step process, as established in the House, to first consider the Arbiter's report, and then meet a second time to consider the publication of documents considered by the Arbiter not to be privileged.
- 1.6 The committee resolved to publish the report and submissions. According to standing order, the report and submissions were deemed to have been presented to the House, and were made publicly available (see Appendix 1).
- 1.7 In his report, Mr Mason evaluated the documents returned on Wednesday 1 November 2023, Thursday 23 November 2023 and Wednesday 20 December 2023 separately. With regard to documents returned on 1 November 2023, Mr Mason noted that there was general consensus regarding their publication, subject to certain minor redactions. Regarding documents returned on Thursday 23 November 2023, Mr Mason did not uphold the claim of privilege, stating 'there is nothing to indicate a basis for restricting the processes of parliamentary oversight and accountability'. The claim of privilege was similarly not upheld on documents returned on Wednesday 20 December 2023. The claim of privilege was similarly not upheld on documents returned on Wednesday 20 December 2023 (see Appendix 2).
- 1.8 On Wednesday 21 February 2024, the committee met a second time to consider additional submissions received since its last meeting, the publication of documents considered not to be privileged by the Arbiter and a request from Ms Faehrmann to the Clerk that the matter be resolved in a manner which would facilitate disclosure of the information with appropriate privacy considerations prior to the Budget Estimates hearing scheduled on Friday 23 February 2024.

- 1.9** In the additional submissions, Ms Faehrmann, Transport for NSW and Sydney Metro expressed agreement to the redaction of certain identifying information contained in the documents considered not privileged by the arbiter. In the additional submissions, Ms Faehrmann, Transport for NSW and Sydney Metro expressed agreement to the redaction of certain identifying information contained in the documents considered not privileged by the Arbiter (see Appendix 2).
- 1.10** The committee resolved to publish the additional submissions and also ordered the production of documents considered by the Arbiter not to be privileged, subject to certain redactions as agreed to in submissions related to the dispute:
- (1) That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 16 February 2024, and related submissions, on the disputed claim of privilege regarding Sydney Metro governance, the committee orders that documents received by the Clerk on 1 November 2023, 23 November 2023 and 20 December 2023, considered by the Independent Legal Arbiter not to be privileged, be returned to the Clerk by 3.30 pm on Thursday 22 February 2024, subject to the redaction of:
 - (a) personal information consisting of mobile phone numbers and signatures only, and
 - (b) identifying information as agreed to in submissions related to this dispute, as follows:
 - (i) redaction of staff spouse's place of employment, lawyer engaged in family court proceedings and staff children's schools in documents received by the Clerk on 1 November 2023,
 - (ii) redaction of names and other identifying information regarding witnesses, complainants or persons who were referenced in investigations but were not themselves the subject of investigation in documents received by the Clerk on 23 November 2023,
 - (iii) redaction of names and other identifying information regarding persons who were the subject of investigations and against whom no findings were made, for all investigations except Operation Cyllene and the proposed investigation by Noble Shore in documents received by the Clerk on 23 November 2023.
 - (2) That on receipt, the redacted documents be published.
 - (3) That, where a redacted document is not returned by 3.30 pm on Thursday 22 February 2024, the committee authorises the making of copies of the unredacted documents considered not privileged by the Independent Legal Arbiter for use by members of the Legislative Council in the course of their parliamentary duties, in a manner which does not disclose the information to be redacted, consistent with the order of the committee this day.
- 1.11** According to the resolution, a return was received on Thursday 22 February 2024 from The Cabinet Office, together with an indexed list of documents not considered privileged, but subject to redactions as ordered by the committee. The redacted documents were made public upon receipt.

Appendix 1 Minutes

Minutes no. 9

19 February 2024, 2.00 pm
Via videoconference (Microsoft Teams)

1. Members

Mr Lawrence (*Chair*)
Mrs Maclaren-Jones (*Deputy Chair*)
Mr Fang
Ms Higginson
Mr Nanva
Mr Primrose
Mr Roberts

Secretariat in attendance: Steven Reynolds, Merrin Thompson, Allison Stowe.

2. Apologies

Mr Murphy

3. Previous minutes

Resolved, on motion of Mr Nanva: That draft minutes no. 8 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 9 February 2024 – Letter from Alex Greenwich MP, to the Chair, advising the Legislative Assembly Parliamentary Standing Committee on Privilege and Ethics will not collaborate on a joint discussion paper on ICAC recommendations
- 16 February 2024 – Email from Steven Reynolds, Acting Clerk, to the Chair, advising that the Independent Legal Arbiter has just provided his report on a dispute of privilege over documents related to Metro Sydney governance and that the report now stands referred to the committee under standing order 54.

Sent:

- 14 February 2024 – Email from the Chair to stakeholders inviting them to make a submission to the inquiry into the recommendations of the ICAC arising out of Operation Keppel.

5. Disputed claim of privilege – Sydney Metro governance

5.1 Method of consideration

The committee noted that it had previously resolved that, wherever possible and unless circumstances require otherwise, the committee follow the established practice in the House and adopt a two-step process.

5.2 Publication of report of the Independent Legal Arbiter – Sydney Metro governance

Resolved, on motion of Mr Roberts: That the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 16 February 2024, together with submissions, on the disputed claim of privilege regarding Sydney Metro governance, be published.

6. Next meeting

The committee adjourned at 2.08 pm, until Wednesday 21 February 2024 at 3.30 pm at Parliament House and via videoconference.

Steven Reynolds
Committee Clerk

Minutes no. 10

21 February 2024, 3.32 pm
Room 814 and via videoconference (Microsoft Teams)

1. Members

Mr Lawrence (*Chair*)
Mr Fang
Ms Higginson
Mr Murphy
Mr Nanva
Mr Primrose
Mr Roberts

Secretariat in attendance: Steven Reynolds, Merrin Thompson, Allison Stowe, Irene Penfold.

2. Apologies

Mrs Maclaren-Jones (Deputy Chair)

3. Previous minutes

Resolved, on motion of Ms Higginson: That draft minutes no. 9 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 19 February 2023 – Additional submission from Transport for NSW and Sydney Metro to the Clerk on the disputed claim of privilege regarding Sydney Metro governance
- 20 February 2023 – Additional submission from Ms Faehrmann to the Clerk on the disputed claim of privilege regarding Sydney Metro governance.

5. Disputed claim of privilege – Sydney Metro governance

5.1 Publication of additional submissions – Sydney Metro governance

Resolved, on the motion of Mr Roberts: That the additional submissions received by the Clerk on the disputed claim of privilege regarding Sydney Metro governance be published.

5.2 Publication of privileged documents – Sydney Metro governance

The committee noted the report of the Independent Legal Arbiter dated 16 February 2024, and related submissions, on the disputed claim of privilege regarding Sydney Metro governance, as well as a request from Ms Faehrmann to the Clerk that the matter be resolved in a manner which would facilitate disclosure of the information with appropriate privacy considerations prior to the Budget Estimates hearing scheduled on Friday 23 February 2024.

Resolved, on the motion of Mr Primrose:

- (1) That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, dated 16 February 2024, and related submissions, on the disputed claim of privilege regarding

Sydney Metro governance, the committee orders that documents received by the Clerk on 1 November 2023, 23 November 2023 and 20 December 2023, considered by the Independent Legal Arbiter not to be privileged, be returned to the Clerk by 3.30 pm on Thursday 22 February 2024, subject to the redaction of:

- (a) personal information consisting of mobile phone numbers and signatures only, and
- (b) identifying information as agreed to in submissions related to this dispute, as follows:
 - (i) redaction of staff spouse's place of employment, lawyer engaged in family court proceedings and staff children's schools in documents received by the Clerk on 1 November 2023,
 - (ii) redaction of names and other identifying information regarding witnesses, complainants or persons who were referenced in investigations but were not themselves the subject of investigation in documents received by the Clerk on 23 November 2023,
 - (iii) redaction of names and other identifying information regarding persons who were the subject of investigations and against whom no findings were made, for all investigations except Operation Cyllene and the proposed investigation by Noble Shore in documents received by the Clerk on 23 November 2023.
- (2) That on receipt, the redacted documents be published.
- (3) That, where a redacted document is not returned by 3.30 pm on Thursday 22 February 2024, the committee authorises the making of copies of the unredacted documents considered not privileged by the Independent Legal Arbiter for use by members of the Legislative Council in the course of their parliamentary duties, in a manner which does not disclose the information to be redacted, consistent with the order of the committee this day.

6. Next meeting

The committee adjourned at 3.33 pm, *sine die*.

Steven Reynolds
Committee Clerk

Draft Minutes no. 11

5 March 2024, 1.18 pm
Room 1043 and via videoconference (Microsoft Teams)

1. Members

Mr Lawrence (*Chair*)
Mrs Maclaren-Jones (*Deputy Chair*)
Ms Higginson
Mr Murphy
Mr Nanva
Mr Primrose
Mr Roberts

Secretariat in attendance: Steven Reynolds, Sharon Ohnesorge, Monica Loftus, Irene Penfold.

