



LS5768 ~ file 16/0732.

Graeme Bowman  
By email to:

[foi+request-2175-cf0b01ad@righttoknow.org.au](mailto:foi+request-2175-cf0b01ad@righttoknow.org.au)

Dear Mr Bowman

### **Your Request for internal review of the decision about your FOI Request No. LS5744**

I refer to your email of 28 August 2016 11:37 PM, to the Australian Electoral Commission ('AEC') in which you request (your 'FOI Request') access under the *Freedom of Information Act 1982* (the 'FOI Act') access to information about the same sex marriage plebiscite.

2 I also refer to your email of 18 September 2016 4:39 PM, to the AEC in which you request (your 'Internal Review Request') an internal review of the decision to refuse access to certain documents retrieved in respect of your FOI Request No. LS5744 made by Mr Paul Pirani, Chief Legal Officer of the AEC that was notified to you on 14 September 2016.

3 I am writing today to give you a decision about your Internal Review Request

#### **Summary**

4 I, Kathryn Toohey, Deputy Electoral Commissioner of the AEC, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to the internal review of a decision about an FOI request.

5 Specifically you sought a review of the decision to refuse access to Documents Nos 1 - 4 that are listed in the schedule at Annexure 1 to this letter.

6 I note that your FOI Request No. LS5744 was wider in its terms and that you were consulted about a practical refusal reason that applied to that FOI Request. See below at paragraphs 52 - 56 about the outcome of that consultation.

7 The schedule of retrieved documents in Annexure 1 provides a description of each retrieved document that falls within the scope of your request and the access decision for each of those documents.

8 With regard to the documents you requested (set out in Annexure 1), I have decided to:

- (a) refuse access to Document No. 2 and to offer in lieu access to an edited copy of that document on the terms offered in paragraphs paragraphs 46 and 47 of this letter.
- (b) refuse access to Documents Nos. 1, 3 and 4.

This substantively affirms the decision by Mr Pirani to refuse access to those documents.

9 More information, including my reasons for my decision, is set out below.

### ***Decision and reasons for decision***

#### **Decision**

10 With regard to the documents identified in Annexure 1, I have decided:

- (a) to refuse access to Documents Nos. 1, 3 and 4 under sections 4 and 15 of the FOI Act because they are outside the scope of documents that may be requested under Part III of the FOI Act; and
- (b) to refuse access to Document No. 2 under section 47C (*Public interest conditional exemption – deliberative processes*) as providing access would be contrary to the public interest and to offer in lieu access to an edited copy of Document No. 2 from which exempt material is redacted on the terms offered in paragraphs 46 and 47 of this letter.

#### **Material taken into account**

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

- (a) the content of the documents that fall within the scope of the FOI Request No. LS5744;
- (b) your contentions in your email of 18 September 2016 4:39 PM;
- (c) the FOI Act, specifically; the long title, sections 3, 3A, 4, 11A, 11B, 15, 47C and 54C.
- (d) the guidelines ('[FOI Guidelines](#)') issued by the Australian Information Commissioner under section 93A of the FOI Act, specifically paragraphs 6.3 – 6.3, 6.11- 6.33, 6.56 - 6.77 and 13.84 – 13.101;
- (e) [Public Governance, Performance and Accountability Act 2013](#) (the 'PGPA Act'), specifically sections 8, 26 and 52; and
- (f) the decision in [Harris v Australian Broadcasting Corporation and Ors \[1983\] FCA 242; \(1983\) 78 FLR 236](#) ('Harris' Case').

#### **Reasons**

12 Annexure 1 indicates each document to which access is refused. My reasons for refusing access are given below.

## ***Public interest conditional exemption – deliberative processes***

13 When seeking internal review of the primary decision in respect of your FOI Request LS5744 you made the following contentions:

The request was refused and I and many others are very disappointed over response. This a non binding Plebiscite. We as Australian Citizens and/or taxpayers have the right to be informed as to how our tax dollars are spent. Many of us believe that the cost \$154,000,000 is completely and underestimated. For that reason along we expect our rights to be protected. This is our only avenue to verify these details.

14 Your contentions seem directed to the manner in which Mr Pirani balanced the competing public interests to ascertain that the factors favouring refusing access outweighed the factors favouring access.

