



Our Ref: LS4451 ~ file 12/1152

Ms Margo Kingston  
By email to [foi+request-32-a8c83d8c@righttoknow.org.au](mailto:foi+request-32-a8c83d8c@righttoknow.org.au)

Dear Ms Kingston

### Re LS4451 Your freedom of information request

I refer to my letter of 29 January 2013 and your email of 15 February 2013 12:33 PM in relation to your freedom of information request.

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 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.

This was your revised request notified in your email to Mr Owen Jones of 6 January 2013 12:22 AM. I have proceeded with retrieving documents relevant to your request on the basis that the following classes of documents were out of scope of the request:

- (a) Documents originating from you and documents supplied to you in your previous FOI requests;
- (b) Media Reports relating to the Trust;

(c) FOI requests by third parties relating to the Trust.

This accords with my letter to you of 29 January 2013.

I 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 has also been widely reported in the media. The second document is 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. Document No. 2 had attachments which I found to be not relevant to your request.

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. 2. You have already been provided with access to Document No. **Error! Reference source not found.** I will provide a further copy of Document No. **Error! Reference source not found.** if you have mislaid the copy provided previously.

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 Owen Jones of 6 January 2013 12:22 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*.

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.

I took the objection into account but gave it less weight than the general object of the FOI Act. My reason for assigning the objection less weight was that the objection was misdirected in as much as it belatedly asserted an equitable duty of confidence relating to information disclosed to the AEC. A claim for confidentiality should have been made by the

third party 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 that party exercised the 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.

In this regard I note that the common law test for the obligation of confidentiality is that each of the following matters must be satisfied:

- (i) the information must have been given in confidence;
- (ii) the information must have been received in confidence;
- (iii) the information must actually be confidential (i.e. not already in the public domain); and
- (iv) the disclosure of the information would cause damage to the confider.

The above matters were clearly set in by Mr Justice Gummow in the case of *Smith Kline and French v Secretary to the Department of Health* [1990] FCA 151. That Federal Court decision (which was upheld on appeal and for which the High Court refused special leave to appeal) also addressed the issue of the duty of confidentiality that could be placed on a Commonwealth agency exercising statutory duties. At paragraph 89 of the Court decision the Court finds with approval that that the circumstance that the person who imparted the information in question intended to do so for a limited purpose, will not necessarily of itself be sufficient to bind the conscience of the party to whom the information was imparted. However there was nothing in the letter to Mr Becker which indicated any confidentiality being claimed.

As regards Mr Abbott's claim that he owed some duty of confidentiality to some unnamed third party in relation to the material contained in that letter, if that is correct, then that duty of confidentiality would have been either waived or breached at the time that Mr Abbott wrote to Dr Becker with that information. Further having examined the contents of the letter, I had difficulties identifying any information that could possibly now be claimed as being confidential.

I also took into account that the information provided by Mr Abbott was consistent with various media reports and can fairly be said to be in the public domain. It follows that the disclosure of the documents (aside from redacting facsimiles of signatures) does not involve the unreasonable disclosure of information about the Mr Abbott's business or professional affairs or personal information.

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](mailto: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](http://www.oaic.gov.au/foi-portal/review_complaints.html#foi_merit_reviews).

### **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 5 April 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.

## OUTSTANDING CHARGES

You will recall that, in my letter to you of 29 January 2013, I mentioned that your current FOI request is substantially the same as an earlier FOI request that you abandoned when you were requested to pay charges assessed at \$837.00 after your request that the charges be waived on public interest grounds was refused. I attach as Attachment B a schedule of the charges previously assessed.

I have considered your request to have the charges waived. I note that you do not make the request on the ground of financial hardship. You made the request on public interest grounds. I note that you said in support of that request:

In view of the public interest in a transparent democracy I request that you provide the information requested free of charge.

You have not given any additional information to lay the foundations for your request.

In considering your request I addressed the requirement in section 29(5)(b) of the FOI Act that I consider 'whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public'.

I did so taking into account the Australian Information Commissioner's Guidelines issued under s 93A of the FOI Act (the 'Guidelines') to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. In particular, I had regard to Part 4 of the Guidelines which explains the factors to take into account when considering the public interest in charges decisions.

I note that paragraph 4.46 of the Guidelines indicates that the AEC may take into account the following factors:

- [whether] the applicant can be expected to derive a commercial or personal benefit or advantage from being given access and it is reasonable to expect the applicant to meet all or part of the FOI charge.

In your email of 27 December 2012 7:41 PM you mentioned that you will be publishing this matter in her book. I concluded that the book is intended to derive a commercial advantage to you.

- the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public.