2. Previous minutes

Resolved, on motion of Mr Roberts: That draft minutes no. 10 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

4. Received:

- 22 February 2024 – Email from Heidrun Blackwood, Senior Corruption Prevention Officer, Independent Commission Against Corruption, to the secretariat, seeking a two week extension on their submission to the review of the Independent Complaints Officer system.
- 22 February 2024 – Email from Heidrun Blackwood, Senior Corruption Prevention Officer, Independent Commission Against Corruption, to the secretariat, requesting a copy of various documents mentioned in the discussion paper for the inquiry into the recommendations of the ICAC arising out of Operation Keppel.
- 4 March 2024 – Letter from Mr Alex Greenwich MP, Chair, Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics to the Chair, enclosing a draft interim protocol with the Independent Commission Against Corruption regarding the procedures for dealing with claims of parliamentary privilege where material is sought by the Commission under ss 22 or 35 of the Independent Commission Against Corruption Act 1988.

Sent:

- 20 February 2024 – Email from the Chair to stakeholders, inviting them to make a submission to the review of the Independent Complaints Officer system.

5. Disputed claim of privilege – Sydney Metro governance**5.1 Chair's draft report**

Resolved, on the motion of Mr Murphy:

- That the committee note that the Chair's draft report was circulated to members less than seven days prior to the report deliberative.
- That the draft report be the report of the committee and that the committee present the report to the House.
- That the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling.

6. *****7. Next meeting**

The committee adjourned at 1.39 pm, *sine die*.

Steven Reynolds
Committee Clerk

Appendix 2 Report of the Independent Legal Arbiter, together with submissions

REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

Sydney Metro Governance

The Hon Keith Mason AC KC

16 February 2024

On 11 October 2023 the Legislative Council called for specified papers relating to Sydney Metro Governance. There had been allegations that senior executives had set up their own recruitment companies, with contractors being hired via those companies at inappropriate rates of remuneration. The matter has also been explored in the House and by the Public Accountability and Works Committee. Ms Cate Faehrmann MLC has raised concerns about potentially corrupt, or at the least highly unethical, behaviour.

Several tranches of papers have been delivered to the House. There are claims of privilege under the rubric of public interest immunity (PII) that have been challenged by the Member in her letter dated 24 January 2024. At my invitation, the Member's letter was shown to Transport for NSW (TfNSW) and Sydney Metro. This has produced some agreement in principle, some reiteration and some development of the original submissions supporting the claim: see the longer of the two letters dated 6 February 2024. The Member has herself limited and clarified her concerns in a letter to the Clerk dated 15 February 2024.

I detect that there is general consensus regarding the appropriateness of 'personal information' redactions. That issue is not presently before me.

As regards the 1 November 2023 Return, the Member seeks the public release of the names of senior executives and investigation officers, the General Delegations Schedule and the Gifts Register. As I read pp 1-2 of TfNSW's letter of 6 February 2024 this is not opposed, subject to minor redactions of items of personal information which themselves are not likely to be controversial.

There are four Boxes of privileged documents forming part of this Return. In the Member's words, they pertain to senior executives 'creating a role for \$459,056 with no competitive tender, as well as a preliminary report into "alleged conflicts of interest and alleged corrupt conduct"'. On p 3 of her letter dated 24 January 2024 the Member identifies the documents in these Boxes to which she seek unrestricted access. I have examined these documents. They are not privileged in my evaluation.

The asserted bases of privilege with respect to these documents as well as 586 documents returned on 23 November 2023 is said to be 'Personal Information and PII'. The relevant submission is dated 26 October 2023 and it asserts that internal investigations 'could' be prejudiced on the following bases:

'Investigation documents'

4.3 These documents contain information that, if released, could prejudice internal workplace conduct investigations by TfNSW. This includes:

- The identities of individuals involved in the investigations (i.e. complainants, witnesses, and subjects of the investigations)
- The alleged conduct under investigation
- Subjects' responses to allegations
- Investigation methods used to investigate the allegations (e.g. searches conducted, enquiries made, identification of witnesses, investigation plans etc)

- Records of interview and other evidence relied on in the investigation
- Findings and outcomes of the investigations, including final investigation reports (and attachments) and related briefing notes
- Actions taken in response to the findings of the investigations (including disciplinary action and referral to external investigatory bodies)

4.4 These investigations were undertaken on the basis that they would be kept confidential due to the personal and sensitive nature of the subject matter of the investigations.

4.5. The documents contain highly personal and sensitive information of participants in the investigation process, including the complainants, respondent and witnesses. The participation of those persons in the investigation was on the basis that confidentiality of their personal and other information provided during the investigation would be maintained. Each of the participants in the investigation process were instructed that they must keep the matter confidential to protect the interests of all participants. TfNSW has maintained the confidentiality of the relevant investigations at all times.

4.6. The complainants, respondent and witnesses are all entitled to expect that their personal information will be kept private in accordance with the Privacy and Personal Information Protection Act 1998 (NSW) . Although there is an exemption under that Act for the disclosure of information in accordance with the law, TfNSW submits it would not be fair to the participants in the investigation for their personal and sensitive information to be publicly available.

4.7. In addition to the matters set out above, TfNSW considers that the release of the material contained in those documents publicly could have serious adverse consequences to NSW public sector employers and the individual participants in the investigation in that it may:

- discourage employees from speaking up and coming forward about any potential issues of fraud, corruption or other misconduct in the public sector, thereby reducing the ability of the NSW public sector to manage its workforce in an effective way;
- expose witnesses to potential detriment including retaliation, thereby discouraging employees from participating in workplace investigations;
- inhibit frankness and candour in future investigations conducted in relation to its workforce, thereby reducing the ability of the NSW public sector to manage its workforce in an effective way; and
- reveal lines of enquiry and other investigation methods employed by TfNSW in its workplace conduct investigations, thereby enabling subjects to circumvent and reduce the effectiveness of those methods.

4.8 It is therefore submitted that it would not be in the public interest to make these documents publicly available because there is a risk of prejudice to TfNSW's internal investigations and possible resulting disciplinary action.'

Pages 2-3 of the letter of 6 February 2024 develop these matters to a degree, albeit in the context of inviting further consultation with the Member.

I have examined all of the documents listed or referred to by the Member for which the claim is disputed: see pp 2-3 of her letter dated 24 January 2024. These are the primary documents examined in the internal investigations, communications with the senior officers inviting their responses, and records and reports setting out the information gathered as well as the findings and reasons of the internally appointed investigators. They all lie at the heart of the matters of concern to the House. In my evaluation, Members need unrestricted access to these documents in order to inform their debate and to consider whether additional measures need to be taken. Nothing has been shown to me to suggest the presence of 'whistle-blowers' or persons at risk of reprisal who call for suppression of this information. The investigations appear to have involved the voluntary participation of all concerned. There there may have been expectations of confidentiality in some situations. But the internal investigations have been completed and there is nothing to indicate a basis for restricting the processes of parliamentary oversight and accountability that are now occurring. See generally report on Local and Community Grants dated 27 November 2023 pp 2-3.

The 20 December 2023 Return produced ten boxes of documents. As regards Box 9, the Member's letter of 15 February 2024 has limited her challenge to the claim of privilege over three documents in Box 9 which are

contracts between Sydney Metro and Bellgrove Advisory Pty Ltd. Those documents are not privileged in my evaluation, for similar reasons.

Neither are the documents in Box 10 which are contracts between Sydney Metro and Bellgrove Advisory Pty Ltd and between Sydney Metro and Pro Consultants Pty Ltd.

A handwritten signature in black ink, appearing to be 'K. Mason', with a long horizontal flourish extending to the right.

The Hon Keith Mason AC KC



24 January 2024

Mr David Blant

Clerk of the Parliament

Parliament of New South Wales

By email

Dear David,

Re: Return to order for papers - Sydney Metro

I write to request a review of the privilege status of selected documents obtained under Standing Order 52 – Sydney Metro, made on 11 October 2023. I seek to challenge privilege, the reasons for which I outline below.

Background to the SO52

This SO52 stemmed from allegations about senior executives at Sydney Metro setting up their own recruitment companies and hiring contractors via these companies to work for Sydney Metro, many on more than \$2,000 per day. The Public Accountability and Works Committee has explored this issue too, and I have been informed that documents exist that demonstrate that senior executives within Sydney Metro may be engaging in potentially corrupt, or at the very least highly unethical, behaviour.

Personal Information

Firstly, there are a number of boxes for which I do not wish to challenge privilege. These are all the returned documents that pertain to b) of the Order and conflict of interest declarations, or Statements of Interests and Association (SIA) including all of Boxes 1 - 8 of the 20 Dec 23 return, and part of Box 8.

1 November 2023 Return**Tranche 1 - Category E S052001:00000102 - 00002479**

All of these documents are privileged on the basis of 'personal information'. These documents can still be publicly released while protecting the personal information (emails, addresses, phone numbers) on all documents, including witnesses to allegations. However, given the circumstances that led to this SO52 and the allegations raised in the media and the parliament, the names of senior executives and investigation officers should be publicly released.

Sydney Metro Box MET.003.001.001 - 0093

These documents relate to the General Delegations Schedule and should be publicly released, redacting personal information (not positions) as above.

Sydney Metro Box MET.001.001.0001

This is the gifts register and should be publicly released in the public interest. Names should also be publicly released.

2 November 2023 Return

Documents E1 - E3 and H1 - H3: remove personal information and make public.