15 Nevertheless, I reviewed the entire decision about Document No. 2.

16 I found that Document No. 2 is in the nature of an opinion forecasting various cost inputs likely to be incurred in conducting a plebiscite, prepared in the course of, or for the purposes of, the deliberative processes involved in the functions, namely the preparation of Document No. 3.

17 Subsection 47C(1) of the FOI Act conditionally exempts a document if its disclosure under the FOI Act would disclose 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 the AEC (among other things).

18 I found that section 47C of the FOI Act applies to Document No. 2.

19 Subsection 47C of the FOI Act provides:

### **47C Public interest conditional exemptions—deliberative processes**

#### *General rule*

- (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.

#### *Exceptions*

- (2) Deliberative matter does not include either of the following:
- (a) operational information (see section 8A);
  - (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

- (3) This section does not apply to any of the following:
- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
  - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
  - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

**(a) Operational information**

20 Section 8A of the FOI Act provides:

**8A Information to be published—what is operational information?**

- (1) An agency's **operational information** is information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities).

Example: The agency's rules, guidelines, practices and precedents relating to those decisions and recommendations.

- (2) An agency's **operational information** does not include information that is available to members of the public otherwise than by being published by (or on behalf of) the agency.

21 The opinions expressed in Document No. 2 are ad hoc estimates of the costs of conducting a plebiscite and offer no ongoing assistance to the AEC in exercising its functions or powers. The impact of decisions made on the basis of Document No. 2 do not directly affect members of the public. The effect on members of the public flows from the conduct of the plebiscite and not the cost of conducting it.

22 Accordingly, I found that the provisions in paragraph 47C(2)(a) of the FOI Act, does not apply to Document No. 2.

**(b) Purely factual material**

23 An opinion is not a fact: see *Harris' Case*. It is for this reason that paragraph 47C(3)(a) of the FOI Act expressly includes 'reports expressing the opinions of such experts on scientific or technical matters'.

24 However, the opinions expressed in Document No. 2 are based on expenditure by the AEC in the financial years ending 30 June 2011 -15 which appear in that document.

25 I found that the provisions in paragraph 47C(2)(b) of the FOI Act applies to Document No. 2 in as much as it contains expenditure by the AEC in the financial years ending 30 June 2011 -15.

**(c) Non-application of subsection 47C(3)**

26 It is self-evident that none of the provisions in subsection 47C(3) of the FOI Act apply to Document No. 2.

**(d) Conclusion**

27 Accordingly, I decided that:

- (a) access may be given to the expenditure by the AEC in the financial years ending 30 June 2011 -15 appearing in Document No. 2; and
- (b) the remainder of Document No. 2 falls within the scope of the conditional exemption for deliberative matter provided by section 47C of the FOI.

***Weighing of public interest factors***

28 Under subsection 11A(5) of the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest.

29 My weighing of public interest factors follows.

- (a) I considered the following factors favouring disclosure:
  - (i) I took into account that the opinion about the forecast costing of a plebiscite was published in Document No. 3.
  - (ii) Your contentions quoted in paragraph 13 of this letter, namely:

(A) *'Australian Citizens and/or taxpayers have the right to be informed as to how our tax dollars are spent.'*

As Document No. 2 is a provisional forecast of what may be spent as distinct from any accounting for the actual spending of money, I gave this contention little weight.

(B) *'Many of us believe that the cost \$154,000,000 is completely and underestimated.'*

As the forecast in Document No. 2 was made ahead of the decision as to the shape of the plebiscite and the manner in which it is to be conducted, it is obvious that the estimate would be revised when these things are known. Knowing the basis of a speculative calculation made ahead of the decision about the shape of the plebiscite and the manner in which it is to be conducted is of little value in contributing to any public discussion about the plebiscite.

(C) *'[W]e expect our rights to be protected. This is our only avenue to verify these details.'*

As the preliminary estimate in Document No. 2 was always subject to revision once the shape of the plebiscite and the manner in which it is to

be conducted, verification of that estimate would not contribute to the protection of taxpayers rights.

(iii) My findings that:

- (A) expenditure by the AEC in the financial years ending 30 June 2011 - 15 appearing in Document No. 2 is purely factual material;
- (B) the disclosure of the costing forecast in Document No. 3 achieves the objects of the FOI Act expressed in sections 3 and 3A for the purposes of paragraph 11B(3)(a) of the FOI Act in relation to publishing the costing, and therefore little weight should be given to this factor when striking a balance as to where the public interest lay in giving access to Document No. 2;
- (C) the manner in which the opinion was arrived at is not of itself a matter that would usefully inform public debate about the cost of the plebiscite for the purposes of paragraph 11B(3)(b) of the FOI Act.