There has been a degree of interest in this matter that is indicated by Twitter comments. However, I do not see this as evidence of general public interest nor of interest by a substantial section of the public. You seek to introduce into public discourse in the lead up to the 2013 election matters that were made known to the public in 2003-2004 when the AEC published its decisions in relation to its investigations into Mr Abbott's activity in relation to the Trust.

There seems to be no public interest to be served in waiving the charges in this instance. The time for initiating a prosecution under section 315 of the CE Act is long past. There was a three year time limit. In my view, it would be improper to launch a further investigation where it could not lead to a prosecution.

Likewise, section 317 of the CE Act puts a three year on the obligation imposed on persons to keep records relating to a matter particulars of which are, or could be required to be set out in a claim or return under Part XX (*Elections funding and financial disclosure*) of the CE Act. So, there is unlikely to be any records retained that could support a prosecution should an investigation be initiated.

- the information in the documents has already been published by an agency and the documents do not add to the public record, or the applicant has requested access to a substantial volume of documents and significant work would be required to process the request.

The documents that I have decided should be disclosed to you do no more than confirm information that has previously placed on the public record in relation to the 2004 decisions by the AEC about the following investigations which are published on the AEC website as indicated:

- *Possible donor disclosure by the Hon. Tony Abbott MP* published at [http://www.aec.gov.au/Parties\\_and\\_Representatives/compliance/AEC\\_Advice/abbott.htm](http://www.aec.gov.au/Parties_and_Representatives/compliance/AEC_Advice/abbott.htm); and
- *Australians for Honest Politics* published at [http://www.aec.gov.au/Parties\\_and\\_Representatives/compliance/AEC\\_Advice/honest-politics.htm](http://www.aec.gov.au/Parties_and_Representatives/compliance/AEC_Advice/honest-politics.htm).

Paragraph 4.47 of the Guidelines notes that despite a public interest purpose for disclosure being established an Agency (i.e. the AEC) may nevertheless impose a charge in relation to giving access. I note that you do not have an onus to justify your case in relation your request to waive charges. It is a matter for me as the delegate to reach a decision on the merits of your request.

In addressing the merits of your request I took into account that you had made, and abandoned, a similar request in 2004.

You will recall that in my letter to you of 29 January 2013 I asked whether I am correct in treating your amended request as being substantially the same as your request dated 28 April 2004 for:

'All material relating to or mentioning discrepancies between Mr Abbott's statement in an interview with me on September 5, 2003 and his letter to the AEC in October 1998 regarding the Australians for Honest Politics Trust.'

You did not address this matter in your latest correspondence to the AEC which was your email to Owen Jones of 15 February 2013 12:33 PM.

I have decided that your current request is substantially the same as that made by you on 28 April 2004 (the '2004 Request').

I note that you made a similar request to have the charges waived on when you made your 2004 Request which request was refused by the relevant delegate. You did not pay a deposit or the total charges imposed within the time required under the FOI Act and as a consequence your 2004 Request was treated as withdrawn.

I took into consideration three matters arising from the 2004 Request.

- First, given the policy of section 3(4) of the FOI Act that:

... functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

and the guidance in [paragraphs 4.2 to 4.5 of the Guidelines](#), I did not see how the AEC could justify imposing higher charges than that quoted to you in 2004.

- Second, the fact that you have put the AEC to the unnecessary trouble of retrieving relevant files and examining them twice should be taken into account in considering the public interest supporting your request to waive the charges. The unnecessary trouble that the AEC has been put to is also a matter of public interest as it is a cost borne by the Commonwealth.
- Third, it is inappropriate that you should circumvent the requirements of the FOI Act by renewing your application after it had lapsed to avoid paying charges imposed on the giving of access.

Having taken these matters into account, I have decided to refuse your request to waive the imposition of a charge in respect of the release of the documents listed in Attachment A.

## **NOTICE THAT YOU ARE LIABLE TO PAY A CHARGE**

In accordance with section 29 of the FOI Act and the *Freedom of Information Charges Regulations 1982*, my preliminary assessment of the charge you are liable to pay is \$837.00.

### ***Basis for my preliminary assessment of the charge***

I have adopted the assessment of the work the AEC would need to do to process your request and the calculation of the breakdown of charges in Attachment B. My reasons for doing this were explained above.

### ***Your right to contend the charge***

Under the FOI Act, you have the right to contend that the charge:

- has been wrongly assessed, or
- should be reduced, or
- should not be imposed.

In deciding whether a charge should be reduced or not imposed, the decision maker in our agency must take into account:

- whether payment of the charge, or part of it, would cause you financial hardship

As noted above, you have not made a claim that payment of the charge would cause you personal hardship

- whether giving access to the documents is in the general public interest or in the interest of a substantial section of the public

This has been considered above.

- any other relevant matter.

