



**Australian Government**

**Department of Communications**

**FOI REQUEST No. 21-1314**

**Mr Renai LeMay, Editor and Publisher of Delimiter**

**STATEMENT OF REASONS  
INTERNAL REVIEW OF ACCESS DECISION**

I, Simon Ash, First Assistant Secretary, Corporate Division, 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 internal review decisions about access to documents under the FOI Act;
- (b) required under section 26 of the FOI Act to provide a Statement of Reasons for my decision; and
- (c) having conducted a review, following a request made by Mr Renai LeMay (the **Applicant**) under subsection 54(1) of the FOI Act, of a decision made by Mr Andrew Madsen, Assistant Secretary, Governance Branch of the Department on 5 December 2013,

make the following statement setting out my findings on material questions of fact, referring to the evidence or other material upon which those findings were based and giving the reasons for my decision.

**A. DECISION ON INTERNAL REVIEW**

1. On internal review of this matter under subsection 54(1) of the FOI Act, I have decided to affirm the Department's decision in this matter dated 5 December 2013. That is, documents 1 to 142 inclusive, collectively referred to as the incoming government briefs (IGBs) for the Coalition Government (i.e. the blue book) in their entirety, are exempt under section 47C and subsection 47E(d) of the FOI Act and are not to be released.

**B. BACKGROUND**

2. On 5 December 2013, Mr Andrew Madsen, a delegate in the Department under section 23(1) of the FOI Act made an access decision in relation to this FOI request. Mr Madsen decided that the IGBs for the Coalition Government which covers documents 1 to 142 inclusive are wholly exempt under section 47C and subsection 47E(d) of the FOI Act (the **Original Decision**). The Applicant was advised of Mr Madsen's decision in this matter by email dated 5 December 2013.

3. On 8 December 2013, the Applicant emailed the Department requesting an internal review of the Original Decision

#### **C. FINDINGS ON MATERIAL QUESTIONS OF FACT**

4. The Applicant's FOI request and request for internal review.
5. Documents 1 to 142 inclusive, which are covered by the Applicant's original FOI request, are collectively referred to as the incoming government briefs (IGBs) for the Coalition Government, or the 'blue book'.
6. These documents contain deliberative matter and material that would affect the operations of the Department.
7. These documents contain strategic advice to the incoming government on issues affecting the communications sector and advice on implementing the Coalition's election commitments.

#### **D. MATERIAL ON WHICH THE INTERNAL REVIEW IS BASED**

8. I based my findings of fact on the following material:
  - the content of the documents falling within the scope of the Applicant's original FOI request, being the 142 documents comprising the blue book;
  - the Applicant's request for internal review dated 8 December 2013;
  - 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 (the OAIC);
  - the Department's *Guidelines for Processing Freedom of Information Requests*;
  - 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); and
  - the 'Review of the *Freedom of Information Act 1982* and Australian Information Commissioner Act 2010' by Dr Allan Hawke AC dated 1 July 2013.

#### **E. REASONS FOR DECISION ON INTERNAL REVIEW**

9. My findings of fact and reasons for deciding that the exemption provisions apply to the documents are set out below. Furthermore, in accordance with subsection 54(1) of the FOI Act, my decision on internal review is a *de novo* decision.

#### **Deliberative processes conditional exemption (section 47C of the FOI Act)**

10. 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) a Minister; or (c) the Government of the Commonwealth.*

(2) *Deliberative matter does not include... (b) purely factual material.*

11. Subsection 47C(1) applies to matter in nature of or relating to ‘opinion, advice or recommendation’ (termed as a ‘deliberative matter’) that relates to the deliberative processes of an agency or the Minister. The Administrative Appeals Tribunal (the AAT) in *Re J E Waterford and Department of Treasury (No 2)*<sup>1</sup> held that deliberative process refers to the agency’s ‘thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or course of action’.<sup>2</sup>

12. I have carefully reviewed each of the 142 documents covered by the Applicant’s original FOI request. I am satisfied that that the Department’s description of the IGBs for the Coalition Government as set out an earlier decision by the Department dated 11 November 2013 (FOI Request No.14-1314) at paragraph 14 (and extracted below) which have been adopted in the Original Decision<sup>3</sup>, is correct:

*...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 areas of portfolio responsibility.*

13. The advice expressed within those documents relates to a deliberative process of both the Department and the Minister. The Department’s role when the Coalition formed Government, after the 7 September 2013 Federal Election, is to provide ongoing support and advice to the Minister in implementing and administering activities discussed in the IGBs.