The cost of the plebiscite will only be ascertained once the plebiscite is conducted and the expenses associated with it have crystallised. Accordingly, I gave little weight to this factor when striking a balance as to where the public interest lay in giving access to Document No. 2;

- (D) the breakdown of the various opinions about particular likely expenses incurred in conducting a plebiscite would provide no useful basis for oversight of the public expenditure incurred in relation to the plebiscite for the purposes of paragraph 11B(3)(c) of the FOI Act. I explain this point in paragraph 29(a)(i) of this letter.
- (E) the considerations required by paragraph 11B(3)(d) of the FOI Act are not triggered by the subject matter of the FOI Request.

I was unable to identify any other consideration that I should take into account that favours giving access to Document No. 2.

(b) I considered the following factors that militate against disclosure:

- (i) A factor against giving access to Document No. 2 is that the public has no discernible interest in knowing how the forecast of probable costs was arrived at by the AEC beyond knowing the historic expenditure upon which it is based.
- (ii) The public's interest lies in knowing how a commitment for the purposes of the PGPA Act is made. The forecast of probable costs of conducting relates to a step before a commitment is made in respect of expenditure that is incurred by the actual conduct of the plebiscite.
- (iii) The time for making a commitment in relation to the conduct of a plebiscite will not arise until after passage of Commonwealth legislation authorising the plebiscite. No such legislation has as yet been enacted.

- (b) In accordance with subsection 11B(4) of the FOI Act I excluded from my consideration the following matters:
- (i) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
  - (ii) access to the document could result in any person misinterpreting or misunderstanding the document;
  - (iii) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
  - (iv) access to the document could result in confusion or unnecessary debate.

30 In considering the weighing of public interest factors I had regard to the FOI Guidelines at paragraphs 6.11 – 6.33.

31 It follows that the public interest factors against access outweigh the public interest factors favouring access to Document No. 2. Accordingly, I decided to refuse to give access to Document No. 2.

32 Accordingly, I am satisfied that the Document No. 2 is conditionally exempt under subsection 47C(1) of the FOI Act and because disclosure would be contrary to the public interest and that the documents should be treated as exempt from disclosure under the FOI Act.

### ***Preparation of an edited copy***

33 In accordance with section 22 of the FOI Act I next considered whether it is both possible and practicable to prepare an edited copy of Document No. 2 from which the exempt material is redacted.

34 Section 22 of the FOI Act provides:

#### **22 Access to edited copies with exempt or irrelevant matter deleted**

##### *Scope*

- (1) This section applies if:
- (a) an agency or Minister decides:
    - (i) to refuse to give access to an exempt document; or
    - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
  - (b) it is possible for the agency or Minister to prepare a copy (an ***edited copy***) of the document, modified by deletions, ensuring that:
    - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
    - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and

- (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
  - (i) the nature and extent of the modification; and
  - (ii) the resources available to modify the document; and
- (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

*Access to edited copy*

- (2) The agency or Minister must:
  - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
  - (b) give the applicant access to the edited copy.

*Notice to applicant*

- (3) The agency or Minister must give the applicant notice in writing:
  - (a) that the edited copy has been prepared; and
  - (b) of the grounds for the deletions; and
  - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

35 I had regard to paragraphs 3.85 – 3.90 of the FOI Guidelines.

36 I found that it is possible and practicable to prepare an edited copy of Document No. 2 from which the exempt material is redacted.

**Documents out of Scope of an FOI Request**

37 Section 15 of the FOI Act enables a person to seek access, among other things, to a document of an agency. The AEC is an agency for the purposes of the FOI Act.

38 I note that you made no contentions to refute the finding that the carve out in paragraph (d) of the definition of ‘document’ provided by subsection 4(1) of the FOI Act applies to Documents Nos 1, 3 and 4.

39 In so far as is material subsection 15(1) of the FOI Act provides:

**15 Requests for access**

*Persons may request access*

- (1) Subject to section 15A, a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document.

40 Section 15A of the FOI Act makes provision with respect to requests for access to personnel records and has no relevance to the FOI Request.

