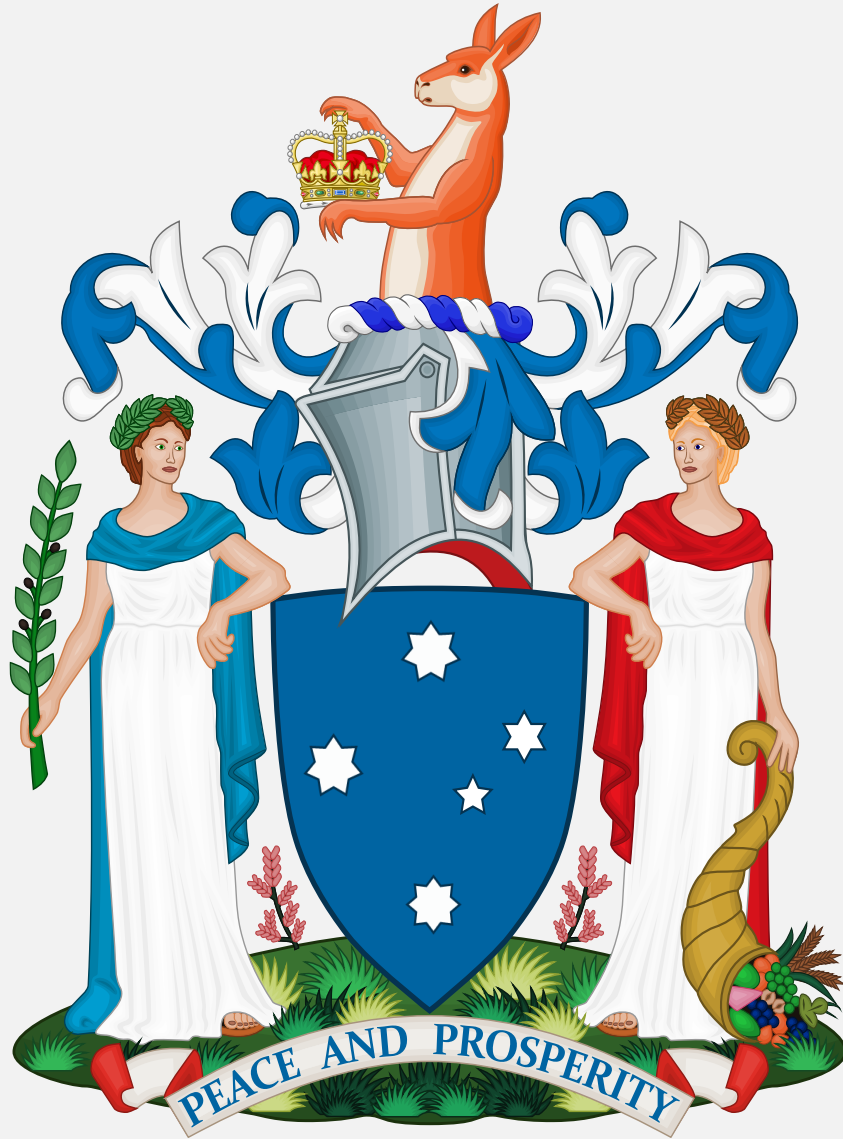




It's the Constitution, stupid!

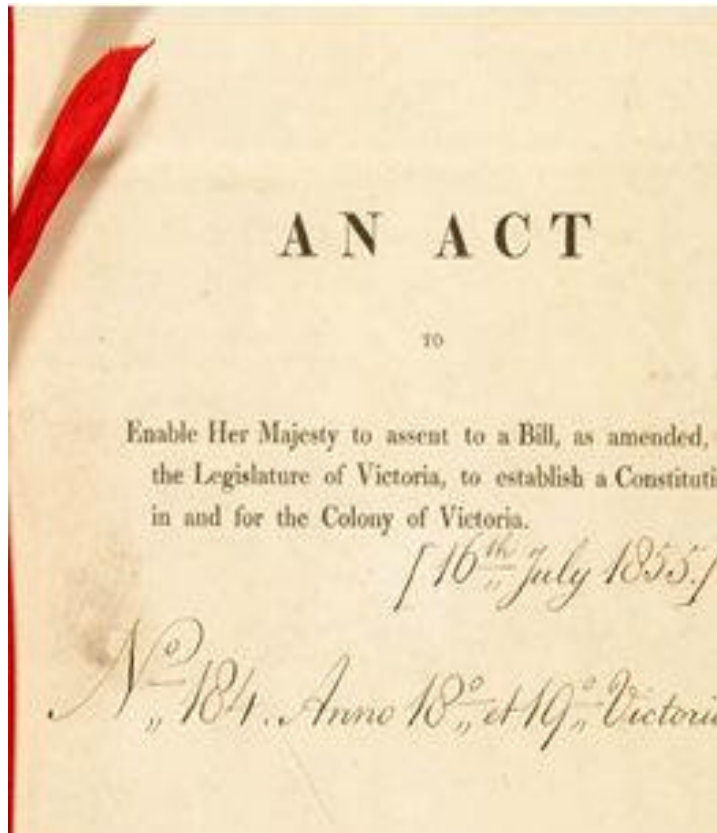
Why the Victorian Government believes it
has the right to control Parliament's access to
information – and why it is wrong

