



13/16890

8 November 2013

Renai LeMay
Editor and Publisher
Delimiter

Dear Mr LeMay

Freedom of Information Request no. FOI13/180

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

Summary

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

You requested access to:

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

Decision and reasons for decision

With regard to the document requested, I have found one document that falls within the scope of your request. The details of this document are provided in the Schedule of Documents.

I consider the document is conditionally exempt from disclosure under paragraphs 47C(1)(a) and 47E(d) of the FOI Act as its disclosure would disclose deliberative matter and would have a substantial adverse effect on the proper and efficient conduct of the operations of the Department. I further consider that access to this document would, on balance, be contrary to the public interest under subsection 11A(5) of the FOI Act. Accordingly, I have found that the document is exempt from disclosure under the FOI Act.

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

Paragraph 47E(d) 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:

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

Detailed and comprehensive briefings are prepared by the Department for incoming Ministers responsible for the portfolio in which the Department falls. Fundamentally, an incoming government brief is 'necessary, particularly when a new government was formed, to ensure a smooth transition between governments and to assist the expedient establishment of the new Government and new Ministers in portfolios.'¹

The incoming government brief contains detailed information about the Attorney-General's portfolio; the responsibilities of the Ministers; relevant election commitments; issues affecting the portfolio, and agencies within the portfolio.

An incoming government brief forms a crucial part of the Department's responsibility for providing incoming Ministers with frank and fearless advice concerning issues affecting the Department and the portfolio. Ministers are responsible for their portfolio and as Dr Allan Hawke AC noted in his review of freedom of information legislation in 2013:

Ministers need to be fully informed on all matters in order to discharge these responsibilities effectively.²

I am of the view that the disclosure of the document would disclose deliberative matter. Specifically, the document contains matter in the nature of opinion, advice and recommendations prepared for the purposes of the deliberative processes of the Department. The Department also considers that disclosing the document would, on balance, be contrary to the public interest.

Deliberative processes (section 47C)

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

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. Notwithstanding, the reasons as to why I have decided that the document is exempt in full is discussed further below.

The document contains the advice of the Department on a full range of issues which fall within the Department's portfolio. The document also includes advice and recommendations of the Department consistent with the policies of the new Government enunciated by them in the lead up to the September 2013 election. The document contains the opinions, advice and recommendations of the Department to properly advise the new Government of the responsibilities within the portfolio, emerging issues relevant to the portfolio, and options for progressing the agenda of the new Government.

¹ See *Crowe and Department of the Treasury* [2013] AICmr 69 per Professor John McMillan at [17]

² Mr Allan Hawke AC 2013, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, p. 49

The Australian Information Commissioner has noted that incoming government briefs, generally, are 'created in preparation for a specific deliberative process within the Australian system of responsible parliamentary government.'³

Certain operations of agencies (section 47E)

I consider that disclosure of the document would, or could reasonably be expected to, prejudice or have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.⁴ The document is prepared by the Department to ensure the new Minister is provided frank and honest advice on issues affecting the Department and the portfolio. I consider the disclosure of the document would have a substantial adverse effect on the proper and efficient conduct of the operations of the Department for the following reasons.

If the document is disclosed, I consider there would be a substantial adverse effect on the Department's ability to establish and maintain a good working relationship with the new Minister. I consider that the disclosure of the document would impede the development of an effective working relationship between the Department and the new Minister, such that the disclosure of the document would have a substantial adverse effect on the Department to properly and efficiently conduct its operations. 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.

Further, the disclosure of the document would have a substantial adverse effect on the development of this relationship in a way that will accord with the conventions of responsible parliamentary government. Consistent with this view, the Hon. Tony Abbott MP, as he then was, noted that 'the release of the incoming government briefs would contravene the Westminster conventions'.⁵

Public interest considerations

As noted, I consider that disclosing the document would, on balance, be contrary to the public interest. I have found that the benefit to the public resulting from disclosure of the document is outweighed by the benefit to the public of withholding the document. In accordance with subsection 11B(3) of the FOI Act, in reaching this decision, I note the following in respect of factors favouring disclosure.

An object of the FOI Act is to give the Australian community access to information held by the Government of the Commonwealth and to facilitate an increase in the public participation in Government processes, with a view to promoting better-informed decision-making. Although the information contained in the document may contribute to the achievement of these objectives, I do not consider that disclosing the form in which the information is presented to the Minister could further inform public debate on these issues. As noted above, the document is for use by the new Minister for the purpose of understanding the issues affecting the Department and the portfolio, and to identify strategies for meeting election commitments. It contains information, some of which may be publicly available, presented in the context of advice, opinion and recommendations as part of a deliberative document for use by the new Minister in managing the Department's and the portfolio's priorities.⁶

Some of the information in the document about the department, including information concerning public expenditure, is publicly available. For example, the Department's organisation chart is available at <http://www.ag.gov.au/About/Documents/Attorney-Generals%20Department%20Organisational%20Chart.PDF>; a description of the Department's

³ [2013] AICmr 69 per Professor John McMillan at [79].

⁴ See paragraph 47E(d) of the FOI Act.

⁵ See [2013] AICmr 69 per Professor John McMillan at [87].

