



Australian Government
Department of Communications

FOI REQUEST NO: 14-1314



ACCESS DECISION

STATEMENT OF REASONS

I, Andrew Madsen, Assistant Secretary, Governance Branch, Corporate Division of the Department of Communications (**the Department**):

- (a) being authorised by the Secretary under subsection 23(1) of the *Freedom of Information Act 1982* (**the FOI Act**) to make decisions about access to documents under the FOI Act, and
- (b) required under section 26 of the FOI Act to provide a Statement of Reasons for my decision,

make the following statement setting out the reasons for my decision.

A. BACKGROUND

1. On 9 September 2013, the Department received a request from [redacted] [redacted] (**the applicant**) under section 15 of the FOI Act, requesting access to the following documents:

"the incoming government briefs" (known as the blue book).
2. On 12 September 2013, the Department contacted the applicant to advise that due to the receipt of the request during the caretaker period, the incoming government brief (the blue book) would not be finalised until the new Ministry was sworn in by the Governor-General. On 12 September 2013, the applicant provided written agreement to considering the 'start' date for processing of his request to be the date on which the Ministry was sworn in. On 19 September 2013, the Department advised the applicant that processing of his request had commenced on 18 September 2013, being the date that the Hon Malcolm Turnbull MP was sworn in as the Minister for Communications (**the Minister**).

3. On 27 September 2013, the applicant was notified of the Department's decision to impose processing charges in relation to this request.
4. On 18 October 2013, the applicant made a part-payment of the processing charges to facilitate continued processing of the request.

B. DECISION

5. The documents covered by the request are collectively referred to as the incoming government brief for the Coalition government, or the blue book. The blue book comprises some 142 documents containing strategic advice to the incoming government on issues affecting the communications sector and advice on implementing the Coalition's election commitments.
6. I hereby decide that documents 1 to 142 inclusive, are wholly exempt under section 47C and paragraph 47E(d) of the FOI Act.

C. MATERIAL ON WHICH MY DECISION IS BASED

7. I have referred to the following material in making my decision:
 - the applicant's FOI request;
 - advice provided by departmental officers;
 - the relevant provisions of the FOI Act;
 - the *Freedom of Information Guidelines* made under section 93A of the FOI Act by the Office of the Australian Information Commissioner (OIAC);
 - decisions of the Australian Information Commissioner, in particular *Crowe and the Department of the Treasury* [2013] AICmr 69 (29 August 2013) and *Cornerstone Legal Pty Ltd and Australian Securities and Investment Commission* [2013] AICmr 71 (10 September 2013);
 - the 'Review of the *Freedom of Information Act 1982* and Australian Information Commissioners Act 2010' by Dr Allan Hawke AC dated 1 July 2013; and
 - the documents covered by the request.

D. REASONS FOR DECISION

8. Following the then Prime Minister's announcement on 4 August 2013 that an election would be held on 7 September 2013, officers in the Department commenced preparing incoming government briefs. During this caretaker period before the election, the Department prepared briefs for the then Labor government (**the red book**) and the then Coalition opposition (**the blue book**).

9. Following the Coalition forming government after the election and the Minister being sworn in by the Governor-General, the Department provided the Minister with the blue book. The Department also retained a copy of both the blue book and the red book as 'national archives' in accordance with the requirements under the *Archives Act 1983*.
10. The reasons for deciding that specific exemption provisions apply to the blue book are set out below.

Section 47C – Public interest conditional exemption - Deliberative processes

11. Section 47C of the FOI Act is a conditional exemption provision, and relevantly provides:

'(1) A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:

(a) an agency; or

(b) Minister; or

(c) the Government of the Commonwealth...'

12. Subsections 47C(2) and (3) of the FOI Act provide exceptions, including that section 47C of the FOI Act does not exempt operational information (as defined in section 8A of the FOI Act and is information that an agency is required to publish under the Information Publication Scheme), purely factual material or reports.