23 November 2023 Return

I wish to challenge the claim of privilege on the following documents:

S052001:0000001-04; 06; 18; 41; 43; 47; 53; 60; 59; 69; 71; 73-75; 78-80; 82; 83; 86; 87; 90; 94; 95; 96; 112; 114; 116; 135; 137; 151; 155; 171; 176; 188; 191; 196; 207; 213; 228; 238; 307; 625; 659; 728

As well as the following (and apologies for any duplication with any of the above):

- Document ID S052001:00000102 - S052001:0002479 (this last document is the start of a confidential briefing note and the entire doc should be made public)
- Most of the boxes returned under this order were Statements of Interests & Associations and Confidentiality Deeds - Boxes 4, 6, 8, 10/12

- Box 1 of 4: There are documents in this box pertaining to senior executives creating a role for \$459,056 with no competitive tender, as well as a preliminary report into "alleged conflicts of interest and alleged corrupt conduct".
- SO52001.000002470 - Briefing Note outlining concerns regarding a labor hire spend of \$459k as well as issues with Sydney Metro projects management. Evidence of concerns being raised but not acted upon.
- SO52001:00000618 - Investigation Report
- File Note from 15 December re meeting
- Annexure F: FN from complaint re senior executives trying to gain confidential information about projects that would give them a commercial advantage
- Annexure A: FN - Sydney Metro employee querying that most of the PSCs are ex-employees
- SO52001.00000585: Proposed investigation scope by Noble Shore listing allegations against Sydney Metro employees
- SO52001:00000611: Senior metro executive leaving to take up a role at Bellgrove at the start of 2024
- SO52001:00000853: Variation of contract - varied by \$1.2 million without going to tender for 'occupational hygienist' services
- SO51001.00000684: Emails showing Sydney Metro senior executives working to hire someone under \$500k to avoid CEO having to sign off on it

Please note that I do understand that there is information pertaining to these investigations, including sensitive personal information, that is not in the public interest to release and for which I do not wish to challenge privilege.

20 Dec 2023 Return

Ten boxes were returned under this order. Boxes 1 to 8 are Statements of Interests and Associations and Confidentiality Deeds and I am not challenging privilege on these documents, except for the following:

- Document ID MET 008.001.0259 is a Statement of Interests and Associations declaration by one of the senior executives mentioned in 34(f) of the SO52 and hence, I am challenging privilege on this document.

I wish to challenge the claim of privilege on all of the documents in Boxes 9 and 10. Many of these documents are contracts entered into between Sydney Metro and the recruitment companies of Sydney Metro senior executives, which have been the subject of media investigations and parliamentary inquiries.

Unreadable documents

There are a number of documents returned as privileged that have been printed out in such a small font that they are unreadable without a magnifying glass. These need to be returned in a format that is legible. The following documents fall within this category:

- Attachment 2 to SO52001.00000684
- SO5200100000108; 111; 178; 219; 222; 225

It is in the public's interest to know that government agencies are spending taxpayers money responsibly and ethically. Therefore, certain details regarding investigations into possible corruption and unethical behaviour, including allegations of senior executives making decisions for their own personal financial gain, should be made public.

I look forward to these issues being considered by the Legal Arbitrator at the earliest opportunity.

Please contact me if you require any further information.

Yours sincerely,

Ms Cate Fachrmann MLC



Mr David Blunt AM
Clerk of the Parliaments and Clerk of the Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

By email: David.Blunt@parliament.nsw.gov.au

6 February 2024

Dear Clerk,

Order for papers — Sydney Metro governance

We refer to Cate Faehrmann MLC's letter to you of 24 January 2024 concerning claims of privilege advanced on behalf of Transport for NSW (TFNSW) and Sydney Metro in relation to documents returned in response to the Legislative Council's order of 11 October 2023.

We note that the Member acknowledges that there is sensitive personal information contained in the documents returned that it is not in the public interest to release and in relation to which she does not wish to challenge privilege.

In these circumstances, we write to suggest that, through consultation with the Member, it may be possible to narrow the range of documents which need to be referred to the Independent Legal Arbiter for evaluation and report. We would appreciate it if you could bring this letter to the attention of the Member.

In view of the course proposed in this letter, as well as other considerations, we have also written today, by separate letter, respectfully seeking from the Independent Legal Arbiter a short pause to the present timetable for preparing further submissions.

Disclosure of certain classes of documents with redactions

Consultation on some matters may be quite straightforward. For example, Sydney Metro would not have any difficulty with the Gifts and Benefits Register (MET.001.001.0001) produced in response to paragraph (a) of the Council's order being published so long as redactions can be made to some personal information which staff, out of an abundance of caution, included in their declarations — for example, details of the school attended by a staff member's child, or information which identifies the

Transport for NSW
Level 8, 231 Elizabeth Street, SYDNEY NSW 2000
PO Box K659, Haymarket NSW 1240

Sydney Metro
Level 43 680 George Street, SYDNEY NSW 2000
PO Box K659, Haymarket NSW 1240

spouse of a staff member. Sydney Metro does not propose that the names of staff members who made declarations would be redacted. If the Member was willing to consult about this document, Sydney Metro could prepare a version which included proposed redactions. We consider that a similar approach might also be possible in relation to a range of other documents, including:

- 20 December return (boxes 9-10, excluding SIAs and CDPs – this is mostly Briefing Notes relating to contracts and variations in which named PSCs were part of the approval chain and copies of the PSC Contracts for PRO and Belgrave Advisory. These can be released with redaction only of personal information (such as signatures and telephone numbers), commercial sensitive information (hourly rates, insurance certificates, cost breakdowns for contracts or tenders not relevant to the named PSCs)
- Sydney Metro Delegations Schedules – only the signature of the Chairman would be redacted.

Investigations

Consultation about other matters may be more involved but would, we suggest, be fruitful. For example, some of the documents produced by TfNSW and Sydney Metro relate to investigations of workplace conduct and the nature of the material subject to the claim for privilege can broadly be broken down into three categories:

- **Witnesses & complainants** - We note that in the Member's letter of 24 January 2024, she indicated that she did not suggest that information which identifies witnesses to allegations should be made public. Further, as noted above, the Member recognised that the documents returned include information pertaining to investigations (including sensitive personal information), and indicated that she does not consider it is in the public interest to release that information and does not wish to challenge privilege in relation to it. As the Member clearly appreciates, there are very significant concerns associated with the publication of information relating to workplace investigations – not least because, in the context of such investigations, information is often provided by complainants or witnesses on the express understanding that it will be kept confidential, and on the further understanding that their identities will not be made public. If the witnesses' or complainants' names or the nature of the evidence they have provided were to be released, it would have a chilling effect on the "speak up" culture fostered within Sydney Metro and TfNSW which is designed to encourage suspected corrupt conduct to be reported and investigated.
- **Subject of investigations** – we note that the Member's letter contemplates the senior executives that were the subject of the investigations being made public. We have a number of concerns that we would appreciate sharing with this course of action, including:
 - o the negative impacts to the subjects of disclosing their names publicly are arguably disproportionate to the investigation findings. The subjects of the investigation are no longer officers of Sydney Metro and TfNSW and the public disclosure of their names where they have not been offered any right of reply is procedurally unfair;

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- unlike investigation reports produced by oversight bodies such as the ICAC, the investigation reports produced by Sydney Metro and TfNSW in this case (including the preliminary investigation reports) were for the purposes of internal action in a confidential employment context and not conducted or written in a manner that contemplated release to the public, and the flow on consequences for the person the subject of the investigation. Put simply, if Sydney Metro/TfNSW was conducting an investigation for the purposes of publicly identifying an individual, the threshold for evidence in support of the investigation may have been different; and
- Moving forward, if the outcomes of Sydney Metro and TfNSW internal investigations are to be made public, Sydney Metro and TfNSW will need to alter its investigation process, which is likely to have significant time and cost implications.
- If the subjects of an investigation are on notice that the outcome of that internal investigation were to be made public, it is expected that the subject of those investigations would be less inclined to accept the outcomes and they would be more frequently subject to applications for judicial review once again causing a significant impact on the time and costs associated with internal investigations.

Given these kinds of considerations, we would value the opportunity to discuss in more detail the precise scope of the Member's challenge to TfNSW and Sydney Metro's claims of privilege in relation to investigation documents. Again, if the Member were willing to consult about these kinds of documents, TfNSW and Sydney Metro could, prior to any consultation, prepare documents (or representative documents) bearing proposed redactions.

It strikes us that, through consultation, it may be possible to focus the scope of any dispute as to claims of public interest privilege which rest on the commercial harm to the State, or to third parties, which may be caused by publication of certain documents. It may, in particular, be possible for documents of this kind to be able to be provided in redacted form.

Other matters

We would also appreciate the opportunity to clarify certain other matters arising out of the Member's letter of 24 January 2024. For example, we are somewhat uncertain as to the Member's position in relation to the documents described in the last dot point of p2 of the letter (that dot point reads "Most of the boxes returned under this order were Statements of Interests & Associations and Confidentiality Deeds – Boxes 4, 6, 8, 10/12"). Matters of this kind could, we think, readily be clarified through consultation.

Finally, we apologise that certain documents were produced in a form that was difficult to read. We have taken steps to reprint those documents in a larger format and have updated those documents in the production boxes. If there are ongoing issues with the legibility of those documents, we would be pleased to work with the member to determine if an alternative means of productions of those documents was possible.

We look forward to hearing from you as to our suggested way forward in relation to this order for papers. Contact details for responsible officers at TfNSW and Sydney Metro are set out below. If the

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Member is amenable to the proposed consultation, we would, if appropriate, be happy to liaise directly with the Member in order to make those arrangements.