Patrick O'Brien, Senior Committee Manager,
Legislative Council, Parliament of Victoria

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*‘The responsibility of Ministers ‘is both collective and individual, and owed to **the whole Parliament** (and not just one House of it) as representatives of the people’.*

Greg Taylor, The Constitution of Victoria, Melbourne: The Federation Press, 2006



19 Privileges powers etc. of Council and Assembly

(1) The Council and the Assembly respectively and the committees and members thereof respectively shall hold, enjoy and exercise such and the like privileges immunities and powers as at the *21st day of July, 1855* were held enjoyed and exercised by the House of Commons of Great Britain and Ireland and by the committees and members thereof, so far as the same are not inconsistent with any Act of the Parliament of Victoria, whether such privileges immunities or powers were so held *possessed or enjoyed by custom, statute or otherwise*.

‘A Joint Investigatory Committee has power to send for persons, documents and other things.’

Parliamentary Committee Act 2003 28(1)

‘The Council may order documents to be tabled in the Council.’

Legislative Council Standing Order 10.01

- (1) Where a document is claimed to be covered by Executive privilege —
 - (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of Executive privilege; and
 - (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the Council and —
 - (i) made available only to the mover of the motion for the order; and
 - (ii) must not be published or copied without an order of the Council.

Legislative Council Standing Order 10.03

(2) The mover of the motion for the order may notify the Clerk, in writing, disputing the validity of the claim of Executive privilege in relation to a particular document or documents. On receipt of such notification, the Clerk is authorised to release the disputed document or documents to *an independent legal arbiter*, for evaluation and report within seven calendar days as to the validity of the claim.

Legislative Council Standing Order 10.03

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‘The Labor Party does not oppose the part of [the] amendment on the production of documents chapter ...

‘The principles of the Labor Party are that we follow the procedures of the Senate as a starting point and we deal with the iterations of what is happening under our current Standing Orders, Sessional Orders and practice.’

John Lenders, Leader of the Government, 16 October 2014



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*‘Executive privilege is **the right of governments** not to disclose certain information or documents from public release where the government deems there are reasonable grounds for such information to be kept confidential ...*

*‘The application of privilege in the Victorian Constitution relies on the practices observed in the **British House of Commons in 1855** ... Claims in the majority report surrounding Executive Privilege ignore this **foundational principle as set out in the Constitution.**’*

Labor Party Members, Minority Report, Select Committee on the 2026 Commonwealth Games Bid, Melbourne: Parliament of Victoria, 2025

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*‘Executive Privilege is a matter to be determined by the executive,
as per the Constitution.’*

Labor Party Members, Minority Report, *Select Committee on the 2026 Commonwealth Games Bid*, Melbourne: Parliament of Victoria, 2025

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‘[In 1855, claims of Executive Privilege] were in the domain of the Executive itself [and to think otherwise] fundamentally misunderstands the Constitutional basis of Executive Privilege.’

Labor Party Members, Minority Report, Legislative Council Legal and Social Issues Committee, Inquiry into the Redevelopment of Melbourne’s Public Housing Towers, Melbourne: Parliament of Victoria, 2025

‘Executive Privilege is a privilege *held by the Executive Government*... The Government may claim Executive Privilege in response to a Parliamentary Committee request for information if it considers the public interest in withholding the information outweighs the public interest in providing it to the Parliamentary Committee.’

‘... various Victorian Governments have informed Parliaments [about the factors they consider when determining whether to abide by orders to produce documents or not].’

Guidelines for appearing before and producing documents to Parliamentary Inquiries

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‘[In 1855] the House of Commons had no power to compel the production of documents from the Executive Government which the Executive Government asserted were the subject of Executive Privilege.’

Rob Hulls to Select Committee of the Legislative Council on Gaming Licensing, First Interim Report Upon Gaming Licencing, Melbourne: Parliament of Victoria, 2007

“ *The Council’s capacity for oversight of government, and particularly the Executive, was ‘beyond serious question’.*

This power is not stated in the Constitution as it is an ‘implied power’.

There was no precedent for a successful claim by the Executive to simply resist an order for papers.

*‘Where a document is not to be regarded as a Cabinet document, there should be no public interest reason to keep it from **the people’s representatives, the legislators, in the Council.**’*

Brett Walker QC, Advice to Select Committee of the Legislative Council on Gaming
Licensing

“ *The Council has some power to call for documents but this power is limited by ‘clearly established exceptions’.*

Crown or Executive Privilege meant that the House of Commons could request documents from the Crown through an ‘address’ but could not compel the production of documents over which the Crown claimed privilege.

A Minister needed only to claim Executive Privilege and the House and its Committees ‘were required to respect that claim’.

