



Australian Government
Attorney-General's Department

13/16890

6 December 2013

Mr Renai LeMay
Editor & Publisher, Delimiter
Sent via e-mail only: renai@delimiter.com.au

Dear Mr LeMay

Freedom of Information Request no. FOI13/180 – internal review

I am writing to advise you of my decision in relation to your request for internal review of a decision by the Attorney-General's Department (the department) to refuse access to documents you requested under the *Freedom of Information Act 1982* (FOI Act).

Background

I am an officer authorised under subsection 23(1) of the FOI Act to make decisions on behalf of the department in relation to FOI requests.

On 20 October 2013, you requested access to:

... *the Incoming Minister's Brief prepared for Attorney-General George Brandis.*

On 8 November 2013, the department provided you with a decision in relation to your request. The department identified one document (the document) that came within the scope of your request. The department advised you that it refused access to the document on the basis that it was exempt in full under sections 47C and 47E of the FOI Act. The department also noted the possible application of other exemptions to the document.

On 8 November 2013, you requested an internal review of the original decision. In your letter you noted that in your view there are substantial grounds to overturn the original decision. I have endeavoured to address your concerns as part of my review.

Decision

In accordance with subsection 54C(3) of the FOI Act, I have reviewed the earlier decision in the matter. I have arranged for further searches for documents and consulted with staff in the relevant area of the department. I have identified one document as falling within the scope of your request. I have considered this document. I have decided to affirm the original decision to refuse access on the basis that the document is exempt under paragraphs 47C(1)(a) and 47E(d) of the FOI Act. The reasons for my decision are as follows.

Reasons for decision

I consider that the document is exempt from disclosure under paragraphs 47C(1)(a) and 47E(d) of the FOI Act. I consider the reasons provided by the original decision maker involve a correct application of these exemptions.

Firstly, I will respond to the comments in your application for internal review.

You noted in your request for internal review:

... I would suggest that a close examination of the Attorney-General's 'Blue Book' would find that substantial portions of the document are not controversial and would be suitable for public release ... Furthermore, there is substantial reason to believe that significant portions of the document are not controversial.

I accept that the document contains some material that is uncontroversial. This was acknowledged by the original decision maker:

I note that deliberative matter does not include operational information or purely factual material. I have found that the document contains operational information and purely factual material.

For the reasons explained in the original decision, I find that the document is exempt in full although it contains this material. My decision to affirm the original decision on this request is based on consideration of the document as a whole. The Information Commissioner, in *Crowe*,¹ considered the concept of an incoming government brief as a whole. The Information Commissioner considered the potential for incoming government briefs to be exempted as a class of document, noting a view that protecting them from disclosure was similar to protecting Cabinet records and emphasised:

*... the general need to protect the confidentiality of briefs, rather than on the need to protect the contents of a particular brief.*²

Further, the purely factual and operation material (that is, uncontroversial material) contained in the document forms an integral part of the document, such that the material is included to provide context to the 'deliberative content and purpose' of the document.³

I note the comments of the Information Commissioner in relation to paragraph 47E(d) of the FOI Act. Following a discussion of the application of the exemption contained in paragraph 47E(d) of the FOI Act, the Information Commissioner noted in *Crowe*, at [94]:

A decision based on s 47E(d) could apply to the entirety of the document, including the factual material in the document.

As will be discussed below, I consider paragraph 47E(d) of the FOI Act operates so as to conditionally exempt the document from disclosure, in full.

You also noted in your application for internal review:

... I would highlight the fact that after the 2010 Federal Election, The Treasury chose to release its incoming ministerial briefing ('the Red Book') in response to a number of FoI requests ...

... this week the Department of Communications indicated that it would be progressing with a FoI request of the Communications Minister's incoming ministerial briefing ('the Blue Book') ... [and]

¹ *Crowe and Department of the Treasury* [2013] AICmr 69.

² See [2013] AICmr 69 per Professor John McMillan at [42].