Yours sincerely,

David Britton
TFNSW – Chief Legal Officer

Brendan Harvey
Sydney Metro – General Counsel

Contact details of responsible officers:

TFNSW
Luisa Sirianni
A/ED Legal Government, Regulatory &
Prosecutions

Sydney Metro
Chontelle Perucich
Chief of Staff

Luisa.Sirianni@transport.nsw.gov.au

Chontelle.Perucich@transport.nsw.gov.au

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Mr David Blunt AM
Clerk of the Parliaments and Clerk of the Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

By email: David.Blunt@parliament.nsw.gov.au

6 February 2024

Dear Clerk,

Order for papers — Sydney Metro governance

We refer to the disputed claim of privilege made by Ms Cate Faehrmann MLC, in her letter to you of 24 January 2024, regarding documents returned by Transport for NSW and Sydney Metro (together, the agencies) in response to the Legislative Council's order of 11 October 2023.

We note that the Independent Legal Arbiter has asked TfNSW and Sydney Metro to provide any further submissions by 9 February 2024. We appreciate that opportunity. Our purpose here is to respectfully seek from the Independent Legal Arbiter a short pause on that timetable. We would, therefore, appreciate it if you could bring this letter to the attention of the Independent Legal Arbiter. We would also be grateful if you could bring this letter to the attention of the Member.

Reasons for request

We have, today, written to you in relation to this disputed claim, indicating that we would welcome the opportunity to consult with the Member, seeking to clarify, and narrow, the scope of the privilege claims in dispute.

We also note that:

Transport for NSW
Level B, 231 Elizabeth Street, SYDNEY NSW 2000
PO Box K659, Haymarket NSW 1240

Sydney Metro
Level 43 680 George Street, SYDNEY NSW 2000
PO Box K659, Haymarket NSW 1240

1. There are some documents where the agencies, consistently with the privilege submissions lodged at the time of the return, are able to provide versions of documents with personal information redacted.
2. There are some instances where the agencies would appreciate the opportunity to clarify with the Member precisely which documents, or parts of documents, are subject to the disputed privilege claims.
3. The agencies note, and appreciate, the Member's indication in her letter that:
 - a. certain personal information, including of witnesses to allegations, should be protected (p. 2, relating to the 1 November 2023 Return, Tranche 1); and
 - b. there "is information pertaining to these investigations, **including** sensitive personal information, that is not in the public interest to release and for which I do not wish to challenge privilege" (emphasis added: p. 3, relating to the 23 November 2023 Return).

In our other letter to you today we have, in particular, suggested that consultation with the Member would be beneficial in order to understand better the scope of the information over which privilege is not challenged.

4. The agencies are also currently considering whether privilege claims may only be maintained in part (through preparing redacted versions), over certain documents over which privilege was originally claimed in full.
5. Sydney Metro is also continuing to review and prepare other tranches of documents required under orders for papers made on 11 October 2023. It is noted that approximately 30,000 documents were identified as potentially responsive to the order, over 10,000 documents have been returned to date, and that it is anticipated that approximately 5,000 further documents may ultimately be produced.

In these circumstances, we respectfully seek from the Independent Legal Arbiter a short pause to the timetable for preparing submissions. A short pause would provide an opportunity for the agencies to focus on resolving the matters outlined above, particularly if the Member is amenable to the consultation as proposed by the agencies.

The agencies acknowledge that it is desirable that privilege submissions are as specific as practicable in identifying the basis of the claim of privilege, and the precise documents (or parts of documents) over which those claims are made.

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It is, however, very difficult to prepare submissions of this kind in circumstances where the scope of the privilege claims in dispute is uncertain, and can be expected to be the subject of significant narrowing and refinement due to the processes outlined above.

If a short pause in the current timetable for submissions is granted, the agencies undertake to provide an update to you on progress within 7 working days from the date of this letter, so that a revised timetable for submissions may be determined at that point.

If you require any further information, please do not hesitate to contact Chontelle Perucich, Sydney Metro Chief of Staff on [redacted] or at chontell.perucich@transport.nsw.gov.au; or Luisa Sirianni, TfNSW A/ED Legal GRP on [redacted] or at luisa.sirianni@transport.nsw.gov.au.

Yours sincerely,

David Britton
TfNSW – Chief Legal Officer

Brendan Harvey
Sydney Metro – General Counsel

Contact details of responsible officers:

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Prosecutions

Luisa.Sirianni@transport.nsw.gov.au

Sydney Metro
Chontelle Perucich
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15 February 2024

Mr David Blant

Clerk of the Parliament

Parliament of New South Wales

By email

Dear David,

Re: Return to order for papers - Sydney Metro

I write to provide further information to my letter dated 24 January challenging privilege on certain documents obtained under Standing Order 52 – Sydney Metro, made on 11 October 2023. I have had a number of conversations with Mr Keith Mason which I understand have resolved most queries he had regarding documents I referred to in my earlier correspondence, except for Boxes 9 and 10.

Boxes 9 and 10 - further clarification

Box 9

In relation to Box 9, I wish to challenge privilege on the following documents which are contracts entered into between Sydney Metro and Bellgrove Advisory:

- METL008.001.0067 - all documents contained in this contract including all appendices
- METL008.001.0020 - all documents contained in this contract including all appendices
- METL008.001.0101 - all documents contained in this contract including all appendices

Box 10

I wish to challenge the privilege claim on all documents in Box 10. These are all contracts entered into between Sydney Metro and Bellgrove Advisory and Pro Consultants, the two recruitment companies of Sydney Metro senior executives Barry McGrattan and Paul Rogers, which have been the subject of media investigations and examined by Legislative Council inquiries. Most of the contracts contain appendices containing hourly rates, services briefs, positions descriptions and Statement of Interests and Associations which I am requesting all to be released because these documents are key to whether taxpayers are getting value for the billions of dollars of taxpayers money that is being spent on Sydney Metro.

Missing Attachments

There are documents that should have been returned which haven't been.

Box 10, Docs MET.001.008.0953-0976

This is a contract for the employment of James Hayward as Senior Project Manager for a 12 month contract for \$638,976. However, it should include Annexure A which is a Services Brief, and Annexure B, the Confidentiality Deed Poll and Statement of Interests & Association. These documents aren't included, whereas most of the contracts in these two boxes do include these documents as attachments.

Box 10, Docs MET.001.008.0977-1007

The Annexure are missing from this contract too, which is a Proposal from Bellgrove Advisory and a Scope of Requirements.

Box 10, Docs MET.001.008.1474-1511

This is a contract for Paul Rogers (who owns Pro Consultants). Schedule 6 of the contract, which is the Services Brief, is referenced at doc MET.001.008.1522 but not included.

Please contact me if you require any further information.

Yours sincerely,

Ms Cate Faehrmann MLC

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Submissions of Transport for New South Wales and Sydney Metro to the Legal Arbiter, Order for Papers – “Sydney Metro Governance”

Introduction

1. These submissions are made by Transport for NSW (TNSW) and Sydney Metro (SM) to the independent legal arbiter, the Hon Keith Mason AC KC (the Arbiter). They relate to the letter of the Hon Ms Faehmann MLC (the Member) disputing claims of privilege made over documents returned to the Clerk on 1 November 2023, 2 November 2023, 23 November 2023 and 20 December 2023, in response to the order for papers made by the Legislative Council on 11 October 2023. They supplement, and extend, submissions advanced by TNSW and SM with their returns of 1 November 2023 and the submissions advanced by SM with its return of 20 December 2023.
2. These submissions should be read in conjunction with the details of the documents as specified in the indexes of disputed documents. This index includes a column of proposed redactions, where possible, that could reasonably be applied to the documents and align with the intent of the Member’s letter.
3. These submissions do not address the documents over which the Member has not challenged the claims of privilege.

Basis of further submissions

4. These further submissions have been prepared for two purposes: to assist those from TNSW and SM involved in any consultation with the Member and the Arbiter, and as submissions which may ultimately be required to be provided to the Arbiter in relation to privilege claims which remain in dispute after any consultation with the Member. Further background is set out in the two letters sent to the Clerk on 7 February 2024.
5. These further submissions have been prepared in the circumstances outlined in the letter sent to the Clerk on 7 February 2024. There have, as a result, been limits on the extent to which it has been possible for the agencies to provide specific information, in relation to specific documents and parts of documents, to fully substantiate its privilege claims. In these circumstances, TNSW and SM would be happy to make its senior officers available to meet with the Arbiter, in the presence of the Member, to provide any further details as to how the submissions advanced here relate to specific documents.

Structure of these submissions

6. These submissions proceed as follows:

1. Investigations

- 1.1. Identities of complainants and witnesses
- 1.2. Identities of persons who were investigated but where the allegations were found to not be substantiated
- 1.3. Identities of persons who were referenced in investigations but were not themselves the subject of investigation and against whom no findings were made

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- 1.4. Identities of persons who were the subject of investigations and against whom findings were made
2. **Commercial-in-confidence information**
 - 2.1. Publication of third parties' commercial-in-confidence information risks unfair prejudice to those parties' commercial operations
 - 2.2. Disclosure of commercial-in-confidence information risks damaging the effective performance of government functions and risks prejudice to taxpayers' interests
 - 2.3. Weighing the public interest considerations
3. **Legal professional privilege**

1. Investigations

7. It is important, at the outset, to note that privilege is not pressed generally over the investigation documents: privilege is only pressed for documents, and parts of documents, which identify (or tend to identify) persons who made complaints or disclosures under the *Public Interest Disclosures Act 1994* (the *PID Act*) or on the basis of assumed confidentiality, and which identify (or tend to identify) participants in investigations undertaken following those disclosures. The limited scope of the privilege claims does not, therefore, impinge upon the public interest in the House being able to examine the processes that were in place to deal with the allegations; the manner in which the complaints were received and investigated; and the action that was taken in response.
8. In every case, the individuals participated in the investigation process (whether or not the process originated from a public interest disclosure) on the basis that confidentiality of their personal and other information would be maintained. Participants were instructed to keep the matter confidential to protect the interests of all participants. Participants supplied information and documentation on the understanding it would be kept confidential, and TNSW and SM have consistently maintained the confidentiality of the investigations. This factual context is the starting point for the submissions below.