14. Section 47C of the FOI Act distinguishes between ‘deliberative matter’ and ‘purely factual matter’. The purpose of this conditional exemption is to protect the deliberative process as much as the deliberative matter that contributes to it. Therefore, the distinction between statements of facts which can stand alone and those which are so close to the deliberative process that they form part of it, is as important as the former purely factual materials. As such, the context to which deliberative documents belong is as important as the content of those documents.

15. A sensible and functional approach must be adopted in segregating deliberative and factual material in a document. Bell J as President of the Victorian Civil

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<sup>1</sup> [1984] AATA 67.

<sup>2</sup> *Ibid.*, at [58].

<sup>3</sup> See paragraphs [7]-[8] of the Original Decision.

and Administrative Appeals Tribunal in *McIntosh v Department of Premier and Cabinet*<sup>4</sup> noted:

*Factual material can be so embedded in the deliberative content of a document that it is impracticable to produce an edited document containing the former. Such material is not 'purely' factual... Wood J in this tribunal... in Re Kosky and Department of Human Services [said] 'if the documents does contain both factual material and [deliberative] material... the two may be so intertwined that it is difficult to separate them to produce an expurgated document of any meaning'.<sup>5</sup> In deciding whether it is possible to separate the factual material from the deliberative content of a document, so as to give access to the former without revealing the latter, the document has to be considered in its entire circumstances.<sup>6</sup>*

16. I have carefully applied the above principles in my consideration of the 142 documents. I observe that some of the documents contain content that is factual material. I note an exclusion of purely factual material exists under paragraph 47C(2)(b) of the FOI Act, and this is intended to allow disclosure of material used by the person who made the conclusion or decision following the deliberative process. However, I find it is not possible to segregate that factual content from the deliberative content without effectively disclosing the deliberative content.
17. Accordingly, I agree with the Original Decision that documents 1 to 142 inclusive comprise materials that are conditionally exempt under section 47C of the FOI Act.

#### **Public interest test in relation to section 47C of the FOI Act**

18. Subsection 11A(5) of the FOI Act provides that access must nevertheless be provided to documents that are conditionally exempt 'unless (in the circumstances) access to those documents at that time would, on balance, be contrary to the public interest'. Section 11B of the FOI Act sets out the public interest factors favouring access to be considered by the decision maker and irrelevant factors that cannot be considered.

#### *Public interests consideration in favour of disclosure*

19. 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).

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<sup>4</sup> [2009] VCAT 1528.

<sup>5</sup> (1998) 13 VAR 424, at 424.

<sup>6</sup> See n4, at [16].

20. In addition to the above factors for disclosure, I note that four additional public interest factors in favour of granting access to the documents were referred to in the Original Decision. These are summarised below:
- the benefit of making the public better informed on a matter of public importance;
  - informing the public in relation to strategic issues affecting the Department, being a matter of general public interest;
  - increasing public scrutiny, discussion and review of government action and decision making; and
  - facilitating and promoting public access to government held information.
21. I agree that the four additional factors identified above favour granting access to the documents and apply to the present circumstances.
22. I further note that the Applicant's submissions in relation to his request for internal review stated that some incoming government briefs or incoming minister briefs have been released since the 21 August 2010 federal election. The Applicant in his request for internal review noted that there 'is substantial precedent for public release of incoming ministerial briefings, especially with relation to the Department'. The Applicant then provided examples where other Commonwealth departments have provided IGBs or incoming minister briefs in response to a number of FOI requests, for example, Treasury between September 2010 and March 2011 released substantial portions of the IGBs for the Labor Government (i.e. the red book) and published this material on its disclosure log.
23. The inference by the Applicant appears to be that this is a factor in support of disclosure. I do not agree with this assertion. Each FOI decision is made personally by the particular delegate with regard to the particular nature of the documents subject to each FOI request. The mere fact that other decision-makers have concluded that certain content in past IGBs may be released under the FOI Act is not determinative in this particular case.
24. Further, since the amendments to the FOI Act in 2010, a body of knowledge has developed around the operation of the exemption provisions of the Act in relation to IGBs. This includes a review of the operation of the FOI Act (the *Hawke Review*); and two significant decisions by the Information Commissioner.
25. The Hawke Review supports the view that IGBs are a special category of deliberative documents and it recommends "that the FOI Act be amended to include a [new] conditional exemption for incoming government briefs". In his submission to the Hawke Review, the FOI Commissioner supported a stronger approach to the treatment of these briefs, and he recommended that an 'incoming brief is exempt from disclosure for ten years after being brought into existence.'
26. Two recent decisions (*Crowe* and *Cornerstone*) by the Information Commissioner have also supported the view that IGBs are generally deliberative

documents and that strong arguments can be made for their exemption under the deliberative process exemption (s.47C) and the certain operations of agencies exemption (s.47E(d)).

