

## Fact sheet: Public interest immunity

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An agency may be in possession of confidential government information which is sought in proceedings or to be made available for administrative processes. If the agency considers that release of the information would be prejudicial to the public interest, it may be able to claim public interest immunity (PII) to prevent the production, disclosure, and use of the information.

### Public interest immunity

PII is a common law doctrine and the name given to the body of substantive and procedural rules whereby confidential information that is otherwise relevant is withheld on the ground that the public interest in its disclosure is outweighed by a competing public interest in its non-disclosure.

The immunity applies to administrative processes, such as the execution of search warrants;<sup>1</sup> pre-trial disclosures (including subpoenas, discovery and interrogatories); and to information sought to be adduced into evidence (for example, during examination of a witness).

A claim of public interest immunity can be made in reliance on the common law. Alternatively, in most NSW Courts, an application to exclude evidence of 'matters of state' can be made under s. 130 and/or 131A of the *Evidence Act 1995*.

### Information which attracts a PII claim

PII applies to confidential government information.

Section 130(4) of the *Evidence Act* sets out a non-exhaustive list of circumstances in which a document or information may be taken to relate to

'matters of state'. That is information which, if disclosed, would:

- prejudice the security, defence or international relations of Australia; or
- damage relations between the Commonwealth and a State or between two or more States; or
- prejudice the prevention, investigation or prosecution of an offence; or
- prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or
- disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or
- prejudice the proper functioning of the government of the Commonwealth or a State.

However, the categories of information that could attract a PII claim are not closed. More common types of information attracting PII are outlined below.

### Cabinet information

The common law recognises that confidential State papers such as Cabinet submissions, other Cabinet documents, and documents relating to the framing of government policy at a high level, as a class of document, can be subject to PII. The rationale for affording protection to such material is twofold. First, that secrecy is at least highly desirable to promote frankness and candour in high-level political decision-making.<sup>2</sup> Second, that the principle of collective responsibility cannot survive if its deliberations are disclosed.<sup>3</sup>

<sup>1</sup> *Jacobsen v Rogers* (1994) 182 CLR 572

<sup>2</sup> *Sankey v Whitlam* (1978) 142 CLR 1 (*Sankey*) at 40 per Gibbs ACJ

<sup>3</sup> *Commonwealth v Northern Land Council* (1993) 176 CLR 604 (*Northern Land Council*) at 615-616

For that reason, records of Cabinet deliberations and decisions have ‘pre-eminent claim to confidentiality’.<sup>4</sup> Cabinet documents which record the matters put to Cabinet for discussion (such as minutes or submissions for the consideration of Cabinet, and drafts of those documents) are generally treated in the same position as records of the deliberations or decisions of Cabinet.<sup>5</sup>

Other documents are less likely to attract the immunity, but can include:

- documents prepared for the purpose of providing advice to Cabinet or for the use of a Minister in Cabinet;<sup>6</sup>
- documents that would disclose the content of Cabinet submissions, such as Ministerial briefing notes and Ministerial correspondence;<sup>7</sup>
- reports prepared by external experts for consideration by Cabinet;<sup>8</sup> and
- other State papers where the documents are concerned with the framing of government policy at a high level.<sup>9</sup>

A PII claim over Cabinet information still requires a decision-maker to undertake a balancing exercise between the competing public interests. Factors relevant to the balancing exercise will include whether the information concerns matters that are ‘current and controversial’<sup>10</sup> and the importance of the information to the issues in dispute.<sup>11</sup>

The Cabinet Office must be consulted before any decision regarding access to Cabinet records is made.<sup>12</sup>

### Confidential sources

PII protects the identity of people who provide information or assistance to law enforcement and regulatory agencies on the basis that their identities will be kept confidential. This is to protect sources’ safety and to ensure the free flow of information to these agencies.

### Prejudice to the prevention, investigation or prosecution of an offence

PII also protects from disclosure confidential information that would, or might:

- reveal confidential methods of investigation undertaken by law enforcement and regulatory agencies – so as not to allow those committing offences to circumvent such methods; and
- allow a person committing, or who has committed, an offence to take steps to thwart an investigation, for example, by destroying inculpatory evidence, creating exculpatory evidence, manufacturing an alibi or fleeing the jurisdiction.

### How to claim PII

PII is core legal work and must be referred to the Crown Solicitor.<sup>13</sup> The Crown Solicitor will provide advice and representation in relation to any claim.

A PII claim should be supported by affidavit evidence which addresses, with specificity, the confidential nature of the information and the harm that will be caused by disclosure. The affidavit must be sworn at the highest or close to the highest level in the agency, normally by the responsible Secretary or Deputy Secretary; or Commissioner, Deputy Commissioner, or Assistant Commissioner. The deponent on a PII claim is generally not called for cross-examination.

A confidential affidavit, for inspection solely by the decision-maker, is often relied upon in support of a PII claim.

A PII claim must be approved by the Solicitor General or the Crown Advocate<sup>14</sup> before it is asserted. The Crown Solicitor’s Office will consult the Solicitor General or the Crown Advocate to obtain approval.

### Effect of an upheld PII claim

PII is an exclusionary doctrine. A successful PII claim results in providing immunity from

<sup>4</sup> Northern Land Council at 618

<sup>5</sup> Northern Land Council

<sup>6</sup> Sankey at 39; Lanyon Pty Ltd v The Commonwealth of Australia (1974) 129 CLR 650 at 653

<sup>7</sup> Commonwealth v Construction, Forestry, Mining and Energy Union (2000) 98 FCR 31; 171 ALR 379; [2000] FCA 453

<sup>8</sup> Aversa v Transport for New South Wales [2022] NSWSC 277

<sup>9</sup> Sankey

<sup>10</sup> Northern Land Council at 618

<sup>11</sup> State of New South Wales v Public Transport Ticketing Corporation [2011] NSWCA 60

<sup>12</sup> Premier’s Memorandum M1997-26: Litigation Involving Government Authorities

<sup>13</sup> Premier’s Memorandum M2016-04: NSW Government Core Legal Work Guidelines

<sup>14</sup> Premier’s Memorandum M1997-26: Litigation Involving Government Authorities

production and preventing the information the subject of the claim being admitted into evidence.<sup>15</sup>

## Other mechanisms to protect information

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A PII claim cannot be waived. However, if there is an alternative mechanism available to protect the information, that would be sufficient to protect the public interest, that alternative should be carefully considered. For example, a court or tribunal may be able to make orders, in the nature of suppression, non-publication, closed court, and the use of pseudonyms, that would be sufficient to prevent harm to the public interest.

## Key contacts

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<sup>15</sup> *HT v The Queen* [2019] HCA 40 per Kiefel CJ, Bell and Keane JJ at [29], Nettle and Edelman JJ at [55] and Gordon J at [71]-[74]