41 The expression ‘document of an agency’ is defined by subsection 4(1) of the FOI Act and depends on the definition given by that subsection to the word ‘document’.



42 In so far as is material, subsection 4(1) of the FOI Act provides:

#### 4 Interpretation

(1) In this Act, unless the contrary intention appears:

**document of an agency:** a document is a **document of an agency** if:

- (a) the document is in the possession of the agency, whether created in the agency or received in the agency; or
- (b) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document.

**document** includes:

- (a) any of, or any part of any of, the following things:
  - (i) any paper or other material on which there is writing;
  - (ii) a map, plan, drawing or photograph;
  - (iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
  - (iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;
  - (v) any article on which information has been stored or recorded, either mechanically or electronically;
  - (vi) any other record of information; or
- (b) any copy, reproduction or duplicate of such a thing; or
- (c) Any part of such a copy, reproduction or duplicate;

But does not include:

- (d) Material maintained for reference purposes that is otherwise publicly available; or
- (e) Cabinet notebooks.

43 Documents Nos 1, 3 and 4 are material maintained for reference purposes respectively by the Department of Finance (Document No 1) and the Department of the Senate (Documents Nos 3 and 4) that are otherwise publicly available. The description of each document in Annexure 1 indicates the URL for that document by which it may be accessed.

44 It follows that the carve out in paragraph (d) of the definition of 'document' provided by subsection 4(1) of the FOI Act applies to Documents Nos 1, 3 and 4 with the outcome that none of those documents is included in the expression 'document of an agency' and thus cannot be requested under subsection 15(1) of the FOI Act.

45 For this reason, I refused access to Documents Nos 1, 3 and 4.

### ***Offer of access to edited copies***

- 46 In paragraph 10 of this letter I indicated that I would offer you access to edited copies of Document No. 2 from which exempt or irrelevant matter had been redacted, the terms of that offer follow:
- (a) The offer remains open for 60 days from the date of this letter;
  - (b) The offer is conditional that you accept the edited copies in satisfaction of your FOI Request for the relevant document; and
  - (c) The offer must be accepted in writing signed by you (this may be scanned and sent by email to Owen Jones whose contact details are below).
- 47 If this offer is not accepted within the 60 day period, my decision to refuse access to Document No. 2 will stand.

### **YOUR REVIEW RIGHTS**

- 48 If you are dissatisfied with my decision, you may apply for Information Commissioner review of the decision.
- 49 Under section 54N 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:	<a href="https://forms.business.gov.au/aba/oaic/foi-review/">https://forms.business.gov.au/aba/oaic/foi-review/</a>
email:	<a href="mailto:enquiries@oaic.gov.au">enquiries@oaic.gov.au</a>
post:	GPO Box 52189, Sydney NSW 2001
in person:	Level 3, 175 Pitt Street, Sydney NSW

- 50 More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to [www.oaic.gov.au/freedom-of-information/foi-reviews](http://www.oaic.gov.au/freedom-of-information/foi-reviews).

### **QUESTIONS ABOUT THIS DECISION**

- 51 If you wish to discuss this decision, please contact Owen Jones, Senior Lawyer at:
- |            |  |
|------------|--|
| email:     | <a href="mailto:owen.jones@aec.gov.au">owen.jones@aec.gov.au</a> |
| fax:       | 02 6293 7657   |
| post:      | Locked bag 4007, Canberra ACT 2601                               |
| telephone: | 02 6271 4528   |

### **OUTCOME OF MR PIRANI'S PRACTICAL REFUSAL CONSULTATION**

- 52 I note that you elected to pursue an internal review of Mr Pirani's interim decision in relation to Documents Nos 1 - 4 and did not respond to the invitation in Mr Pirani's letter to you of 14 September 2016 to discuss how you wished to proceed with the

processing of your FOI Request No. LS5744 in light of the practical refusal reason that applied to that request.

53 Mr Pirani described the practical refusal reason in the following terms:

46. I am writing to tell you that I believe that the work involved in processing your request in its current form would substantially and unreasonably divert the resources of this agency from its other operations due to its size of the documents requested and the broad scope of the FOI Request. This is called a 'practical refusal reason' (section 24AA).