27. The material which is the subject of this FOI request (internal review) is not the same as the material contained in other IGBs which have been partially released. I further note that where content from IGBs has been released to the public in the past, typically this has been of a purely factual nature (eg details about the structure and functions of the agency, its key personnel, facts and statistics, national trends) with significant redactions usually being made, in reliance on section 47C (deliberative processes), and to other exemption provisions under the FOI Act. There has been no common structure in these published briefs, nor any obvious pattern in the quantity or sensitivity of the material that has been redacted in the documents released in the past. Nor is it known whether the material that has been released was thought to be non-exempt material or was instead released on a discretionary basis under section 3A of the FOI Act in furtherance of the open government objects in the FOI Act.
28. The mere fact that the Communications Minister has made public comment in support of releasing a portion of the documents is not, in my view, a factor in favour of disclosure. Nor has the Minister provided any direction or instruction to the Department to release the IGB.
29. I acknowledge the comments made by the Applicant that there is a "very strong degree of public interest which exists" in relation to the release of these documents, including the issue of the National Broadband Network (the **NBN**) which is being "publicly debated constantly". I agree with the Applicant's observations that the NBN is significant infrastructure project and that the NBN is a matter of great public interest. In my opinion, these comments come within the public interest consideration in favour of disclosure identified at paragraph 20 above (first dot point), namely, the benefit of making the public better informed on a matter of public importance.
30. I also acknowledge that the Applicant is a journalist and would publish and analyse any documents released under this FOI request, and as such, the publication of the material would increase public scrutiny, discussion and review of government action and decision making regarding the NBN policy and broadly facilitating and promoting public access to government held information. In my opinion, the things come within the two public interest considerations in favour of disclosure identified at paragraph 20 above (third and fourth dot points).

*Public interests consideration against disclosure*

31. Notwithstanding the public interest considerations in favour of disclosure that apply in relation to a document, it is important that the public interest not inadvertently be damaged through the release of information or documents without proper assessment of the possible consequences. As such, it is

important to consider public interest considerations against disclosure of the 142 documents comprising the IGB.

32. The decision maker in the Original Decision referred to an earlier departmental decision dated 11 November 2013 (FOI Request No. 14-1314) relating to IGBs whereby the Department identified seven factors against disclosure of the documents and adopted those to the Original Decision. It is convenient that I summarise the main points of these seven factors and they are:
- disclosure of the IGBs would undermine the ability to develop and build an effective and productive working relationship between the Department and the Government in accordance with the conventions of responsible government;
  - disclosure of the IGBs could inhibit the deliberative processes of departmental officers in freely canvassing their views to the incoming government (through the IGBs for the Coalition Government);
  - if the IGBs were disclosed to the world at large under FOI, there is a risk that departmental officers in future would tailor IGBs into a more generic bland document;
  - disclosure of the IGBs could potentially be misleading the public because the drafters have not had an opportunity to seek the Minister's views;
  - if the IGBs were to be disclosed it could result in them being written with interests in mind beyond those of the Minister which would defeat their purpose;
  - disclosure of IGBs could jeopardise the unique opportunity they present in shaping the government thinking at a time when it is being formed and when policy ideas are evolving into their implementation stage; and
  - disclosure of the IGBs 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.
33. Without limiting the above identified factors, I further note that IGBs do play an important role in the Australian system of responsible parliamentary government. Their purpose is to enable and facilitate a smooth transition from one government to another following a general election with the new government placing strong reliance on receiving helpful IGBs. In this respect, IGBs are different from other advice that may be prepared at the request of the Minister or as part of the Department's ordinary support and advising functions. This is because IGBs are prepared before the identity of the new Minister is known. Therefore, the context of the preparation and development of the IGBs is unique and requires that confidential advice can be prepared by the Department for the incoming Minister without endangering the impending development of a proper working relationship with the Minister.
34. Further, it is important in the early days of a new government that the public service is not drawn into political controversy or required to publicly defend the advice provided to a new government. IGBs that are not confidential may

include bland material that will not raise concern and possibly be of less value to an incoming government. An associated risk is that the resulting IGBs will not be comprehensive, replaced by oral briefing to the incoming Minister, or both.

