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

Part 1—Introduction

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

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

This protocol addresses the balance between parliamentary privilege and the public interest in Parliament’s openness and transparency. It has its genesis in on-going calls for Parliament to be subject to the Official Information Act 1982. In 2011, the Standing Orders Committee[3] addressed the issue and considered that high-level freedom of information principles might be established in legislation, but that their implementation be a matter for Parliament through rules adopted by the House or published by the Speaker. In the following year, the Law Commission[4] recommended that the Official Information Act be applied to the parliamentary agencies, but with a limited definition of official information that mitigated concern about any adverse effect on the ability of the House to maintain control of its own proceedings and safeguarded member and party information.

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

2 Legislature Act 1908 s.242(2).
4 The Public’s Right to Know: Review of the Official Information Legislation, NZLC R125.
Coverage
Members of Parliament perform a central role in New Zealand’s system of representative parliamentary democracy. They dedicate much of their time and effort to concerns and issues raised by the community or the general public. In the course of their work, they receive and handle a great deal of information, some of which may be personal information about their constituents and other New Zealanders, or information relating to proceedings in Parliament. Members may also retain information in relation to their roles as members of parties recognised for parliamentary purposes.

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

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

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

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

This protocol does not limit or affect any of these disclosures of parliamentary information.
Other legal authority for access to information
The principle of exemption from legal liability for parliamentary conduct does not mean that criminal acts committed in a parliamentary environment are exempt from prosecution. The protocol for execution of search warrants within the parliamentary precinct applies where access to information is required under a search warrant. Where access to information is sought subject to other legal authority, the request for access must also, to the extent possible, be treated in accordance with the protocol for the execution of search warrants. This way the public interest in parliamentary independence can be balanced against the interest of maintaining the rule of law.

Part 2—Information protocol

Application of protocol
1. This protocol applies to every request for the disclosure of any information (including metadata) that is about, or in relation to,
   a) a member of Parliament in his or her capacity as such a member, or as a member or leader of a recognised parliamentary party
   b) a recognised parliamentary party
   c) a member of the Parliamentary Press Gallery
   d) proceedings in Parliament
   e) parliamentary administration.

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

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

4. Other principles that must be taken into account in applying this protocol are as follows:
   a) parliamentary privilege provides the House with exclusive control of its operations, and protects parliamentary proceedings from questioning outside Parliament. Members of Parliament must have the ability to raise claims for parliamentary privilege in relation to requests for the disclosure of information:
   b) the House may punish for contempt any action that obstructs or impedes the House or a member of Parliament in the performance of their functions or has the tendency, directly or indirectly, to produce such a result:

6 *Protocol for the Execution of Search Warrants on Premises Occupied or Used by Members of Parliament*, An agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of Police, October 2006.
c) members of the Parliamentary Press Gallery must be able to carry out their functions and duties in order to advance the interests of democracy:

d) members of Parliament and members of the Parliamentary Press Gallery should have complete control over the disclosure of any information held in the parliamentary information, communication and security systems that is about, or in relation to, them unless the disclosure is required or compelled by law:

e) leaders or whips of recognised parliamentary parties should have complete control over the disclosure of any information held in the parliamentary information, communication and security systems that is about, or in relation to, their parties unless the disclosure is required or compelled by law:

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

Requirements for requests for information

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

a) the disclosure, —

i. in the case of a request for information about, or in relation to, an identifiable member of Parliament, is made with the written consent of that member of Parliament; and

ii. in the case of a request for information about, or in relation to, a particular recognised parliamentary party, is made with the written consent of the leader or whip of that party; and

iii. in the case of a request for information about, or in relation to, an identifiable member of the Parliamentary Press Gallery, is made with the written consent of the relevant member of the Parliamentary Press Gallery; or

b) the disclosure is required or compelled by—

i. a court order:

ii. a search warrant:

iii. an enactment (including, for example, the Commissions of Inquiry Act 1908, the Ombudsmen Act 1975, and the Inquiries Act 2013):

iv. a rule of law:

v. any other lawful authority that authorises access to or the disclosure of any information or compels the production of any evidence, documents, papers, or things.
Disclosure of information required or compelled by law

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

7. Without limiting the procedure for the execution of search warrants set out in the agreement referred to in clause 6, the applicable procedure under that agreement includes, among other things, the following steps:
   a) notifying the Speaker and the Clerk of the proposed access to information:
   b) informing the relevant member of Parliament that access to information is being sought under legal authority:
   c) allowing the relevant member of Parliament to be present or represented while access to the information is occurring:
   d) allowing the relevant member of Parliament to claim parliamentary privilege and making arrangements for any information in respect of which parliamentary privilege is claimed to be excluded and held by the Clerk:
   e) allowing the relevant member of Parliament to seek a certificate from the Speaker that proceedings in Parliament are in fact involved and the claim of privilege can be sustained:
   f) ensuring that access to the information does not take place at a time when the House is actually sitting or when a committee on which the relevant member of Parliament serves is actually meeting, so that the member can give full and undivided attention to parliamentary business.

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

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

10. If a request for information relates to members of Parliament, recognised parliamentary parties, or members of the Parliamentary Press Gallery generally and does not relate to an identifiable individual or a particular recognised parliamentary party,—
   a) the Speaker must be promptly notified of the request; and
   b) the parliamentary agencies must provide the Speaker with any assistance that may be required to enable the Speaker to deal with the request (including the provision of advice and administrative support)
   c) the Speaker may, where he or she considers it appropriate, consult members of Parliament, leaders of recognised parliamentary parties or the chairperson of the Parliamentary Press Gallery about such requests.

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

Requests for information relating to parliamentary administration

12. As soon as practicable after the commencement of this protocol, the parliamentary agencies must—
   a) develop detailed guidelines for dealing with requests for information about parliamentary administration that balance openness and transparency, privacy principles, and parliamentary independence; and
   b) submit those guidelines to the Speaker for approval.

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

13. If an Ombudsman proposes to undertake an investigation into a complaint under the Official Information Act 1982 in respect of information held by a Minister of the Crown where the Minister is claiming that the information is not held in his or her official capacity as a Minister and is therefore not subject to that Act, the Ombudsman must, before exercising his or her powers under section 19 of the Ombudsmen Act 1975,—
   a) be satisfied that there is a reasonable likelihood that the information is held by the member of Parliament in his or her official capacity as a Minister of the Crown; and
   b) have regard to the following:
      i. that a Minister’s official capacity does not include matters that are carried out by the Minister in his or her capacity as a member of Parliament, a member of a recognised parliamentary party, or a leader of a recognised parliamentary party; and
      ii. that the Official Information Act 1982 does not apply to members of Parliament or the parliamentary agencies generally, and that this protocol is based on the principle of member consent; and
      iii. that the exercise of the power to require production of information under section 19 of the Ombudsmen Act 1975 cannot be used as a
means of widening the scope of the Official Information Act 1982 to cover the parliamentary agencies.

Commencement and review

14. This protocol—
   a) comes into effect on the date of the Speaker’s signature, following adoption by the House; and
   b) continues in force until termination.

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

Signed by:

Rt Hon David Carter
Speaker of the House of Representatives

DATED this 17th day of August, 2016