1.1 Identities of complainants and witnesses

9. Public interest immunity is claimed for documents, and parts of documents, which identify (or tend to identify) persons who made disclosures under the *PID Act*, and which identify (or tend to identify) persons who were witnesses in investigations undertaken following those disclosures.¹ It is submitted that the public interest in keeping confidential the identities of complainants and witnesses strongly outweighs any public interest in the disclosure of that information. As detailed further below, that the investigations in question were undertaken in a workplace context is a matter of particular significance here.

¹ Though the *PID Act* has been repealed by the *Public Interest Disclosures Act 2022*, the protections of the former Act continue to apply in relation to public interest disclosures made under the former regime: see cl 3 of sch 1 to the *Public Interest Disclosures Act 2022*.

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1.1.1 The public interest in protecting the identities of complainants and witnesses has been recognised at general law

10. The general law recognises that there are some topics concerning which there is a higher inherent likelihood of a claim of public interest privilege being made out than there is concerning other topics. Those topics include information relating to police informers and whistle-blowers.²
11. Although, under the general law, documents which may disclose the identities of, and confidential information given by, complainants and witnesses are not necessarily a “class” protected by public interest immunity, such documents may be the subject of public interest immunity because disclosure of their “contents” may be contrary to the public interest.³ Accordingly, it is submitted that witnesses and complainants in workplace investigations stand in an analogous position to police informers and whistle-blowers, and stand in need of similar kinds of protection. Identification of persons who raise complaints about alleged wrongdoing within a workplace, or who assist with investigations into such wrongdoing, can expose those persons to detrimental consequences within their workplace and beyond.
12. The public interest in protecting complainants was recognised in *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227, which concerned documents relating to disclosures made by complainants in regulatory investigations. Here, the Full Court of the Federal Court of Australia opined on the potential harms to complainants:⁴

“The effect of disclosure on the informer(s) in this case as well as the intimidatory effect on potential future informers carries great weight. ... Rightly or wrongly, informers are often regarded with disfavour. Their motives are often questioned - sometimes justifiably, although the public interest is not confined to protection of those informers who act from pure altruism. Persons contemplating whistleblowing would realise that disclosure of their identity may cause them harm in ways they never find out - employment or promotions not offered, friendships undermined.

That such adverse consequences may ensue is **not to be dismissed as speculative**. Assessing what is likely to happen in the future, or would be likely to have happened had not something intervened, is not a matter of scientific demonstration or proof. Nor, unlike findings as to alleged past events, is it a case of all or nothing; 51 per cent probability win, 49 per cent probability lose ... The point is that such fears may well be held by potential future informers who may, if disclosure is permitted in the present case, decide that informing ASIC is just not worth it.” (footnotes omitted, emphasis added)

13. In *Dupont v Chief Commissioner of Police* (2015) 295 FLR 283, the Full Court of the Family Court of Australia considered an appeal from *Dupont v Urwin* [2014] FamCA 1003, which concerned a claim of public interest immunity in respect of documents relating to an internal workplace police investigation into a defendant’s professional conduct. The Full Court upheld the primary judge’s finding that the

² See, for example, Hon J C Campbell KC, *Report under Standing Order 32 on Disputed Claim of Privilege - Contaminated at Power Station Associated Sites*, 18 September 2020, p. 10.

³ *Zarro v Australian Securities Commission* (1992) 36 FCR 40 per Lockhart J at 45-6, Gummow J at 60.

⁴ *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227; [2008] FCAFC 123 per the Court at [51]-[52].

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disclosure of the documents would be "... highly prejudicial to the ability of Victoria Police to properly receive and investigate complaints against police members ..."¹ The Court continued:²

"The release of documents would breach the confidentiality of complainants, undermine confidence in internal disciplinary proceedings, prevent future potential complainants from disclosing complaints due to a fear their comments would be used to generate evidence and ultimately jeopardise confidence in the investigation of complaints against police members."

14. The Court held that the disclosure of the documents would prejudice the public interest in the following ways:³

- a. Disclosure would breach the promises and assurances of confidentiality under which the particular statements were given.
- b. Police members could not be confident that the internal complaints process would be confidential, with the effect that police members may not be as candid as they would otherwise be if they truly believed that confidentiality of what they could say could be maintained.
- c. Disclosures of opinions, advice and recommendations of investigative officers to their superior officers, and vice versa, may jeopardise the "free and frank exchange of information" which would, in turn, "prejudice the fearless and thorough investigation of police complaints".
- d. Disclosure may jeopardise public confidence in the investigation of complaints against police members.

15. In a report under Standing Order 52 dated 14 February 2017, the Hon Keith Mason AC KC observed that it is necessary to contemplate the specific vulnerabilities of complainants:⁴

"It is just possible that some of the persons identified as 'complainants' in the 'Welfare Enquiries - Non Misconduct' series of spreadsheets may be in the category of true 'informants' whose identity needs protection for reasons going beyond discomfort or embarrassment. Informants come in all shapes and sizes, but if it were to be suggested that a particular 'informant' was at some specific risk on some basis, this may call for further consideration ... Naturally, means would have to be put in place to ensure the confidentiality of information provided as to anticipated harm."

16. In a workplace context, the risk of reprisal or other adverse consequences (for example, in relation to future employment) cannot be satisfactorily mitigated by the mere redaction of personal information (for example, by the redaction only of the names of complainants or witnesses). Documents taken together may convey information which each, by itself, could not.⁵ The risk of identification for complainants and witnesses is particularly acute in a workplace context, due to their colleagues' familiarity with the organisational structure, role titles, and the duties attached to particular roles.

¹ *Dipont v Chief Commissioner of Police* [2015] FamCAFC 64; (2015) 288 FLR 283 at [19].

² *Dipont v Chief Commissioner of Police* [2015] FamCAFC 64; (2015) 288 FLR 283 at [19].

³ *Dipont v Chief Commissioner of Police* [2015] FamCAFC 64; (2015) 288 FLR 283 at [64]-[65].

⁴ Hon Keith Mason AC KC, *Report under Standing Order 52 on Disputed Claim of Privilege - Greyhound Welfare*, 14 February 2017, p. 9.

⁵ *Zaru v Australian Securities Commission* (1992) 36 PCR 40 per Gummow J at 60.

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17. Judge Bennett acknowledged this particular risk in *Dupont v Urwin*, finding that “seemingly innocuous information contained in complaints can, when combined with a reader’s background knowledge, lead to the ready identification of a complainant”.¹⁰ Accordingly, her Honour held that the familiarity between the serving police personnel at a police station meant that it was not feasible to edit any of the complaints or redact parts of the complaints to adequately protect the identity of the complainants or witnesses.¹¹

1.1.2 The Legislature has given specific recognition to the public interest in protecting the identities of persons who make disclosures concerning alleged wrongdoing in the public sector

18. Some of the documents referred to in the Member’s letter identify, or tend to identify, persons who made public interest disclosures protected by the *PID Act*. In the protections afforded by that Act, the Legislature has recognised the public interest in protecting the identities of persons who make disclosures concerning alleged wrongdoing in the public sector, and in protecting such persons from detrimental action as a result of making such disclosures. It is submitted that it would undermine that aspect of the public interest – expressed in statute – for information to be published under Standing Order 52 which identifies, or tends to identify, persons who have made public interest disclosures.
19. As noted above (at fn 1), the *PID Act* was repealed by the *Public Interest Disclosure Act 2022* (the *PID Act 2022*). However, the *PID Act* continues to apply to a former scheme disclosure as if the former legislation had not been repealed or amended.¹² The protections conferred by the *PID Act* in relation to former scheme disclosures, in particular, continue to apply in relation to those disclosures.¹³
20. The object of the *PID Act* is “to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration, serious and substantial waste, government information contravention and local government pecuniary interest contravention in the public sector”.¹⁴ The *PID Act* furthers this object by “protecting persons from reprisals that might otherwise be inflicted on them because of these disclosures” and “providing for those disclosures to be properly investigated and dealt with”.¹⁵
21. The *PID Act* provides protection to any public official who makes a disclosure that complies with the requirements of Pt 2 to an individual or body specified by s 8(1). The protections afforded to a public official who makes a public interest disclosure are set out in Pt 3 of the *PID Act*. Central to the scheme of the Act is the protection from reprisal conferred by s 20. Central also is the requirement in s 22 that information which identifies, or which might tend to identify, a person who has made a public interest disclosure must not be disclosed, except in limited specified circumstances.¹⁶
22. The disclosure of information which identifies, or which would tend to identify, persons who have made public interest disclosures in relation to alleged misconduct within SM could prejudice the public interest

¹⁰ *Dupont v Urwin* [2014] FamCA 1003 at [83], quoting *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* (2008) 159 FCR 227; [2008] FCAFC 123 at [41].