***The time you have to respond and what you need to do***

You have 30 days to respond in writing to this notice. We therefore expect a response from you by 8 April. By that date, you must do one of the following things in writing:

- agree to pay the charge (this will mean that you will not be entitled to access the requested documents until the full charge is paid);
- contend that the charge has been wrongly assessed, or should be reduced or not imposed and explain your reasons; or
- withdraw your request.

Please send your response to:

Owen Jones  
Senior Lawyer

Email: [owen.jones@aec.gov.au](mailto:owen.jones@aec.gov.au)

Postal: PO Box 6172, Kingston ACT 2604

If you do not provide us with a written response by 8 April 2013 your request will be taken to have been withdrawn.

The period for processing your request is suspended from the day that you receive this notice and resumes on either the day you pay the charge (in full or the required deposit) or the day on which this agency makes a decision not to impose a charge.

***Your further review rights***

If you decide to make contentions and are dissatisfied with the outcome regarding calculation of the charge or the searches we did to locate documents related to your request, you may then 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 AEC for an internal review of my decision. The internal review application must be made within 30 days of the date of the letter informing you of the outcome of my consideration of your contentions.

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.

**(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](mailto: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](http://www.oaic.gov.au/foi-portal/review_complaints.html#foi_merit_reviews).

**Questions about this notice**

If you have any questions or wish to discuss this notice with us, please contact the following officer:

Owen Jones  
Senior Lawyer

Email: [owen.jones@aec.gov.au](mailto:owen.jones@aec.gov.au)

Telephone: 02 6271 4528

More information about charges under the FOI Act is available in Fact Sheet 7 on the Office of the Australian Information Commissioner's website:

[www.oaic.gov.au/publications/factsheets.html](http://www.oaic.gov.au/publications/factsheets.html)

and in part 4 of the Australian Information Commissioner's FOI guidelines published 7 on the Office of the Australian Information Commissioner's website:

[www.oaic.gov.au/publications/guidelines.html#foi\\_guidelines](http://www.oaic.gov.au/publications/guidelines.html#foi_guidelines).

**PROVISION OF THE DOCUMENTS**

Following payment of the outstanding charge and expiration of third party review rights on 8 April 2013, the AEC will provide the requested documents to you via email as requested by you.

Yours sincerely



Paul Pirani  
Chief Legal Officer

12 March 2013

# 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	Decision
<b>FILE 00/244 LEGAL SERVICES – COMPLIANCE – LEGAL REQUIREMENTS – TONY ABBOTT – AUSTRALIANS FOR HONEST POLITICS TRUST – QUESTION OF ASSOCIATED ENTITY</b>				
1	12	Letter from Hon Tony Abbott to AEC submitting that the Trust is not an associated entity.	20/10/1998	
<b>File 04/869 Legal Services – Compliance – Legal requirements – Tony Abbott – Australians for Honest Politics Trust – Question of Associated Entity</b>				
2	320-	Letter from Tony Abbott MHR to Andy	8/6/2004	This is relevant. The answers give information about Mr. Abbott's business affairs and his

321	Becker, Electoral Commissioner This is replicated by folios 141-142 of file 04/1376		<p>personal information.</p> <p>It would be unreasonable to give access to a facsimile of Mr. Abbott's signature.</p> <p>I <b>decided</b> to grant access to this document with the facsimile of the signature of Mr. Abbott redacted.</p>
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**NOTIFICATION OF PROCESSING CHARGES**  
**TIME AND CHARGES CALCULATION WORKSHEET**

PARTICULARS OF PROCESS	ESTIMATED TIME	CHARGES	AMOUNT
<b>Search &amp; Retrieval</b> 6 files	6 x 0.25 hours = 1.5 hours	\$15 per hour x 1.5 hours	<b>\$22.50</b>
<b>Searching files &amp; tagging folios</b> Estimate that there are 758 folios that may relate on the 6 files  Based on 0.6 mins per folio  758x0.6 = 454.8 minutes	7.5 hours	\$15 per hour x 7.5 hours	<b>\$112.50</b>
<b>Preparation of schedule of all documents</b> 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	<b>\$530.00</b>
<b>Relevant Documents</b> Percentage of file <i>estimated</i> to be relevant to request  758 x 5% = 37 folios	5%		

<b>PARTICULARS OF PROCESS</b>	<b>ESTIMATED TIME</b>	<b>CHARGES</b>	<b>AMOUNT</b>
<b>Consulting with third parties</b> Based on 2 hours per person	N/a	N/a	N/a
<b>Examination &amp; decision-making</b> 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
<b>Access to relevant documents</b> Estimated % of relevant folios to which access will be given in whole or part Approx 33 folios	90%		
<b>Preparation and notification of decisions</b> 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
<b>Photocopying</b> 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

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

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