



Our Ref: LS4640 ~ file 12/1152

Ms Margo Kingston
By email to foi+request-106-4ffed512@righttoknow.org.au

Dear Ms Kingston

Re LS4440 Your freedom of information request

I refer to my letter of 31 May 2013 and your email of 31 May 2013 3:02 PM in relation to your freedom of information request. I also refer to the correspondence in relation to your freedom of information request No. LS4451 for the same documents which lapsed.

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, Paul Pirani, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests received by the AEC.

You requested access to documents relating to the Australian Electoral Commission's deliberations relating to assertions that the Hon Tony Abbott, MP had sought legal advice in relation to the Australians for Honest Politics Trust and its disclosure obligations under Part XX (Electoral funding and financial disclosure) of the [Commonwealth Electoral Act 1918](#) (the 'CE Act'). Specifically you sought access to:

-- all documents not previously released to me mentioning or referring to the assertion by Mr Abbott in his 1998 letter that he had sought legal advice before seeking donations to the Trust, and all documents mentioning or referring to allegations later made publicly (in 2003 & 2004, and again in 2007) that that statement was untrue;

The schedule of relevant documents compiled for the purposes of your FOI request No. LS4451; and

You will recall from my letter to you dated 12 March 2013 in relation to your request No LS4451 that I had identified 2 documents that fell within the scope of the FOI applicant's request.

The first of those documents (Mr Abbott's letter to the AEC dated 20 October 1998) has previously been disclosed to a number of FOI applicants in the 2003 and 2004. The content of that letter had also been widely reported in the media.

The second document was the letter that Mr Abbott sent to the former Electoral Commissioner, Mr Andy Becker, dated 8 June 2004 which was the subject of the reverse FOI consultation that I notified you about in my letter of 29 January 2013 in relation to your FOI request No LS4451.

In the interval between your FOI request No LS4451 lapsing and a decision being made on your renewed request on 10 May 2013 certain events occurred that made it appropriate to undertake a further reverse consultation that I notified you about in my letter of 31 May 2013.

I also note that the schedule of relevant documents compiled for the purposes of your FOI request No. LS4451 was provided to you as Attachment A to my letter to you of 13 March 2013 in relation to that request. I have therefore treated that request as out of scope of your current request. However, there is no reason against providing you with a further copy of this document.

The attached schedule of documents (Attachment A) provides a description of each document that falls within the scope of your request and the access decision for each of those documents.

ACCESS DECISION AND REASONS FOR DECISION

With regard to the documents identified in the attached schedule (Attachment A), I have decided to grant access to an edited version of Document No. 1. You have already been provided with access to Document No. 12, however I see no reason against providing you with a further copy of that document.

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

- the content of the documents that fall within the scope of your request;
- your email to Legal Service - NO of 10 May 2015 10:42 AM;
- the FOI Act (specifically sections 12, 22, 47C and 47F)
- the [guidelines issued by the Australian Information Commissioner](#) under section 93A of the FOI Act
- the views of Mr Abbott who was the third party consulted by the AEC under sections 27 and 27A of the FOI Act.

REASONS

The schedule in Attachment A indicates each document to which access is refused. My reasons for refusing access are given below.

(a) *Decision to grant access*

An outcome of the consultation with Mr Abbott was that the AEC received an objection to the release of documents that related to that party's business affairs and personal information and on the ground that they were confidential. I considered the conflicting public policies of a person's right to privacy in their business affairs and personal

information and the general public interest giving access to records held by the government. I took into account the objects of the FOI Act expressed in section 3, namely to:

- give the Australian community access to information held by government, by requiring agencies to publish that information and by providing for a right of access to documents;
- promote Australia's representative democracy by increasing public participation in government processes, with a view to promoting better-informed decision making;
- promote Australia's representative democracy by increasing scrutiny, discussion, comment and review of government activities;
- increase recognition that information held by government is to be managed for public purposes and is a national resource;
- ensure that powers and functions in the FOI Act are performed and exercised, as far as possible, so as to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

In support of the objection, the third party consulted advanced the following arguments:

- The document discloses the existence of certain undertakings and may also serve to identify other documents that the third party was required to produce to the AEC;
- Those documents provide details concerning private Trust business and the participation of other persons to whom the third party owed an equitable duty of confidence.