Conditionally exempt material

13. Pursuant to subsection 47C(1) of the FOI Act, I must determine whether any of the documents contain material that would, if released under the FOI Act, disclose the deliberative processes of an agency, a Minister or the government.
14. The blue book comprises information that relates to deliberative thinking by the Department in preparing advice for an incoming government. The briefing sets out opinions, advice and recommendations regarding strategic issues, matters requiring early attention and election commitments relating to the Department's areas of portfolio responsibility, consistent with the broad policy agenda enunciated by the then Coalition opposition prior to and during the election

campaign. The advice provided in the blue book was for consideration and deliberation by the new Minister (in the event that the Coalition attained government), who would then decide whether to accept the advice based on the recommendations of the Department.

15. I have considered whether any part of the documents contain purely factual information which is not exempt for the purposes of paragraph 47C(2)(b) of the FOI Act. I have discussed the preparation of the documents with drafters and been advised that the briefs were prepared almost exclusively for the purpose of providing deliberative material, with very little purely factual information included. To the extent the documents contain purely factual information, or publicly available material, that material is inextricably intertwined with the deliberative matter, such that it is not reasonably practicable to separate the two without enabling a reader to infer the content of the deliberative material from the purely factual material.
16. Further, I note that the Australian Information Commissioner has recently considered whether incoming government briefs for a party that did not form government could constitute a 'class exemption' for the purposes of section 47C of the FOI Act (*Crowe and Department of Treasury* [2013] AICmr 26 (**Crowe**)). In coming to my decision on whether or not the documents constitute deliberative matter for the purposes of section 47C, I also consider that the nature and context of the documents constitute an exceptional case for a class conditional exemption to apply. I note in particular the Information Commissioner's reference in **Crowe** (paragraph 42) to the views expressed by Treasury officials where he noted, "[e]mphasis was placed on the general need to protect the confidentiality of briefs, rather than upon the need to protect the contents of particular briefs. They likened this to protecting Cabinet records".
17. I therefore find that the abovementioned documents relating to the Department's briefing for the new Minister in the blue book comprises material that is conditionally exempt under section 47C of the FOI Act.

Section 47E – Public interest conditional exemption – certain operations of agencies

18. Section 47E of the FOI Act relevantly provides:

'A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

- (d) *have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.'*

19. One of the most important functions of the Department is to provide advice through incoming government briefs to an incoming government. These briefs are fundamental to enabling the incoming government to transition to policy implementation as soon as practicable after the election result is known. The incoming government briefs provide strategic advice on critical issues affecting the communications sector, as well as advice on implementing the election pledges of the Coalition, or alternative suggestions to meet their policy objectives. Based on my discussion with departmental officers, incoming government briefs are regarded by agencies, the government and the opposition as being of similar importance as Cabinet documents. They are prepared on the basis that they will be confidential to government and subject to very limited distribution.
20. Given the purpose of the material, it is imperative that such advice and briefings are provided to the incoming Minister in a frank and candid manner, containing all of the strategic information necessary for the incoming Minister to make fully informed decisions. If confidentiality cannot be guaranteed, future incoming government briefs are unlikely to contain such frank and comprehensive advice.
21. The ability of departmental officers to provide advice to the incoming Minister on strategic issues in an uninhibited manner is a critical part of the operations of the Department. If departmental officers do not provide frank and comprehensive advice to the incoming Minister in the first instance, the incoming Minister may be required to seek further advice or clarification from those officers. This complicates the communication process between departmental officers and the incoming Minister, which is likely to adversely affect the efficient manner in which the Department operates. If the briefing does not address all relevant issues in a comprehensive and uninhibited manner it may affect the establishment of a relationship of trust and confidence between the Department and Minister.
22. Further, if frank and comprehensive advice is not provided by the Department, this could lead to delays in policy implementation, or the incoming Minister proceeding with policy implementation in the absence of sound policy advice from the Department.
23. I therefore find that disclosure of the blue book containing the opinions, advice and recommendations of the Department would have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.
24. The fact that release of the documents would have a substantial and adverse effect on the proper and efficient conduct of the operations of the Department is further supported by the fact that information released under FOI is not subject to any confidentiality conditions. Disclosure of the information under FOI is effectively disclosure to the world at large.