35. For the above reasons, I agree that the seven factors identified above, [together with the additional points noted in paragraph 33 and 34 above] are against disclosure of the documents and apply to the present circumstances.

*Irrelevant considerations in the application of the public interest test*

36. 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 document could result in embarrassment to the Commonwealth Government or cause a loss of confidence in the Commonwealth Government;
- access to the document could result in any person misinterpreting or misunderstanding the document;
- the author of the document was (or is) of high seniority in the department to which the request for access to the document was made;
- access to the document could result in confusion or unnecessary debate.

37. In undertaking my examination of the public interest test, 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 for internal review.

*Balancing the public interest considerations*

38. I note that some of the factors in favour of disclosure as noted above and in the Original Decision apply to information generally. This 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. Taking into account the nature and context of the documents in question, I consider the public interest factors in favour of disclosure are compelling.

39. By contrast, I agree with the view expressed by the decision maker in the Original Decision that the public interest factors against disclosure of the IGBs for the Coalition Government are stronger and more persuasive. This is because of 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'<sup>7</sup>. I agree with the sentiments, expressed in an earlier departmental decision dated 11 November 2013 (FOI Request No. 14-1314) at paragraph 30, which have been adopted in the Original Decision<sup>8</sup>, in respect of

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<sup>7</sup> Crowe and Department of Treasury [2013], Australian Information Commissioner, ALCmr 69 at [59].

<sup>8</sup> See n3 above, paragraphs [7]-[8] of the Original Decision.



the importance of the conventions of responsible government for the preparation of frank, confidential and comprehensive IGBs be maintained and the criticality of IGBs to remain confidential in order to foster and maintain a trusted working relationship between the Department and the incoming government. This is further supported by the Australian Public Service Values, which state that '[t]he APS...provides the Government with advice that is frank, honest, timely and based on the best available evidence' (subsection 10(5) of the *Public Service Act 1999* (PS Act)). By making deliberative material available to the public, the Department could be criticised for pre-empting a direction or decision on policy matters that have not yet been considered by the Government.

40. While the public interest factors in favour of disclosure are compelling, in my view, the public interest factors against disclosure are much stronger.
41. Therefore, on balance, I agree with the view expressed in the Original Decision that disclosure of the documents 1 to 142 (comprising the 'blue book') would be contrary to the public interest. My conclusion on this basis was strongly influenced by the confidential treatment of deliberative matters in the IGBs for the Coalition Government. Accordingly, I am satisfied that the information contained in documents 1 to 142 inclusive is exempt under section 47C of the FOI Act.

**Certain operations of agencies conditional exemption (subsection 47E(d) of the FOI Act)**

42. Section 47E of the FOI Act is a conditional exemption provision, and subsection 47E(d) 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.*

43. I am of the view that providing frank and honest briefs to an incoming government is an important function of the Department. The IGBs are important tools which allow the Department to assist the incoming government to transition to policy implementation after the election result is known. In the public service, IGBs are regarded by agencies, the government and the opposition as being of similar importance as Cabinet documents and are prepared on the basis that they will be confidential and subject to a very limited distribution. Also, after examining the content of all 142 documents which are subject to this FOI request, I am satisfied that, for the purposes of section 22 of the FOI Act, it is not possible to prepare an edited copy of each individual document so that access could be provided to non-exempt material that did not satisfy the criteria under subsection 47E(d) of the FOI Act.
44. Accordingly, I agree with the Original Decision that disclosure of the IGBs for the Coalition Government would have a substantial adverse effect on the proper

and efficient conduct of the operations of the Department. I would also add that this conclusion is further supported by the fact that information released under FOI is not subject to any confidentiality conditions (i.e. disclosure of information under the FOI Act would constitute disclosure to the world at large).

45. Accordingly, I am of the view that all 142 documents subject to this FOI request for Internal review are conditionally exempt under subsection 47E(d) of the FOI Act.

**Public interest test in relation to subsection 47E(d) of the FOI Act**

46. For the same reasons discussed above, I am satisfied that disclosure of the information contained in documents 1 to 142 inclusive would, on balance be contrary to the public interest. Therefore, all 142 documents are exempt under section 47E(d) of the FOI Act.

**F. REVIEW RIGHTS**

47. This decision is subject to review under paragraph 54L(2)(b) of the FOI Act by the Information Commissioner. The Office of the Australian Information Commissioner's *FOI Fact Sheet 12 – Your review rights* is attached to my reply letter to the Applicant for his information.



Simon A. Ash  
First Assistant Secretary  
Corporate Division

3 February 2014