Section 19(1) of the Constitution Act 1975 means that those limitations apply in Victoria.

Rob Hulls to Select Committee of the Legislative Council on Gaming Licensing, First Interim Report Upon Gaming Licencing, Melbourne: Parliament of Victoria, 2007

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‘Parliament (as an institution consisting of Assembly, Council and Governor) is not limited by s. 19. That is, the Parliament could enact a law re-defining those privileges in a manner very different from s. 19.’

Peter Hanks KC

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*‘It is to be assumed – for this is its whole point – that s. 19 only increases Parliament’s powers from what they would be at common law, or leaves them the same: **it never reduces them.**’*

Greg Taylor



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‘The 1855 edition must be the primary source for the privileges held by the House of Commons, its committees and members on 21 July 1855.’

Peter Hanks KC

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*‘[Parliament] is invested with the power of ordering all documents to be laid before it **which are necessary for its information.**’*

*Regarding Committees: ‘any neglect or disobedience of a summons will be reported to the House, and the offender will be treated in the same manner as if he had been guilty of a **similar contempt to the House itself**’.*

Thomas Erskine May, A practical treatise on the law, privileges, proceedings and usage of Parliament, Butterworths: London, 1855

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*‘... all public departments connected with the collection or management of the revenue, or which are under the control of the Treasury, may be reached by a **direct order from either House of Parliament**; but that public officers and departments subject to her Majesty's **secretaries of state** are to receive their orders from the Crown.’*

Thomas Erskine May, A practical treatise on the law, privileges, proceedings and usage of Parliament, Butterworths: London, 1855

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*‘[Using addresses] does not reflect a legal restriction on the powers of each House of Parliament but is a parliamentary practice only, which **any House is free to use or not to use as it wishes.**’*

Greg Taylor, Parliament’s power to require the production of documents – a recent Victorian case, in Deakin Law Review, Volume 13, No 2, 2014

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‘... the House clearly has this power. You do not provide a power like this through the Standing Orders. They exist to regulate your proceedings once you use your particular power ... The power comes, if you like, from higher up – in this case the Constitution Act of the State of Victoria.’

Bruce Chamberlain, President, Legislative Council, 16 October 2002

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‘Custom, statute or otherwise of course includes the common law doctrine. This Council derives its power via the Constitution, via the Bill of Rights of 1689 and via common law interpretation.’

Ed O’Donohue, Member for Eastern Victoria, 14 March 2007

“ *‘[Philip Davis] argued that the power **already** existed in the Constitution. That is a view I share.’*

Wayne Tunnecliffe, Former Clerk, Legislative Council, Parliament of Tasmania,
Legislative Council Select Committee Report on Production of Documents, 2021

“ *‘I do not agree with the Attorney-General’s assertion ... that the Council’s powers are trumped by a Government’s claim of Executive Privilege ... the powers and privileges of the Council mean that **it is for the House to decide this on a case-by-case basis.**’*

Andrew Young, Former Clerk, Legislative Council, Submission to Parliament of
Tasmania, Legislative Council Select Committee Report on Production of Documents,
2021

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*‘The Legislative Council **has not conceded** the existence of any conclusive Executive Privilege in relation to its proceedings.’*

Robert McDonald, Clerk, Legislative Council to Commonwealth Games Select
Committee Chair David Limbrick

REMEMBER!

‘... various Victorian Governments have informed Parliaments [about the factors they consider when determining whether to abide by orders to produce documents or not].’

Guidelines for appearing before and producing documents to Parliamentary
Inquiries

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‘... the Executive is not the sole arbiter of when Executive Privilege applies.’

Peter Hanks KC



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*‘... an attachment to a Cabinet document providing **factual or statistical information to assist in Cabinet decision making** should not be exempt. This is because **such raw material cannot, by definition, disclose Cabinet’s deliberations.**’*

Discussion Paper on Reform of Government Accountability in Australia, Ken
Coghill et al Australasian Parliamentary Review, Spring 2006

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*‘The claim cannot be made simply because a document has the word
“Cabinet” in or on it.’*

Harry Evans, *Odgers’ Australian Senate Practice*, 14th edition, 2016

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‘The reality is, most Cabinet documents – certainly ones I saw as a Minister – do not reveal the deliberations of Cabinet. They reveal the decisions of Cabinet.’

Gordon Rich-Phillips, Parliament of Tasmania, Legislative Council Select Committee Report on Production of Documents, 2021

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‘Really, the House should vote to empower the President to see the case through ... make sure the Council is represented at every level of court, because these things never just stop at one level of court.’

Andrew Young, Former Clerk, Legislative Council

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*‘... the Journals abound with cases in which witnesses have been punished by commitment to the serjeant at-arms, **and to Newgate**, for prevaricating, or giving false testimony, or suppressing the truth; for refusing to answer questions, or to produce documents in their possession’*

Thomas Erskine May, A practical treatise on the law, privileges, proceedings and usage of Parliament, Butterworths: London, 1855