I noted that you appear to be of the view that your statement about the timing of when Mr Abbott sought and obtained legal advice about the Trust was false or misleading in a material particular. This could have given rise to offences under section 136.1 of the *Criminal Code Act 1995* and section 315 of the *Commonwealth Electoral Act 1918*.

In my letter of 12 March 2013 in notifying you about my decision on your request No LS4451 I informed you of the following.

However, an examination of the records in the possession of the AEC indicates that this was never in issue as the sole statutory function that was being dealt with by the AEC was whether or not the Trust met the requirements for being as "associated entity" for the purposes of Part XX of the *Commonwealth Electoral Act 1918*. Whether or not Mr Abbott had obtained and received some legal advice on this issue was irrelevant to the AEC's consideration of the matter. The AEC obtained its own legal advice on the then known facts and formed its own conclusions which eventually led to the withdrawal of the subsection 316(3A) notice that was issued to Mr Abbott by the delegate of the AEC on 24 May 2004. Accordingly, the AEC never formed any conclusion about if and when Mr Abbott may have sought and obtained legal advice on the Trust as that was not a "material particular" to the statutory function that was being performed.

In considering the third party's contentions in relation to your current request, I made my decision based on my finding that while the document falls within the scope of the

conditional exemption under either section 47F or section 47G of the FOI Act, access to it would not, on balance, be contrary to the public interest. I also decided section 45 of the FOI Act did not apply to documents provided by the third party.

I further considered whether the circumstances of that disclosure implied an obligation applying to the AEC to receive and deal with the information on a confidential basis and whether the third party had waived any claim to confidentiality by the third party. I reached the conclusion that there was no implied obligation of confidentiality applying to the AEC when it received the documents from the third party. I also reached the conclusion that the disclosure made by the third party was confined to the fact that the third party had obtained legal advice and the gist (but not the full details) of that advice. Such a disclosure does not seem to amount to a waiver of legal privilege that would prejudice the third party: see *College of Law Limited v Australian National University* [2013] FCA 492. I have also reached the conclusion that the third party had waived any claim to confidentiality when the third party volunteered the information to the AEC.

I then considered the application of section 47F(2) and section 47G(1) of the FOI Act to determining whether to uphold the third party's objections. In this regard, I noted that the information disclosed by the third party was consistent with various media reports and can fairly be said to be in the public domain. On that basis I did not see how it can be unreasonable to disclose such information notwithstanding that it is the third party's personal information: see section 47F of the FOI Act. Similarly, it is not unreasonable to disclose the information about the third party's business or professional affairs.

I reached the conclusion that the third party's objection was misdirected in as much as it belatedly asserts an equitable duty of confidence relating to information disclosed to the AEC. A claim for confidentiality should have been made at the time of disclosure. It was not made at time. Further, the objection is predicated on the premise that the third party was required to disclose the subject information to the AEC. In fact his disclosure was voluntary.

When the AEC delegate issued a notice under section 316(3) of the CE Act to the third party, the third party had exercised his right under section 316(3B) to have the Commission review the delegate's decision and the outcome of that review was that the notice was withdrawn. It follows that no information was gathered by the AEC from the third party by compulsion. As a consequence section 45(1) of the FOI Act does not apply to make the documents disclosed by you exempt documents. Accordingly, I decided that it was appropriate to grant access to the document.

I then considered section 47F of the FOI Act which provides that a document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person (including a deceased person). Considerations of the risk of identity theft militate against allowing access to documents that contain the signature of an individual. This triggers the 'unreasonable' test in section 47F of the FOI Act causing documents that have originals or facsimiles of signatures of individuals to be conditionally exempt documents. This is because such signatures fall within the scope of the expression 'personal information' as defined by section 4 of the FOI Act. I therefore decided to issue an edited copy of document in which a facsimile of the third party's signature is redacted.

