

RESPONDING TO SUBPOENAS – THE LAW RELATING TO SUBPOENAS AND THE UNIVERSITY’S OBLIGATIONS WHEN IT RECEIVES A SUBOENA

Introduction

This paper sets out the law relating to subpoenas (also known as summonses) and explains what the University’s obligations are when it receives a subpoena.

What is a subpoena?

A subpoena is an order from a court, tribunal or similar body requiring the attendance before it of a person named in the subpoena to produce a document or documents, give evidence or to produce evidence and to give evidence.

Each Federal and State court and many tribunals, boards and similar bodies created under an Act of Parliament have the power to issue subpoenas.

The law relating to subpoenas

Subject to the limitations and exceptions set out below, the obligation of a person receiving a subpoena to produce a document or documents is to produce the documents named in the subpoena to the court or tribunal or other issuing body (rather than to the person who requested that the subpoena be issued).

The subpoena states a date by which the documents need to be produced. If the recipient of the subpoena does not object to the production of the documents, it can send the documents to the court or tribunal by the date specified in the subpoena. It is not necessary to physically take the documents to the court or to the tribunal or to appear at the court or tribunal hearing (unless an application is to be made to have the subpoena set aside). The court or tribunal then decides which parties, if any, will have access to the documents.

If the subpoena is an order to give evidence, the person name in the subpoena must attend the court or tribunal on the day named in the subpoena.

General rule

The general rule is that provided a subpoena is in the proper form and other procedural requirements have been met, a subpoena to a staff member of the University from a court or tribunal must be complied with unless one of the recognised limitations or exceptions referred to below applies.

Limitations and exceptions to the general rule

It is possible to avoid the obligation created by a subpoena if it is technically deficient – that is, it is not in the correct form, it is not properly served or it is not accompanied

by the prescribed fee or conduct money. Legal Services should be contacted for advice if there are concerns about the form of a subpoena.

Assuming that there are no technical deficiencies in or associated with the subpoena, the recipient of a subpoena must comply with it unless the recipient applies to the court or tribunal which issued the subpoena to have it set aside on one of the following grounds:

1. the subpoena is an abuse of process in that it was issued for an improper or ulterior purpose and not for the proceeding in question;
2. responding to the subpoena constitutes an undue or oppressive burden on the recipient or it has been issued with insufficient particularity as to what documents are being sought;
3. the documents sought are not relevant to any issue that may legitimately arise at the hearing;
4. the subpoena is equivalent to “discovery” (discovery is a court-ordered pre-trial legal process by which the parties in a dispute list the documents that they hold). This ground can usually only be relied upon where the recipient of the subpoena is a party to the legal proceedings referred to in the subpoena;
5. the issue of the subpoena amounts to a “fishing” expedition – that is, the party seeking the documents is trying to find out whether there are any documents which would assist that party’s case;
6. the documents sought by the subpoena are “privileged” from production, that is, that they attract legal professional privilege, or doctor/patient privilege under s 28(2) of the *Evidence Act 1958* (Vic);
7. the documents attract public interest immunity;
8. the recipient of the subpoena does not have sufficient possession or control of the documents sought;
9. the subpoena was served too late to be able to comply;
10. there is a statutory provision which prohibits the documents or certain information in the documents from being produced to a court.

What if the information sought is ‘personal information’ under the Information Privacy Act 2000 or ‘health information’ the Health Records Act 2001?

The *Health Records Act 2001* (Vic) and the *Information Privacy Act 2000* (Vic) govern the use and management of health information and personal information respectively. Those Acts contain provisions regulating the disclosure of health information and personal information. Both Acts contain provisions that permit disclosure where it is required by law.

A subpoena requiring the production of documents containing personal information or health information would be a situation where disclosure is required by law. Thus, a subpoena will not be set aside solely on the ground that production of the documents would involve an invasion of a person's privacy, or result in a breach of a duty of confidentiality, unless that duty can be brought within one of the limitations or exceptions discussed above.

Requests for information without a subpoena

A document or other information may be sought not by subpoena, but rather in the form of a letter (or an oral request) from a law enforcement agency such as the police force or a statutory body such as the ATO or the Victorian WorkCover Authority. In such a case, care must be taken to ensure that personal information or health information is only disclosed in accordance with the Information Privacy Principles in the *Information Privacy Act* and the Health Privacy Principles in the *Health Records Act*. The body or its representative requesting the information should state what statutory power is being relied upon in requesting or requiring the information.

All requests for information about students should be forwarded to Academic Services Division for processing.

Information about the procedures in relation to disclosing personal information about students for law enforcement and regulatory purposes can be found at <http://www.latrobe.edu.au/records/privacytu>

Conclusion

Provided a subpoena is in a proper form and all other procedural requirements have been met, the recipient of a subpoena must comply with it unless one of the above limitations or exceptions applies.

If the recipient of a subpoena wishes to rely on a limitation or exception in any individual case, Legal Services should be contacted for advice. An application to the court or tribunal which issued the subpoena has to be made if the recipient wishes to have it set aside.

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