25. I therefore find that the documents are conditionally exempt under paragraph 47E(d) of the FOI Act.

Application of the public interest test

26. Subsection 11A(5) of the FOI Act requires that access to a conditionally exempt document (that is, including a document that is conditionally exempt under either section 47C or 47E) must be given to the applicant unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest. In these circumstances, the concept of public interest requires that I:

- weigh the public interest factors for and against disclosure; and
- decide, on balance, whether disclosure is in the public interest.

Public interest considerations in favour of disclosure

27. In applying the public interest test, I am required to have regard to subsection 11B(3) of the FOI Act, which sets out factors favouring access in the public interest, including where access would:

- promote the objects of the FOI Act;
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure; and
- allow a person to access his or her own personal information (not relevant in this instance).

28. I have identified the following additional public interest factors *in favour of* granting access to the documents:

- the benefit in making the public better informed, promoting discussion of public affairs and informing debate on a matter of public importance, in the context of implementation of the policy commitments of an incoming government;
- informing the public in relation to strategic issues affecting funding programs, legislative and policy proposals and budget proposals relevant to the incoming government, being a matter of general public interest;
- increasing public scrutiny, discussion and review of government actions and decision-making, including public scrutiny of the quality of advice provided for an incoming Minister; and

- facilitating and promoting public access to government held information generally.

Public interest considerations against disclosure

29. Notwithstanding the public interest considerations in favour of disclosure that may apply in relation to a document, it is important that the public interest is not inadvertently damaged because of information or documents being released without a proper assessment of the possible consequences. As such, it is important to consider public interest considerations against disclosure of documents.

30. Having regard to the nature of the documents, the public interest factors I have identified *against* disclosure of the documents are set out below.

- Disclosure of the confidential briefs would undermine the ability to develop and build an effective and productive working relationship between the Department and the Government in accordance with the long-standing conventions of responsible parliamentary government. The incoming government briefing represents the first exchange of advice between a department and an incoming Minister and as such, it has a unique status in forming the relationship of trust and confidence between the Department and Minister. The potential for this particular advice to be disclosed could result in the Department being drawn into public controversy and potential conflict with the Minister early in the term of the new government. Such an outcome could cause lasting damage to the relationship between the Department and the Minister, which could be detrimental to the effective operation of the government.
- Disclosure of the briefs could inhibit the deliberative processes of departmental officers in freely canvassing their views to the incoming government (through preparing a blue book), in the context of a possible transition of government. The significance of freely canvassing views in the blue book is magnified by the short period for the incoming government to transition from being in opposition to being in a position to govern. It is therefore critical that the advice received in the briefs is comprehensive, candid and not inhibited by concerns about potential public disclosure, which could have a chilling effect on the candid nature of the advice.
- If the incoming government briefs were disclosed to the world at large under FOI, there is a risk that departmental officers may, in the future, tailor incoming briefings into a more generic bland document which, among other things, might not raise difficult questions for an incoming Minister in implementing the policy agenda of the Coalition. If this practice emerged, it would result in the incoming government not obtaining the benefit of frank and fearless advice for best practice policy development and implementation. Disclosure of the briefs to the world at large could also

increase the propensity for departments to provide verbal briefing, rather than committing advice to the written form. While verbal briefing has many advantages, it can diminish the Minister's ability to digest information and reflect on advice before making an informed decision, and therefore, has some potential for less well considered decision-making.