⁶ See paragraph 11B(3)(b) of the FOI Act.

senior management is available at <http://www.ag.gov.au/About/Seniormanagement/Pages/default.aspx>; the Administrative Arrangements Order is available at <http://www.comlaw.gov.au/Details/C2013G00742/Download>, and the portfolio budget statements are available at <http://www.ag.gov.au/Publications/Budgets/Budget2013-14/Pages/default.aspx>. Other information concerning the Department is available on the Department's website at www.ag.gov.au.

Disclosure of the way in which that information is presented to the Minister cannot be said to further inform public debate.

I do not consider that access to the document could reasonably promote the effective oversight of public expenditure. As noted above, the portfolio budget statements are publicly available. The document does not provide detailed information on public expenditure, rather suggesting approaches to meeting priorities within the portfolio.

I do not consider the document affects a person's ability to access his or her own personal information. The document only contains personal information of individuals that is available to those individuals, such as information concerning appointments.⁷

The FOI Act does not list relevant factors against disclosure of a document. However, the Guidelines do identify possible factors against disclosure.

As part of further considerations explored below, I consider that the disclosure of the document as a whole, that is, an incoming government brief, is strongly against the public interest, as its disclosure will compromise the Department's ability to function effectively and efficiently. The Information Commissioner has noted, the confidentiality of the briefing provided to the new Minister is 'essential at... (the) early stage in developing a relationship that accords with the conventions of responsible parliamentary government.'⁸ The disclosure of the document will materially affect the Department's ability to properly inform the new Minister through the provision of confidential and sensitive advice.

The document is presented to a particular audience: the new Minister. Should the document be disclosed, I consider the proper and efficient conduct of the Department's operations will be adversely affected as the Department would, in the future, tailor the document to the new audience: the public. If this were to occur, I consider the document would lose its value to the new Minister and would compromise the Department's ability to meet its responsibilities in accordance with the convention of responsible parliamentary government. For example, if the document is disclosed, the material contained in future incoming government briefs would be tailored to a different audience and, as such, would not contain the necessary frank and honest advice required to properly inform the new Minister of the responsibilities of the Department and portfolio, and the challenges and priorities present and in the future facing the Department and portfolio. This will seriously undermine the ability of the Minister to support decision-making with the advice of the Department. This would have a substantial adverse effect on the Department to properly and efficiently conduct its operations, as it would not be in a position to properly brief the new Minister in the nature and manner that is expected in accordance with responsible parliamentary government.

The document provides detailed advice to the Minister on issues affecting the Department and the portfolio. If the confidentiality of the document cannot be assured and an incoming government brief is tailored to an audience other than the new Minister, the document will lose its utility as a document containing the frank and honest advice of the Department on issues affecting the Department and the portfolio. Due to the nature of the material covered in the document, the removal of confidential material will compromise the value of the document as providing a

⁷ See paragraph 11B(3)(d) of the FOI Act.

⁸ [2013] AICmr 69 per Professor John McMillan at [85].

comprehensive tool for the new Minister to quickly develop an understanding of the Department's and portfolio's operations.⁹

For these reasons, I consider that disclosing the document would, on balance, be contrary to the public interest. I have found that the benefit to the public resulting from disclosure of the document is outweighed by the benefit to the public of withholding the document.

Other exemptions

I consider that were the document considered for edited release under section 22 of the FOI Act, other exemptions under the FOI Act would apply. The material contained in the documents may potentially be exempt under the following provisions of the FOI Act. I note this is not an exhaustive list of the potential exemptions.

- Material relating to Australia's dealings with foreign countries, including in the Department's capacity as the International Crime Cooperation Central Authority (subparagraph 33(a)(iii) – Documents affecting international relations/paragraph 37(1)(a) – Documents affecting the enforcement of law and protection of public safety/subsection 45(1) – Documents containing material obtained in confidence);
- Material relating to advice on the operation and application of international law (subparagraph 33(a)(iii) – Documents affecting international relations/subsection 42(1) – Documents subject to legal professional privilege);
- Material relating to the administration of national security legislation, including the *Australian Security Intelligence Organisation Act 1979* (subparagraph 33(a)(iii) – Documents affecting international relations/subsection 38(1) – Documents to which secrecy provisions of enactments apply), and
- Material relating to the Constitution of Australia (subsection 42(1) – Documents subject to legal professional privilege).

Material taken into account

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

- the FOI Act;
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act;
- the material that comes within the scope of your request, and
- *Crowe and Department of the Treasury* [2013] AICmr 69.

Your review rights

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the Attorney-General's Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, and be lodged in one of the following ways:

online: foi@ag.gov.au
post: FOI and Privacy Section

⁹ It is important to note that the Information Commissioner has stated that an exemption under paragraph 47E(d) of the FOI Act 'could apply to the entirety of a document, including the factual material contained in the document', see [2013] AICmr 69 per Professor John McMillan at [95].

Office of Corporate Counsel,
Attorney-General's Department,
3-5 National Circuit
Barton, ACT 2600

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. 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/>
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. Go to <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

Questions about this decision

If you wish to discuss this decision, please contact the Department by email at foi@ag.gov.au.

Yours sincerely



Emily Roper
Acting Assistant Secretary
Attorney-General's Department

Schedule of documents – Freedom of information request no. FOI13/180

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