

## PART E.-GOVERNMENT SERVANTS SUMMONED TO PRODUCE OFFICIAL DOCUMENTS

The following instructions have been issued by the government of India, Ministry of Home Affairs, to all State Governments and with minor modifications, have been circulated by the Punjab Government to all Heads of Departments, Commissioners of Divisions and Deputy Commissioners in Punjab—*vide*, letter No. 5591-J-54/ 20066, dated the 31st August, 1954, (Punjab High Court endorsement No. 11321-Genl/XX. C. 24, dated 15th September, 1954, to all District and Sessions Judges.)

1. The law relating to the production of unpublished official records as evidence in courts is contained in sections 123, 124 and 162 of the Indian Evidence Act, 1872 (Act 1 of 1872).
2. For the purposes of section 123 of the said Act, the expression 'Officer at the head of the department concerned' may be held to mean the officer who is in control of the department and in whose charge records of the department remain. Ordinarily such an officer would be the Secretary to the State Government in the case of State Governments and the Secretary, Additional Secretary or Joint Secretary in charge of the Ministry in the case of the Government of India. But in case of attached offices like Director of Industries, Punjab or Director of Agriculture, Punjab, the Director concerned may be regarded as 'the head of the Department' for the purposes of this Section. Only such an officer should be treated as the authority to withhold or give the necessary permission for the production of official documents in evidence. In case of Union territories the Chief Commissioner or the Lieutenant Governor, as the case may be, may be regarded as the head of department and not his Secretaries.
3. In respect of documents (1) emanating from a higher authority i. e. the Government of India, or the State Government, or which have formed the subject of correspondence with such higher authority, or (2) emanating from other Governments, whether foreign or members of the Commonwealth, the head of the Department should obtain the consent of the Government of India or of the State Government, as the case may be, through the usual official channels before giving permission to produce the documents in court or giving evidence based on them unless the papers are intended for publication or are of a purely formal or

routine nature, when a reference to higher authority may be dispensed with.

4. In the case of documents other than those specified in paragraph 3 above production of documents should be withheld only when the public interest would by their disclosure be injured, as where disclosure would be injurious to national defence, or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. Some High Courts have pointed out the circumstances under which no such privilege should be claimed, e. g. privilege is not to be claimed on the mere ground that the documents are State documents or are official or are marked confidential or, if produced, would result in Parliamentary discussion in or public criticism or would expose want of efficiency in the administration or tend to lay a particular department of Government open to a claim for compensation. The mere fact that the head of the department does not wish the documents to be produced is not an adequate justification for objecting to their production. The High Courts have also observed that refusal to produce documents relating to affairs of State implies that their production will be prejudicial to public interest. Consequently the reasons therefore should be given in an affidavit in form I at the appropriate place.
5. In the case of doubt the head of the department should invariably refer to higher authority for orders.
6. These instructions apply equally to cases in which Government is a party to the suit. In such cases, much will depend on the legal advice as to the value of the documents but before they are produced in court, the considerations stated above must be borne in mind, and reference to higher authority made, when necessary.

6.-A. A Government servant other than the Head of a Department who is summoned to produce an official document should first determine whether the document is in his custody and he is in a position to produce it. In this connection, it may be stated that all official records are normally in the custody of the Head of the Department and it is only under special circumstances that an official document can be said to be in the custody of an individual Government servant. If the document is not in the custody of the Government servant summoned, he should inform the court accordingly. If, under any special circumstances, the document is in the custody of the Government servant

summoned, he should next determine whether the document is an unpublished official record relating to affairs of State and privilege under section 123 should be claimed in respect of it. If he is of the view that such privilege should be claimed or if he is doubted of the position should refer the matter to the Head of Department, who will issue necessary instructions and will also furnish the affidavit in form No. 1 in suitable cases. If the document is such that privilege under section 123 could not be claimed but if the Government servant considers that the document is a communication made to him in official confidence and that the public interest would suffer by its disclosure, he should claim privilege under section 124 in form No. 11. In case of doubt, he should seek the advice of the Head of the Department.

The expression 'Head of Department' used in this paragraph will have the same meaning as the expression 'Head of Department' in paragraph 2 of these instructions.

7. The Government servant who is to attend a court as a witness with official documents should, where permission under section 123 has been withheld, be given an affidavit in form 1 duly signed, by the head of the department in the accompanying form. He should produce it when he is called upon to give his evidence, and should explain that he is not at liberty to produce the documents before the court, or to give any evidence derived from them. He should, however, take with him the papers which he has been summoned to produce.
8. The Government servant who is summoned to produce official documents in respect of which privilege under section 124 has to be claimed, will make an affidavit in the accompanying form No. II. When he is not attending the Court himself to give evidence, he shall have it sent to the court along with the documents. The person through whom the documents are sent to court should submit the affidavit to the court when called upon to produce the documents. He should take with him the documents which he has been called upon to produce but should not hand them over to the court unless the court directs him to do so. They should not be shown to the opposite party.
9. The head of the department should abstain from entering into correspondence with the presiding officer of the court concerned in regard to the grounds on which the documents have been called for. He should obey the

court's orders and should appear personally, or arrange for the appearance of another officer in the court concerned, with the documents, and act as indicated in paragraph 7 above, and produce the necessary affidavit if he claims privilege.

FORM I

**In the Court of**

Suit No..... of 19

I,..... do hereby solemnly affirm and state as follows:—

A summons bearing No..... , dated.....

issued by the Court of..... in suit No.....of 196 (.....) Vs ..... ) has been received on..... 19 , requiring production in the said Court on..... 19 , of documents stated below. I, as the Head of the Department am in control of, and in charge of, its records. I have carefully considered the relevant documents and have come to the conclusion that they are unpublished official records relating to affairs of State and their disclosure will be prejudicial to public interest for the following reasons:—

\*(here insert the name, designation and address of the person making the affidavit).

LIST OF DOCUMENTS SUMMONED

I do not, therefore, give permission to anyone under section 123 of the Indian Evidence Act, 1872, to produce the said documents or to give any evidence derived therefrom.

Solemnly affirmed at this day of 19.

*Name and Designation of the Person Making the Affidavit.*

FORM No. II

FORM OF AFFIDAVIT

**In the High Court of**

Suit No.....of 19 .

I, \* .....do hereby solemnly affirm and state as follows:—

A summons bearing No..... dated..... issued by the Court of..... in suit No. .... of 196 . (..... Vs.....) has been served on me on..... 19 requiring production in the said court on..... 19 of the documents stated below. I have carefully considered them and have come to the conclusion that they contain communications made in official confidence and I consider that the public interest would suffer by their disclosure for the following reasons.

\*Here insert the name, designation and address of the person making the affidavit.

LIST OF DOCUMENT SUMMONED

I, therefore, claim privilege under section 124 of the Indian Evidence Act, 1872.

Solemnly affirmed at  
day of..... 19 .

(Here write the name and designation of the officer making the affidavit.)

*Sworn before me.-*