- Disclosure of the briefs could potentially be misleading to the public because drafters have not had an opportunity to seek the Minister's views. The briefs must be prepared on available information, such as published policies, and therefore may be speculative in part if there are matters not fully canvassed in the Coalition's policy documents.
- If the briefs were to be disclosed it could result in them being written with interests in mind beyond those of the Minister for whom they are prepared. This could result in drafters preparing briefs that are not optimally focussed on providing the most comprehensive, frank and candid opinions and advice for the purpose of the Minister undertaking his portfolio responsibilities.
- Disclosure of the confidential incoming government briefs could jeopardise the unique opportunity presented by the incoming government briefing to shape government thinking at a time when it is being formed and when policy ideas are evolving into their implementation stage. An incoming government brief is provided in the strictest confidence, is held very tightly within the Department's senior executive group and only distributed to the Minister. In this environment, the Department can feel confident to provide frank advice on policy, give views on emerging issues and give candid advice on potential difficulties that may need to be tackled in the communications sector. There is a public benefit in this advice being provided in the incoming government brief, given its critical timing in the establishment of the government's agenda. Because of its timing, some issues can potentially be addressed at this early stage in the life of a government, when later the ability to provide such wide ranging advice may be more limited.
- Disclosure of the blue book could prejudice the interests of the government, by disclosing candid advice on policy implementation of the Coalition's election platform, where the Minister is actively considering the deliberative advice. Furthermore, as noted above, the material contained in the briefs is deliberative in nature and does not represent the position of the incoming Minister and/or incoming government. The incoming Minister (and government) will consider whether to accept the advice provided by the Department. Disclosure of this advice could prejudice the Minister's ability to exercise free choice on how he responds to this advice and potentially undermine his discretion to select from policy options as Minister.

Irrelevant considerations in application of public interest test

31. Under subsection 11B(4) of the FOI Act, I am not allowed to take into account the following irrelevant factors in applying the public interest test to the various conditional exemptions relating to the applicant's FOI request:
- access to the documents could result in embarrassment to the Commonwealth Government or the Government of Norfolk Island, or cause a loss of confidence in the Commonwealth Government or the Government of Norfolk Island;
 - access to the documents could result in any person misinterpreting or misunderstanding the documents;
 - the author of the documents were (or are) of high seniority in the Department to which the request for access to the documents was made;
 - access to the documents could result in confusion or unnecessary debate.
32. Accordingly, I have ensured that the irrelevant factors listed above have not been considered in reaching my decision in relation to the applicant's FOI request.

Balancing public interest considerations

33. Some of the factors in favour of disclosure that are set out above apply to documents and information generally. That is not to take away from their strength or relevance, as the information access regime established by the FOI Act recognises the strong public interest in public access to government-held information.
34. Bearing in mind the nature of the documents in question, I consider that the public interest factors in favour of disclosure are of moderate strength.
35. By contrast, I consider that the public interest factors against disclosure of the blue book to be considerably stronger. It is important that the conventions of responsible government for the preparation of candid, confidential and comprehensive incoming government briefs be maintained. This fundamental function of the Department is imperative to enable a smooth transition to policy implementation for an incoming government, based on robust strategic advice. It is vital that such briefs remain confidential for a trusted working relationship between the Department and an incoming government.
36. Having considered the relative strengths of the public interest factors for and against disclosure, I am therefore of the view that, on balance, the public interest factors against disclosing the deliberative material outweigh those in favour of disclosure.

Disclosure would be contrary to the public interest (subsection 11A(5))

37. I therefore find that documents 1 to 142 inclusive, are exempt under section 47C and paragraph 47E(d) of the FOI Act; and that for the purposes of subsection 11A(5), it would be contrary to the public interest to release those documents.

F. DECISION ON CHARGES

38. Having made this access decision, I have also considered the level of charges that should be applied to the processing of this request. It is the case that the processing of this request required that I review a significant number of documents, consult broadly within the Department and undertake a careful weighing of the public interest. The Department would therefore be entitled to charge for the processing of this request. However, I have decided that in this particular matter, charges are not to be imposed in relation to processing the FOI request. The payment made by the applicant on 18 October 2013 is to be refunded.

G. REVIEW RIGHTS

39. This decision is subject to review under section 54 and/or 54L of the FOI Act. The OAI's FOI Fact Sheet 12 – *Your review rights* is attached.



Andrew Madsen
Assistant Secretary | Governance
Corporate Division

|| November 2013