³ See [2013] AICmr 69 per Professor John McMillan at [83].

... blocking the entire 'Blue Book' document from release is not consistent with the approach taken by other departments over the past several years.

In my view the starting point for the consideration of whether access to the document would be contrary to the public interest is not whether documents of a similar nature have been disclosed in the past. The obligation of the decision maker is rather to apply their best understanding of the provisions of the FOI Act and to balance the relevant public interest considerations using their knowledge of both the content of the document and surrounding circumstances at the time of making the decision.

Paragraph 9.29 of the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines) notes that, *'the role of the internal review officer is to bring a fresh, independent and impartial mind to the review'*. I do not consider that previous releases of edited versions of incoming government briefs by this, or any other department, to have particular relevance to the decision under review. I consider that disclosure of the document would, at this point in time, cause significant detriment to the ability of this department to provide frank and honest advice to a new Minister. I also note the comments of the Information Commissioner in *Crowe*, at [40], in relation to the timing of public interest conditional exemptions claims:

... as that wording indicates, it is necessary to balance competing public interest considerations to decide whether an exemption claim should be upheld at a particular point in time.

Notwithstanding previous decisions and approaches taken by other departments, I have found that the release of the document in question would have a significant, adverse effect on the proper and efficient operations of this department at this particular point in time, for the reasons noted in the original decision:

Principal to these operations include the provision of frank and honest advice to the new Minister on what the Department considers to be the policy priorities and challenges facing the portfolio presently and into the future.

This view is not displaced by previous instances of disclosure of edited forms of incoming government briefs released under FOI by this or any other department within the Commonwealth.

The original decision maker concluded that the release of the document would, or could reasonably be expected to, have a substantial effect on the proper and efficient conduct of the operations *'of the department'*. As part of my internal review, I have considered further the application of this exemption below.

You also noted in your application for internal review:

... blocking the entire 'Blue Book' document from release ... ignores the significant public interest arguments for its release.

As part of this internal review, I have carefully considered the application of the public interest factors in relation to paragraphs 47C(1)(a) and 47E(d) of the FOI Act, and provide my reasons below.

In accordance with subsection 54C(3) of the FOI Act, as part of this internal review, I am required to make a fresh decision. I have considered your request and have identified one document that comes within its scope. I consider the document is exempt in full under paragraphs 47C(1)(a) and 47E(d) of the FOI Act. Further, I consider other exemptions may apply to material contained in the document. I provide my reasons for this decision below.

Deliberative processes (section 47C)

Paragraph 47C(1)(a) of the FOI Act 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...*

I find that the document contains the department's opinion, advice and recommendations on matters affecting and likely to affect the portfolio of the Attorney-General. In providing this advice and the opinions and recommendations, the department is exercising its judgment in formulating options for the progressing of the agenda of the new Government and for addressing current and future issues relevant to the portfolio. The material is expressed in such a way that it involves the 'weighing up' and evaluation of the effectiveness of these options.⁴

The options are directly related to the portfolio of the Attorney-General. The document contains the department's opinion, advice and recommendations on policy issues affecting the department and the portfolio, and non-policy issues relating to the functions of the department.⁵ The material contained in the document provides the department's advice on these decision making processes.

The Guidelines note that a class of document may typically be considered to be a document containing material in the nature of deliberative matter.⁶ The document is designed to advise a Minister in a new Government of the issues that the department considers affects, or will affect, the portfolio. Further, the document also provides the opinions, advice and recommendations of the department in progressing the agenda of the new Government.

For the above reasons, I have found that the document is conditionally exempt under paragraph 47C(1)(a) of the FOI Act. I have considered section 11B of the FOI Act below.

I have found that purely factual and operational material is contained in the document. Accordingly, not all of the material contained in the document is 'deliberative matter'.⁷ In addition to the reasons set out below, I consider that the entirety of the document is exempt under the FOI Act. The factual and operational material contained in the document is a necessary part of, and provides crucial context to, the deliberative material contained in, and deliberative purpose of, the document.