RIGHTS OF A THIRD PARTY

As indicated above, during the processing of your request we consulted a third party potentially affected by the release of the documents. That third party has until 26 August 2013 to seek a review of my decision after which time (subject to the outcome of any such review) we will provide you with the documents. I will inform you if the third party requests a review.

PROVISION OF THE DOCUMENTS

Following expiration of third party review rights on 26 August 2013 (unless the third party requests a review), the AEC will provide the requested documents to you via email as requested by you.

Yours sincerely

A handwritten signature in black ink, appearing to read "Paul Pirani". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Paul Pirani
Chief Legal Officer

25 July 2013

YOUR REVIEW RIGHTS

I came to the conclusion that the balance of interest favoured giving access to the documents subject to the exceptions that I explain in the following paragraphs.

(b) Redaction of signatures

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person (including a deceased person). Considerations of the risk of identity theft militate against allowing access to documents that contain the signature of an individual. This triggers the 'unreasonable' test in section 47F of the FOI Act causing documents that have originals or facsimiles of signatures of individuals to be conditionally exempt documents. This is because such signatures fall within the scope of the expression 'personal information' as defined by section 4 of the FOI Act.

Section 22 of the FOI Act provides for access being given to edited copies of documents with exempt or irrelevant matter deleted. I have decided to release an edited copy of any document that has a signature or facsimile of the signature of an individual with the facsimile of the signature redacted.

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.

(a) Internal review

Under section 54 of the FOI Act, you may apply in writing to [the Department / name of agency] for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.

(b) 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.australia.gov.au/forms/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 www.oaic.gov.au/foi-portal/review_complaints.html#foi_merit_reviews.

ATTACHMENT A

LS4451 FOI REQUEST BY MARGO KINGSTON

Revised (6 January 2013)

all documents mentioning or referring to the assertion by Mr Abbott in his 1998 letter that he had sought legal advice before seeking donations to the Trust, and all documents mentioning or referring to allegations later made publicly (in 2003& 2004, and again in 2007) that that statement was untrue.

Schedule of Documents

Document No	Folio	Description	Date	Recommendation and Decision
File 04/869 Legal Services – Compliance – Legal requirements – Tony Abbott – Australians for Honest Politics Trust – Question of Associated Entity				
1	320-321	Letter from Tony Abbott MHR to Andy Becker, Electoral Commissioner This is replicated by folios 141-142 of file 04/1376	8/6/2004	This is relevant. The answers give information about Mr. Abbott's business affairs and his personal information. It would be unreasonable to give access to a facsimile of Mr. Abbott's signature. I have decided to grant access to this document with the facsimile of the signature of Mr. Abbott redacted.
2	319	Letter from Kathy Mitchell, Director, Funding and Disclosure to the Hon Tony Abbott MP	24/5/2004	This is not relevant. The letter gives information about Mr. Abbott's business affairs and his personal information that

		This is marked Attachment A and enclosed with Document 1.		do not relate to the scope of the request by Ms Kingston. I have decided to refuse access to this document with the facsimile of the signature of Ms Mitchell redacted.
3	317-318	Notice to Produce Documents issued by Kathy Mitchell to the Hon Tony Abbott This was an enclosure with document 2.	24/5/2004	This is not relevant. The letter gives information about Mr. Abbott's business affairs and his personal information that do not relate to the scope of the request by Ms Kingston. It would be unreasonable to give access to a facsimile of Ms Mitchell's signature. I have decided to refuse access to this document.
4	316	Extract of subsections 316(3B), 316(3C) and 316(3D) of the <i>Commonwealth Electoral Act 1918</i> This was an enclosure with document 2.		Section 12(1)(c) of the FOI Act applies to access to Acts of Parliament. As a consequence Ms Kingston is not entitled to have access to this document. I have decided to refuse access to this document.
5	315	Extract of subsections 316(5), 316(5A), 316(5B) and 316(3C) of the <i>Commonwealth Electoral Act 1918</i> This was an enclosure with document 2		Section 12(1)(c) of the FOI Act applies to access to Acts of Parliament. As a consequence Ms Kingston is not entitled to have access to this document. I have decided to refuse access to this document.
6	316	Letter from Brad Edgman, Director, Funding and Disclosure to the Hon Tony	10/6/1999	This document has been previously provided to Ms Kingston and therefore is out of scope of her