54 As a consequence subsections 24AB(6) and (7) of the FOI Act applied to the remainder of your FOI Request No. LS5744.

55 Subsections 24AB(6) and (7) of the FOI Act provide:

**24AB What is a request consultation process?**

*Outcome of request consultation process*

- (6) The applicant must, before the end of the consultation period, do one of the following, by written notice to the agency or Minister:
- (a) withdraw the request;
  - (b) make a revised request;
  - (c) indicate that the applicant does not wish to revise the request.
- (7) The request is taken to have been withdrawn under subsection (6) at the end of the consultation period if:
- (a) the applicant does not consult the contact person during the consultation period in accordance with the notice; or
  - (b) the applicant does not do one of the things mentioned in subsection (6) before the end of the consultation period.

56 Accordingly the remainder of your FOI Request No. LS5755 is taken by subsection 24AB of the FOI Act to have been withdrawn under subsection 24AB(6) of the FOI Act.

Yours sincerely



Kathryn Toohey  
Deputy Electoral Commissioner

18 October 2016

**Attachments**

Annexure 1 (Schedule of documents);

## SCHEDULE OF RETRIEVED DOCUMENTS IN RESPECT OF FOI REQUEST LS5744

Document No.	Description	Date	Recommendation/decision
1	Budget related paper No. 1.7 Portfolio Budget Statements 2013-14 Finance and Deregulation Portfolio	[undated]	<div style="background-color: #cccccc; text-align: center; padding: 5px;">1</div>
<p>1.1 Document No. 1 is published for reference by the public at <a href="http://www.finance.gov.au/publications/portfolio-budget-statements/13-14/docs/finance-portfolio-pbs-combined.pdf">http://www.finance.gov.au/publications/portfolio-budget-statements/13-14/docs/finance-portfolio-pbs-combined.pdf</a>.</p> <p>1.2 It follows that Document No. 1 is out of scope of the class of document that may be requested under Part III of the FOI Act as a consequence of the operation of the carve out from the definition of 'document' provided by paragraph (d) of subsection 4(1) of the FOI Act.</p> <p>1.3 Accordingly, I have <b>decided to refuse access</b> to Document No. 1.</p>			
2	Spreadsheet calculation of estimated costs	[undated]	<div style="background-color: #cccccc; text-align: center; padding: 5px;">2</div>
<p>2.1 Document No. 2 contains expenditure by the AEC in the financial years ending 30 June 2011 -15 which is factual material.</p> <p>2.2 As regards the remainder of Document No. 2, each entry is in the nature of an opinion about various cost inputs, prepared in the course of, or for the purposes of, the deliberative processes involved in the functions, namely the preparation of Document No. 2.</p>			

	<p>2.3 It is possible and practicable to prepare a meaningful edited copy of Document No. 2 if the exempt material is redacted.</p> <p>2.4 Accordingly, I have <b>decided to refuse access</b> to Document No. 2 and offer in lieu access to an edited copy of Document No. 2 from which exempt material is redacted.</p>		
<b>3</b>	Submission to the inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia	?/09/2015	3
	<p>3.1 Document No. 3 is published for reference by the public at <a href="http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Marriage_Plebiscite/Submissions">http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Marriage_Plebiscite/Submissions</a></p> <p>3.2 A definition of 'document' is provided by subsection 4(1) of the FOI Act unless a contrary intention</p> <p>3.3 It follows that Document No. 3 is out of scope of the class of document that may be requested under Part III of the FOI Act as a consequence of the operation of the carve out from the definition of 'document' provided by paragraph (d) of subsection 4(1) of the FOI Act.</p> <p>3.4 Accordingly, I have <b>decided to refuse access</b> to Document No. 3.</p>		
<b>4</b>	Letter from Tom Rogers, Australian Electoral Commissioner to Sophie Dunstone, Committee Secretary, Senate Legal and Constitutional Affairs Committee re <i>Australian Electoral Commission's (AEC) response to Questions taken on Notice at the 10 September 2015 Senate inquiry into the matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia</i>	14/09/2015	4

	<p>4.1 Document No. 4 is published for reference by the public at <a href="http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Marriage_Plebiscite/Submissions">http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Marriage_Plebiscite/Submissions</a></p> <p>4.2 It follows that Document No. 4 is out of scope of the class of document that may be requested under Part III of the FOI Act as a consequence of the operation of the carve out from the definition of 'document' provided by paragraph (d) of subsection 4(1) of the FOI Act.</p> <p>4.3 Accordingly, I have <b>decided to refuse access</b> to Document No. 4.</p>
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