The factual and operational material is so intertwined with the deliberative aspect of the document that it is not possible to separate such material from the deliberative material of the document. As the Information Commissioner noted in *Crowe*, considering incoming government briefs, that although some of the material is factual:

... it is an integral part of the deliberative content and purpose of the document... none of the material... should be classified as 'purely factual material'.⁸

Accordingly, I consider factual material contained in the document could not be separated from the deliberative content, such that it is considered 'purely factual material'. I therefore consider such material to be exempt under paragraph 47C(1)(a) of the FOI Act.

Certain operations of agencies (section 47E)

Paragraph 47E(d) of the FOI Act provides:

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

⁴ See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67.

⁵ See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249.

⁶ See 6.67 of the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

⁷ See paragraphs 47C(2)(a), (b) of the FOI Act.

⁸ See [2013] AICmr 69 per Professor John McMillan at [83].

...

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

I have considered the document and find that its disclosure could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the department.

As discussed above, the document is prepared solely for the Minister responsible for the portfolio for which the department is the lead agency. The document contains the department's frank and honest advice on issues that the department considers will affect the portfolio. The disclosure of the document, that is, an incoming government brief, will affect the manner in which the department provides its opinions, advice and recommendations on policy issues affecting the portfolio. The maintenance of the confidentiality of the document as a whole is imperative to the department's ability to provide this frank and honest advice. This finding applies to the document as a whole, that is, as an incoming government brief, and not particular aspects of the document.⁹

I consider there is a strong likelihood that the disclosure of the document will have a substantial adverse effect on the proper and efficient conduct of the operations of the agency. As was noted in the original decision, the document is prepared for the new Minister.

If incoming government briefs were liable to disclosure, the department would tailor them to a different audience, and would not be able to provide the necessary frank and honest advice expected of a department. As the Information Commissioner acknowledged, there are examples of claims where the protection of confidentiality and candour is a persuasive element. The present case of the disclosure of an incoming government brief provides an example.¹⁰

Further, the Information Commissioner recognised:

*... the need to safeguard the tradition by which a Minister in a newly-elected Government can receive a confidential brief from the public service that provides constructive and candid commentary for the Minister's consideration.*¹¹

The disclosure of the document would compromise the utility and purpose which such a confidential brief provides to a new Minister in an incoming government. The department would not be in a position to provide such constructive and candid advice to the Minister in circumstances where the document would be disclosed. This would compromise the department's working relationship with the Minister.

The Information Commissioner noted the strength of the submissions of the respondent in *Crowe*, that:

*(i) if it is known that the brief will be disclosed publicly under the FOI Act, there is a risk that it will be tailored to a different audience or with different interests in mind... (potentially compromising) the quality and value of the brief and (making) it less relevant to its specific circumstance.*¹²

I have found that the effect on the proper and efficient conduct of the operations of the department could reasonably be expected to be substantial and adverse. I have found the potential damage is real and substantial, and not insignificant or nominal.¹³ Without repeating my observations above, which I consider apply with equal force here, the loss of the utility and purpose gained from frank and honest advice being provided to a new Minister would have a significant and substantial

⁹ See [2013] AICmr 69 per Professor John McMillan at [95].

¹⁰ See [2013] AICmr 69 per Professor John McMillan at [59].

¹¹ See [2013] AICmr 69 per Professor John McMillan at [59].

¹² See [2013] AICmr 69 per Professor John McMillan at [85].

¹³ See *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* (1979) 27 ALR 367.

detrimental effect on the department's working relationship with a new Minister. It would compromise the department's ability to properly inform the Minister of his or her responsibilities, and undermine the provision of advice, opinions and recommendations by the department to the Minister on crucial issues affecting, and likely to affect, the portfolio.