¹¹ *Dupont v Urwin* [2014] FamCA 1003 at [83].

¹² *Public Interest Disclosure Act 2022*, Sch 1, Pt 2, cl 3(1).

¹³ *Public Interest Disclosure Act 2022*, Sch 1, Pt 2, cl 3(2)(a).

¹⁴ *PID Act*, s 3(1).

¹⁵ *PID Act*, s 3(1)(b)-(c).

¹⁶ Both of these forms of protection are also found in the *PID Act 2022*: see Div 2 of Pt 3 of that Act, together with s 64.

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by undermining the protections which Parliament has, through the *PID Act*, extended to such persons. More specifically, the proper operation of the *PID Act* (and the *PID Act 2022*) would be undermined by the publication of such information because:

- a. such publication would expose persons who made disclosures expecting that their confidence would be protected by the legislative scheme to the risk of detrimental action from their colleagues and members of the public, and
 - b. could, in turn, have a “chilling effect” on the making of full and frank disclosures of serious misconduct in the public service.
23. In addition to the qualified protection which s 22 of the *PID Act* confers in relation to the identity of a person who makes a public interest disclosure, the *PID Act* also requires a public authority to establish procedures for receiving, assessing and dealing with public interest disclosures to ensure its public officials maintain confidentiality of those disclosures.¹⁷
24. Although confidentiality is not a separate head of privilege, it may be a material consideration to bear in mind when privilege is claimed on the ground of public interest.¹⁸ It must be clearly demonstrated that, in the particular case, the public interest in disclosure is displaced by the public interest in maintaining confidentiality.¹⁹ It is submitted that, in the *PID Act*, the Legislature has expressed a clear judgment as to the importance of the public interest in maintaining the confidentiality of public interest disclosures.
25. Further, it has been said that the public interest in protecting confidentiality is greater where it is “a right that the legislature has deemed of sufficient importance that it has been enshrined in statute”.²⁰ It is not suggested that the prohibition against disclosure under the *PID Act* applies to restrict the powers of the Legislative Council, or necessarily establishes a ground of privilege under Standing Order 52. Nonetheless, the statutory nature of the obligation to maintain confidentiality in the identity of persons who make disclosures under the *PID Act*, weighs in favour, as an aspect of the claim of public interest immunity, of non-publication of information which identifies or tends to identify such persons.

1.1.3 There is reason to think that the prospect of information being published under Standing Order 52 which identifies, or tends to identify, complainants or witnesses may represent a real source of prejudice to the effective conduct of public sector workplace investigations

26. It is notable that the 2022 independent review of bullying, sexual harassment and sexual misconduct in New South Wales parliamentary workplaces recorded that many review participants made particular reference to the possibility of public disclosure under Standing Order 52, and that this was a “key concern for many”²¹.
27. There are various differences between the context and subject matter of that report and the present matter, and it is not suggested these findings provide evidence that is directly applicable in the present matter.

¹⁷ *PID Act*, s 22(2).

¹⁸ *Sandley v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ at 42-3.

¹⁹ *Nixon v Graham* (1988) 70 ACTR 1 per Gallop J at 8.

²⁰ *Tan v St George Bank* [2005] WASC 143; (2005) 192 FLR 315 per Master Neaves at [36].

²¹ Elizabeth Broderick & Co, *Leading for Change: Independent Review of Bullying, Sexual Harassment and Sexual Misconduct in NSW Parliamentary Workplaces 2022*, p. 69.

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Nonetheless, these findings, and the subsequent amendments made to what is now paragraph (15) of Standing Order 52 – excluding from production under an order for papers “documents concerning workplace complaints and investigations in a Minister’s office subject to the NSW Ministerial Offices Respectful Workplace Policy” – support the view that, in some circumstances, the prospect of publicity following Standing Order 52 processes may be a source of significant concern for affected individuals, and may limit the extent to which persons are prepared to disclose sensitive information.

1.2 Identities of persons who were investigated but where the allegations were found to not be substantiated

28. Public interest immunity is claimed in relation to documents, or parts of documents, which identify, or tend to identify, persons who were the subject of investigations, but in relation to whom allegations were not ultimately found to have been substantiated. It is submitted that the public interest in keeping confidential the identities of such persons strongly outweighs any public interest in the disclosure of that information.
29. The public interest favouring non-publication has both **individual** and **systemic** aspects. For individuals, there are fundamental considerations of fairness. And from a systemic perspective, maintaining the confidentiality of the results of workplace investigations in which allegations are not substantiated encourages, so far as possible, full and frank participation in those investigations by the persons subject to them.

1.2.1 Publication of the identities of persons who were investigated but in relation to whom allegations were not substantiated is fundamentally unfair and risks causing significant reputational damage

30. Where a person has been the subject of a workplace investigation which has not substantiated any allegations concerning them, and where the fact of that person having been the subject of an investigation is **not already in the public domain**, publication of information which identifies, or tends to identify, that person as having been investigated is fundamentally unfair and is apt to cause significant damage to the person’s reputation.²² That damage may not be able to be cured by confirmation that allegations were not substantiated. And it may have particularly serious ramifications for a person in relation to their future employment prospects. It could hardly be assumed that any publicly accessible reports identifying the person – whether through the traditional media, social media, or other electronic sources – would emphasise, or even necessarily mention, the fact that the allegations were found to have been unsubstantiated.
31. To the extent that there may be a public interest in understanding *how* complaints were investigated, it is submitted that that public interest does not require disclosure of the identities of persons who were the subject of investigations into allegations which were not substantiated.

²² Reputation is a well-recognised legal interest: see *Assets v McCann* (1990) 170 CLR 596 at 599 (Mason CJ, Deane and McHugh JJ), 608-609 (Brennan J) and *Albarran v Criminal Justice Commission* (1992) 175 CLR 564 at 577-578 (Mason CJ, Dawson, Toobey and Gaudron JJ), 585, 592 (Brennan J).

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1.2.2 Publication of the identities of persons who were investigated but in relation to whom allegations were not substantiated is likely to hinder the effective conduct of future workplace investigations

32. The effective conduct of workplace investigations depends upon the understanding that where allegations are not substantiated, persons will not suffer reputational harm. Publication of information which identifies or tends to identify persons who have been investigated, but in relation to whom allegations were not substantiated, undercuts that understanding, and therefore is likely to hinder the effective conduct of future workplace investigations, both within SM and in the public sector more broadly.
33. A particularly important consideration arises in relation to the willingness of persons who are the subjects of investigations to participate in them. That consideration was articulated by Gallop J in *Mines v Graham* (1986) 70 ACTR 1, a case concerning records arising out of complaints made in relation to certain police officers:²³

“There is no doubt in my mind that the investigation of disciplinary matters within the Australian Federal Police is cloaked in confidentiality and secrecy. In pursuit of such confidentiality and secrecy, members are encouraged to complete frankness and candour in responding to any complaint made, which frankness and candour would be affected if they realised that their answers are not protected from disclosure, possibly years later, in unrelated proceedings not of a disciplinary nature. Such disclosure may well be inimical to the proper functioning of a well disciplined police force.”

34. Though the police force has certain distinguishing features, his Honour’s observation that the “frankness and candour” of persons the subject of an investigation “would be affected if they realised that their answers are not protected from disclosure, possibly years later” is apt in the present context.

1.3 Identities of persons who were referenced in investigations but were not themselves the subject of investigation and against whom no findings were made

35. For the same reasoning as for the identities of persons who were investigated and allegations were found to not be substantiated, public interest immunity is claimed over the identities of persons who were referenced in investigations but were not themselves the subject of investigation and against whom no findings were made.

1.4 Identities of person who were the subject of investigations and against whom findings were made

36. Public interest immunity is claimed in relation to documents, or parts of documents, which identify, or tend to identify, persons who were the subject of investigation and against whom findings were made. Whilst it is accepted that there is a strong public interest in having confidence that NSW government agencies have strong complaints handling processes and that these processes are followed with appropriate actions taken at their conclusion, this does not extend to the publication of information that would identify a person where the negative impacts to the subjects of disclosing their names publicly are arguably disproportionate to the investigation findings. The subjects of the investigation are no longer

²³ *Mines v Graham* (1986) 70 ACTR 1 at 7.

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officers of the Transport Service and the public disclosure of their names where they have not been offered any right of reply is procedurally unfair.

37. Unlike investigation reports produced by oversight bodies such as the Independent Commission Against Corruption (ICAC), the investigation reports produced by SM and TINSW in this case (including the preliminary investigation reports) were for the purposes of internal action in a confidential employment context.
38. As articulated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 serious allegations should be considered cautiously and be determined based upon the “seriousness of an allegation made; the inherent unlikelihood of an occurrence of a given description; and the gravity of the consequences flowing from a particular finding”. The gravity of consequences in these circumstances, being the public disclosure of the identities of subjects of investigation, is far beyond that which was contemplated by either internal or external investigators. It is not in the public interest for these identities to be disclosed where an agency has appropriately reported the outcome of an investigation to ICAC and, as the proper body for considering such matters, ICAC has assessed no further action is required.
39. Disclosure of the identities of persons against whom findings have been made may be reasonably expected to lead to a significant shift in the way NSW government agencies conduct any workplace investigations and may result in perverse outcomes; where agencies are reticent to make adverse findings, with the threshold for substantiation rising to account for the potential of public disclosure and thereby public servants losing confidence in agencies’ ability to provide a safe workplace. Further it could be reasonably expected that future workplace investigations would become highly adversarial, thereby eroding the culture of a workplace that seeks to foster open and safe communication. It is not in the public interest for the public service to be unreasonably constrained in its operations if it is required to consider the disproportionate harm to reputational and mental wellbeing arising from publication of the identities of those who are the subject of what are inherently confidential workplace investigations, when making any determination.