7	313	Abbott MP This is marked Attachment B and enclosed with Document 1 Letter from Tony Abbott to Roger Willis This is marked Attachment C and enclosed with Document 1.	20/10/1998	request. I have decided to refuse access to this document. This document has been previously provided to Ms Kingston and therefore is out of scope of her request. I have decided to refuse access to this document.
8	312	Letter from Doug Orr, Assistant Commissioner, Elections to the Hon Tony Abbott This is marked Attachment D and enclosed with Document 1	26/9/2003	This document is not relevant. The letter gives information about Mr. Abbott's business affairs and his personal information that do not relate to the scope of the request by Ms Kingston. I have decided to refuse access to this document.
9	303-311	Annexure A This was an annexure to document Error! Reference source not found..		This document is not relevant. The letter gives information about Mr. Abbott's business affairs and his personal information that do not relate to the scope of the request by Ms Kingston. I have decided to refuse access to this document.
10	302	Letter from Tony Abbott MHR to Doug Orr This is bundled as part of Document 8 and enclosed with Document 1	16/10/2003	This document is not relevant. The letter gives information about Mr. Abbott's business affairs and his personal information that do not relate to the scope of the request by Ms Kingston.

				I have decided to refuse access to this document.
11	Answers to questions 1-44 This was enclosed with Document 10.			This document is not relevant. The answers gives information about Mr. Abbott's business affairs and his personal information that do not relate to the scope of the request by Ms Kingston. I have decided to refuse access to this document.
13/387 Information Management - Cases - Freedom of Information (FOI) - Request - Margo Kingston - Tony Abbott and Australians for Honest Politics Trust				
12	Schedule of Documents in relation to your Freedom of Information Request No. LS4451			I have decided to grant access to this document.

NOTIFICATION OF PROCESSING CHARGES
TIME AND CHARGES CALCULATION WORKSHEET

PARTICULARS OF PROCESS	ESTIMATED TIME	CHARGES	AMOUNT
Search & Retrieval 6 files	6×0.25 hours = 1.5 hours	$\$15$ per hour x 1.5 hours	\$22.50
Searching files & tagging folios Estimate that there are 758 folios that may relate on the 6 files Based on 0.6 mins per folio $758 \times 0.6 = 454.8$ minutes	7.5 hours	$\$15$ per hour x 7.5 hours	\$112.50
Preparation of schedule of all documents i.e. full descriptions of each document <u>preparatory</u> to decision making based on 1000 folios = 35 hours	26.5 hours	$\$20$ per hour x 26.5 hours	\$530.00
Relevant Documents Percentage of file <i>estimated</i> to be relevant to request $758 \times 5\% = 37$ folios	5%		

PARTICULARS OF PROCESS	ESTIMATED TIME	CHARGES	AMOUNT
Consulting with third parties Based on 2 hours per person	N/a	N/a	N/a
Examination & decision-making 5 mins per relevant folio plus time for decision-making includes consulting and researching 37 relevant folios x 5 mins = 185 mins = 3 hours	3 hours	\$20 per hour x 3 hours	\$60.00
Access to relevant documents Estimated % of relevant folios to which access will be given in whole or part Approx 33 folios	90%		
Preparation and notification of decisions Includes findings and conclusions & reasons for decisions. Based on 100 folios = 8 hours (480 minutes) 33 folios = 158 minutes	2.5 hours for 33 folios plus 1 hour to write up decision = 3.5 hours.	\$20 per hour x 3.5 hours	\$ 70.00
Photocopying Copying approx 33 relevant folios without deletions (3 mins per folio) 33 folios x 3 mins = 99 mins = 1.6 hours	1.6 hours	\$20 per hour x 1.6 hours	\$ 32.00

PARTICULARS OF PROCESS	ESTIMATED TIME	CHARGES	AMOUNT
Packaging plus postage Includes collating, packing and addressing envelope/container	0.5 hours	\$20 per hour x 0.5 hours	\$ 10.00
ESTIMATED TOTALS	44.1 hours		\$837.00

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