I also note the significance of the observations of the Hon. Tony Abbott MP. The Information Commissioner considered the below comments in the context of exempting the incoming government brief of an agency as a whole. It was noted:

*... the release of the incoming government briefs would contravene the Westminster conventions.*¹⁴

For the above reasons, I have found that the document is conditionally exempt under paragraph 47E(d) of the FOI Act. I have considered the public interest considerations below.

Public interest considerations

I find that disclosing the document would, on balance, be contrary to the public interest. The reasons for this decision are largely consistent with my findings in respect of the exemption contained in paragraph 47E(d) of the FOI Act.

I acknowledge that the disclosure of the document could promote the objects of the FOI Act and inform debate on matters of public importance. The document contains advice, opinions and recommendations relating to the delivery of election commitments of the new Government. Further, it provides advice, opinion and recommendations relating to public expenditure and policy issues affecting the portfolio presently and issues likely to affect the portfolio into the future. Such information could inform public debate on matters of importance.

It is important to appreciate that the test is relevantly whether disclosure is *in* the public interest, not *of* interest to the public.¹⁵ The material contained in the document may be of interest to the public, though it is not necessarily in the public interest for the document to be disclosed.

Consideration of whether disclosure is in the public interest is a balancing exercise. Fundamentally, the consideration of this '*depends on the particular facts of the matter and the context in which it is being considered.*'¹⁶ Ultimately, I find that, on balance, disclosure of the document would be contrary to the public interest. I have concluded that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information.¹⁷

An incoming government brief is fundamental '*to enable and facilitate a smooth transition from one government to another following a general election.*'¹⁸ The brief assists '*the expedient establishment of the new Government and the new Ministers in portfolios.*'¹⁹ Further, as the Information Commissioner noted, '*as a consequence of the speed with which incoming governments in Australia are required to take leadership of the nation, over the past three decades incoming government briefs have become a core part of government practice.*'²⁰

If the document was disclosed under the FOI Act, its utility and purpose of in ensuring this smooth transition and assisting in the expedient advising of a new Minister would be undermined.

A likely consequence is impairment of the department's ability to expediently and properly advise the new Minister of the issues affecting the portfolio. The ability for the department to provide

¹⁴ [2013] AICmr 69 per Professor John McMillan at [87].

¹⁵ *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186.

¹⁶ See 6.8 of the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

¹⁷ See 6.9 of the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

¹⁸ See [2013] AICmr 69 per Professor John McMillan at [85].

¹⁹ See [2013] AICmr 69 per Professor John McMillan at [17].

²⁰ [2013] AICmr 69 per Professor John McMillan at [19].

frank and honest advice to the new Minister would be compromised as the document would be drafted in light of the fact it is to be publicly available.

The incoming government brief is the principal tool available to the department to comprehensively and candidly advise the new Minister on a myriad of sensitive issues affecting the portfolio; providing advice, opinion and recommendations on progressing the new Government's agenda, and managing policy issues affecting, and likely to affect, the portfolio.

In light of the considerations noted above, I find that the disclosure of the documents would, on balance, be contrary to the public interest. I find that the documents are exempt from disclosure under the FOI Act.

I have also found other exemptions under the FOI Act would apply. I agree with the original decision maker as to the potential application of the exemptions listed.

Material taken into account

I have taken the following material into account in making my decision:

- the original decision
- the representations included in your application for internal review
- the provisions of the FOI Act
- advice from the relevant line area
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

Information Commissioner review

If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner for review. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: [https://forms.business.gov.au/aba/oaic/foi-review/-/](https://forms.business.gov.au/aba/oaic/foi-review/)

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website: <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

Questions about this decision

I hope the above information is of assistance. If you wish to discuss this decision, please contact the department by e-mail foi@ag.gov.au.

Yours sincerely



A/ Louise Glanville
Deputy Secretary
Attorney-General's Department

Schedule of documents – Freedom of Information Request no. FOI13/180 – Internal Review

Document no.	Date	Description	Decision on access	Exemption
1	September 2013	Incoming government brief (two volumes)	Access refused	Principally, section 47C and section 47E