2. Commercial-in-confidence information

40. Public interest immunity is claimed in relation to documents, or parts of documents, which contain commercially sensitive information, the publication of which could unfairly prejudice the commercial operations of third parties or could damage SM’s commercial activities in a manner likely to result in increased costs to the public revenue. The following submissions supplement and expand upon submissions made by SM in relation to documents returned on 15 December 2023. It should be noted, however, that since preparing those earlier submissions, SM has narrowed the kinds of information over which it claims privilege on this ground. SM now only claims privilege in relation to:
 - a. the identities of unsuccessful tenderers, and commercially sensitive information provided by those tenderers in competitive tendering processes;
 - b. detailed quotes and other information provided in the context of competitive tendering processes, or otherwise provided on a confidential basis;

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- e. daily rates of individuals (no claim being made in relation to general ranges or total sums);
- d. details of proposed or negotiated positions (of both SM and third parties); and
- e. contingency figures and internal budget estimates prepared by SM.

2.1 Publication of third parties' commercial-in-confidence information risks unfair prejudice to those parties' commercial operations

41. The general law recognises a public interest in protecting commercially sensitive information obtained in confidence from disclosure to the public and, in particular, to commercial competitors. As noted in SM's earlier submissions on this ground, the New South Wales Legislative Council Practice states that "the proper basis for claims of commercial-in-confidence information is not that there may be a commercially confidential dealing, but that the disclosure of the matter is likely to cause damage to the commercial activity" (emphasis added).²⁴
42. In *Mobil Oil Australia Ltd v Guinea Developments Pty Ltd* [1996] 2 VR 34, Hayne JA made the following observations about the potential harms of disclosing commercially sensitive material to a commercial competitor:²⁵

"... where, as here, the party obtaining discovery is a trade rival of the person whose secrets it is proposed should be revealed by discovery and inspection, other considerations arise.

Once the documents are inspected by the principals of the trade rival the information which is revealed is known to the trade rival and cannot be forgotten. Confidentiality is destroyed once and for all (at least so far as the particular trade rival is concerned). To say that the trade rival is bound not to use the documents except for the purposes of the action concerned is, in a case such as this, to impose upon that trade rival an obligation that is impossible of performance by him and impossible of enforcement by the party whose secrets have been revealed. How is the trade rival to forget what internal rate of return the competitor seeks to achieve on a new investment of the kind in question? How is the party whose hurdle rate has been revealed to know whether the rival has used the information in framing a tender? Thus, if the trade rival may inspect the documents concerned, the confidentiality of the information in them is at once destroyed. Is that necessary for the attainment of justice in the particular case?"

43. It is submitted that these observations lend further support to submissions earlier advanced by SM as to the prejudice to the commercial interests of third parties which would likely follow from the publication of the kinds of sensitive commercial information identified in the first four dot points above under the heading "Category C: Commercial-in-confidence information". The kinds of information under consideration here are varied, ranging from confidential pricing information to the details of insurance policies taken out by third parties.

2.2 Disclosure of commercial-in-confidence information risks damaging the effective performance of government functions and risks prejudice to taxpayers' interests

²⁴ Loveleck, L. and J. Evans (2008) 'Chapter 18: The Inquiry Power', *New South Wales Legislative Council Practice*, 1st ed, p. 512.

²⁵ *Mobil Oil Australia Ltd v Guinea Developments Pty Ltd* [1996] 2 VR 34 per Hayne JA at 38.

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44. In addition to the unfair prejudice to the commercial interests of third parties which could flow from publication of their commercially sensitive information, it is submitted that publication of commercial-in-confidence information risks damaging the effective performance of SM's objectives and functions specifically, and other governmental functions generally, and also risks prejudice to taxpayers' interests.
45. The *Transport Administration Act 1988* constitutes SM and sets out its objectives and functions. Section 38A of that Act provides that the principal objectives of SM are "to deliver safe and reliable metro passenger services in an efficient, effective and financially responsible manner" and "to facilitate and carry out the orderly and efficient development of land in the locality of metro stations, depots and stabling yards, and proposed metro stations, depots and stabling yards". Among the "other objectives" of SM set out in the same section is the following:
- "(a) to be a successful business and, to that end—
 - (i) to operate at least as efficiently as any comparable business, and
 - (ii) to maximise the net worth of the State's investment in the metro"
46. Section 38B of the *Transport Administration Act* sets out the functions of SM. So far as is presently relevant, sub-s (3) of that section provides that SM may:
- "(a) conduct any business (whether or not related to its functions) that it considers will further its objectives, and...
 - (c) build, modify, hold, manage, maintain, finance and establish transport assets vested in or owned by it, or to be vested in or owned by it, and
 - (d) acquire, build, modify, hold, manage, maintain, finance and establish metro assets vested in or owned by it, or to be vested in or owned by it, and...
 - (f) acquire, build, modify, manage, maintain and establish transport assets vested in or owned by, or to be vested in or owned by, another public transport agency, and
 - (g) make and enter into contracts or arrangements for the carrying out of works, or the performance of services, or the supply of goods or materials, and
 - (h) make and enter into contracts or arrangements with any person for the operation, on such terms as may be agreed on, of any of Sydney Metro's passenger or other transport services or of any of Sydney Metro's businesses..."
47. Sydney Metro is Sydney Metro is Australia's biggest public transport project. Building, operating and maintaining a network of four metro lines, 46 stations and 113km of new metro rail. Sydney Metro is currently delivering three large-scale city-shaping projects. Sydney Metro represents a once in a century infrastructure investment of greater than \$60 billion. Complex and large-scale procurement and delivery activity continues across each of the projects with live tenders and ongoing interface negotiations with public and private stakeholders.

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48. In order to fulfil the statutory objective of being a “successful business” which operates at least as efficiently as any comparable business and maximises the net worth of the State’s investment in the metro, and in order to perform its statutory functions in a manner consistent with that objective, SM needs to be able to assure prospective contractors of the confidentiality of its competitive tendering processes. It also needs to be able to assure counter-parties in negotiations of the confidentiality of those negotiations. This is a practical and commercial necessity. It is submitted that publication of commercially sensitive information obtained by SM through competitive tendering processes or confidential negotiations would likely impede the effective performance of SM’s statutory objectives and statutory functions.²⁶ It is also submitted that the effective performance of SM’s statutory objectives and functions would be frustrated were contingency figures and budget estimates prepared for internal purposes published to the market generally — for publication of such information could weaken SM’s commercial position (for example, in future negotiations).
49. Though the context differs in certain respects, remarks made by the Western Australian Court of Appeal in *Australian Statistician v Leighton Contractors Pty Ltd* (2006) 36 WAR 83 are apt here. In that case, the Court considered a claim of public interest immunity in respect of information in documents which came into existence for the purpose of constructing a producer price index. It was accepted that disclosure of the redacted information would identify the respondents to the statistical collection and the confidential information that they provided.²⁷ The Court held that:²⁸
- “... disclosure would, or had significant potential to, seriously damage the proper workings of the Statistician or [Australian Bureau of Statistics] in the collection of reliable raw data in a timely fashion for all price index (not just [the current price index]). Such an outcome would impair the efficient or proper functioning of the Australian Government in the management of, inter alia, the economy. The evidence relating to the need for maintaining confidentiality is consistent with the statutory framework in which the Statistician and ABS operate. The importance of confidentiality in establishing and maintaining the trust and confidence of the pool of actual and potential respondents is the basis for the onerous confidentiality requirements in the Statistics Act.” (emphasis added)
50. In support of the submission – previously advanced, and reiterated here – that the confidentiality of tender processes is essential to the efficient and proper exercise of the commercial functions of SM specifically, and of government generally, the decision of the Victorian Supreme Court in *Heckler & Koch GmbH v Farnesh Pty Ltd (via Point Trading)* [2016] VSC 697 should also be noted. In that case, the Commonwealth raised a claim of public interest immunity against a subpoena to produce for inspection the “Source Evaluation Report”. The Source Evaluation Report was a document produced in the course of a tender process for the supply of military weapon systems. Associate Justice Derham held that there

²⁶ The nature of that impediment was articulated in SM’s earlier submissions concerning commercially sensitive information.

²⁷ *Australian Statistician v Leighton Contractors Pty Ltd* (2006) 36 WAR 83; [2008] WASCA 34 per Stoyler P, McLure and Newman JJA at [36].

²⁸ *Australian Statistician v Leighton Contractors Pty Ltd* (2006) 36 WAR 83; [2008] WASCA 34 per Stoyler P, McLure and Newman JJA at [42].

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was an overwhelmingly strong interest in protecting the commercial-in-confidence information, observing:²⁹

“The Commonwealth also points to the desirability of avoiding the disclosure of information which would cause tenderers to lose confidence in the tender process. Such companies might be less inclined to tender if their sensitive information the subject of the tender, which they are informed will be kept confidential, is disclosed to anyone other than the Commonwealth. Tenderers to the Commonwealth might also be less inclined to give full and frank information in connection with a tender if they consider that any information supplied might later be disclosed to a competitor or the public. Tenderers must have confidence in the process and in the maintenance of the confidentiality of their information when dealing with the Commonwealth.

...

My conclusion is that even if the [Source Evaluation Report] could be shown to be relevant to the issues in the claim made by Point Trading against the Commonwealth or [Heckler & Koch GmbH], on balance, the production of the [Source Evaluation Report] for inspection by Point Trading would be contrary to the public interest.” (footnotes omitted)

51. Finally, it is noted that independent legal arbiters have accepted that “specific information could attract privilege where its disclosure could compromise the financial interests of taxpayers, including where it might impact adversely upon on ongoing commercial negotiations.”³⁰ As submitted in SM’s earlier submissions on this ground, if third parties tendering with SM (and with government more generally) apprehend that there is a risk that commercially sensitive information provided in the context of a confidential tendering process may be made public under Standing Order 52, there is a real possibility that those parties will price that risk, resulting in increased expenditure of public funds.

2.3 Weighing the competing public interest considerations

52. TINSW and SM submit that, in assessing a claim of public interest immunity under Standing Order 52, the legal arbiter is required to balance:
- a. the harm to the public interest arising from disclosure of the documents to the public; and
 - b. the public interest in disclosure arising from the significance and relevance of the documents to the Legislative Council’s proceedings, and the need for those documents to be made public in the course of those proceedings.³¹
53. The Member’s reasons for seeking the present order for papers are specified in the debate on the motion seeking that order.³² That debate, it is respectfully submitted, is the basis upon which the Arbiter can seek

²⁹ *Heckler & Koch GmbH v Pattech Pty Ltd (in liq Point Trading)* [2016] VSC 697 per Durburn AJ at [99], [101].

³⁰ Hon Keith Mason AC KC, *Report under Standing Order 22 on Disputed Claim of Privilege – WinComer Business Case*, 8 August 2014, p. 11; Hon J C Campbell, *Report under Standing Order 32 on Disputed Claim of Privilege – Contamination at Power Station Associated Sites*, 18 September 2020, p. 10.

³¹ Submissions made by the former Department of Premier and Cabinet, *Roundtable Report*, at p. 40.

³² *Hansard*, Legislative Council, 11 October 2023, at pp. 7700-7703.

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to ascertain the significance and relevance of the documents to the Legislative Council's proceedings, and the need for those documents to be made public in the course of those proceedings.

54. The matters over which public interest immunity is claimed under the heading of "commercial in confidence" are, as outlined at [40], quite confined. The extent to which publication of these specific details relates to the matters identified by the Member appears, at best, to be limited. It should, therefore, readily be concluded that the harm caused by disclosure of these specific details (as outlined in this part of the submissions) outweighs the public interest in the disclosure, and use, of these documents by the House in the course of its proceedings.

3. Legal professional privilege

55. Privilege is claimed, in part, over several documents which include extracts of, or otherwise summarise, legal advice.
56. In *AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30; Young J stated (at [46]):

"... the legal advice limb of the privilege extends beyond material that is literally a communication, or a record of a communication, of legal advice or instructions. In *Propend* at 569, Gummow J said that the privilege extends to any document prepared by a lawyer or client from which one might infer the nature of the advice sought or given. The principle extends to internal documents or parts of documents of the client, or of the lawyer, reproducing or otherwise revealing communications which would be covered by privilege *Bank of Nova Scotia v Helmiic Mutual War Risks Assn (Bermuda) Ltd* [1992] 2 Lloyd's Rep 540 per Saville J."

57. TINSW and SM submit that documents which are subject to legal professional privilege at common law are privileged within the meaning of Standing Order 52, and that there is no room to apply any additional "balancing" test which might lead to a conclusion that documents subject to legal professional privilege should nonetheless be released. TINSW and SM, respectfully, rely on the submission made by the former Department of Premier and Cabinet to the Standing Order 52 Roundtable¹³, whilst acknowledging that the present arbiter has not previously accepted those submissions.
58. TINSW and SM also submit, in the alternative, that there is no basis to conclude there is any compelling or overriding public interest which would support disclosure of the legal advice in the present circumstances. The legal advice that is summarised in the documents often discloses legal risks to SM, including risks arising under current contracts, and risks equivalent to those arising under current contracts. It is also reasonable to expect that contractors or other third parties might use such information, if it were disclosed, in the course of future legal proceedings against SM, TINSW or the State.¹⁴ Disclosure of such information would – in addition to the risks of systemic harm in disclosing any confidential legal advice provided to a government client¹⁵ – risk financial detriment to the State.

¹³ Roundtable Report at pp. 40-1.

¹⁴ Parliamentary privilege would likely prevent a party from tendering in evidence copies of documents tabled under Standing Order 52, but would otherwise be unlikely to prevent a party from using information acquired from such documents to its advantage in the proceedings.

¹⁵ See, for example, *Waterford v Commissioner* (1987) 163 CLR 55 at 62 (Mason and Wilson JJ).

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59. T~~he~~NSW and SM also make a similar submission to that made above (at [53]-[54]): the specific matters subject to legal professional privilege appears largely removed from the matters of public interest identified by the Member in seeking the present order for papers.

"To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers."

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Sarah Johnson
 Director Legal
 The Cabinet Office
 52 Martin Place
 Sydney NSW 2000
 By email: sarah.johnson@tco.nsw.gov.au

19 February 2024

Dear Sarah,

Report under Standing Order 52 on disputed claim of privilege — Sydney Metro governance

We refer to Legal Arbiter, the Hon Keith Mason AC KC's report of 16 February 2024.

We note that the Legal Arbiter acknowledges that there is a general consensus regarding the appropriateness of personal information redactions in relation to the documents in dispute.

In these circumstances, we write to suggest the redactions to be applied by both agencies in accordance with that consensus. We would appreciate it if you could bring this letter to the attention of the Clerk.

Proposed redactions to be applied

Document	Proposed redactions
Sydney Metro Gifts and Benefits Register	Mobile numbers Details of staff spouse's place of employment Lawyer engaged in family court proceedings Details of staff children's schools
Sydney Metro General Schedule of Delegations	Signatures

Transport for NSW
 Level 8, 231 Elizabeth Street, SYDNEY NSW 2000
 PO Box K659, Haymarket NSW 1240

Sydney Metro
 Level 43 680 George Street, SYDNEY NSW 2000
 PO Box K659, Haymarket NSW 1240

Investigations	Mobile numbers Signatures Names and/or identifying information of: <ul style="list-style-type: none"> • witnesses or complainants • persons who were referenced in investigations but were not themselves the subject of investigation • persons who were the subject of investigations and against whom no findings were made • persons who were the subject of investigations and against whom findings were made
PSC Contracts	Signatures

We note that in the Member’s letter of 24 January 2024, she indicated that she did not suggest that information which identifies witnesses to allegations should be made public. Further, the Member also recognised that the documents returned include information pertaining to investigations (including sensitive personal information) and indicated that she does not consider it is in the public interest to release that information and does not wish to challenge privilege in relation to it. As the Member clearly appreciates, there are very significant concerns associated with the publication of information relating to workplace investigations — not least because, in the context of such investigations and despite the voluntary nature of the participation of individuals, information is often provided by complainants or witnesses on the express understanding that it will be kept confidential, and on the further understanding that their identities will not be made public. Similarly, those who have been subject to an investigation and participated in that process are entitled to a presumption that the information they provide in response will be kept confidential, and that any outcome (whether adverse or not) will not be disclosed to the world at large but rather treated with the same confidentiality as any other workplace matter that did not require formal disclosure (ie, mandatory reporting).

While the investigations in question have been completed, it is difficult to overstate the significant precedent implications on future investigations of releasing witnesses’ or complainants’ names or the nature of the evidence they have provided. The knowledge that the name of a complainant or witness, or the evidence they provided, could be released will have a chilling effect on the “speak up” culture fostered within Sydney Metro and TfNSW which is designed to encourage suspected corrupt conduct to be reported and investigated.

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We note this issue has previously been raised with the Clerk by the Secretary of the then Department of Premier and Cabinet in his letter dated 10 December 2021 (copy attached).

Yours sincerely,

David Britton
TFNSW – Chief Legal Officer

Brendan Hanvey
Sydney Metro – General Counsel

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20 February 2024

Mr David Blunt

Clerk of the Parliament

Parliament of New South Wales

By email

Dear David,

Re: Response to Transport for NSW Letter Dated 19 February re Return to order for papers - Sydney Metro

I write to respond to the correspondence from Transport for NSW (TfNSW), dated 19 February 2024, suggesting proposed redactions for some of the documents that I have challenged privilege on. In relation to those suggestions, I agree to the following:

Agree to redactions as proposed by TfNSW:

- Sydney Metro Gifts and Benefits Register
- Sydney Metro General Schedule of Delegations
- PSC Contracts
- Investigations
 - Mobile numbers
 - Signatures
 - Names and/or identifying information of
 - Witnesses or complainants
 - Persons who were referenced in investigations but were not themselves the subject of investigation

Not agree to the redactions as proposed by TfNSW:

- Persons who were the subject of investigations and against whom no findings were made:

I agree to this for all investigations except for Operation Cyllene and the proposed investigation by Noble Shore.

- Persons who were the subject of investigations and against whom findings were made

I do not agree to this.

I trust this is sufficient information. Please contact me if you require any further details.

Yours sincerely,

Ms Cate Faehrmann MLC

