



Our Ref: LS4451 ~ file 12/1152

Ms Margo Kingston
By email to foi+request-32-a8c83d8c@righttoknow.org.au

Dear Ms Kingston

Re LS4451 Your freedom of information request

I refer to your email of 6 December 2012 4:52 PM to the Australian Electoral Commission ('AEC') in which you requested under the *Freedom of Information Act 1982* (the 'FOI Act') the following:

all material touching upon the AEC's response to the revelation in 2003 that Tony Abbott had misled it in his 1998 letter in response to the AEC's request that he disclose his donors to the AHPT.

I also refer to your emails to Mr Owen Jones, Senior Lawyer, Legal Services of 14 December 2012 at 5:35 PM and 5:51 PM about this matter.

As explained in Mr Jones' email of 11 December 2012 10:47 AM, the AEC understands the reference to AHPT to refer to the Australians for Honest Politics Trust.

I am writing to inform you that a practical refusal reason exists in relation to your request for documents under section 24AA(1)(b) of the FOI Act. This is so because your request does not satisfy the requirement in paragraph 15(2)(b) (identification of documents) of the FOI Act. In particular, your assertion that somehow the AEC had been "misled" by Mr Abbott appears to have qualified the documents to which you state that you are now seeking access.

In so far as is material, section 15(2)(b) of the FOI provides:

(2) The request must:

...

(b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and

Your request refers to concerns raised about the AHPT and the Trust's administrator, the Hon. Tony Abbott, MP. The responsibility of the Trust's administrator under the provisions of the *Commonwealth Electoral Act 1918* (Electoral Act) was dependant on whether or not the AHPT was an "associated entity". The question of possible disclosure obligations with respect to the AHPT first came to the attention of the AEC in September 1998. At that time the AEC sent a standard inquiry to Mr Abbott on behalf of the AHPT indicating that, based on the information then available, it was considered the entity may meet the definition of "associated entity" (as it existed at that time) under subsection 287(1) of the Electoral Act, by being "an entity that operates wholly or mainly for the benefit of one or more registered political parties".

A response was received from Mr Abbott putting forward arguments that AHPT was not an "associated entity" as defined in the Electoral Act and stating that, before seeking donations to the Trust, he had received legal advice that AHPT would not be subject to disclosure obligations. In support of this view Mr Abbott provided a copy of the Trust deed.

On the basis of the delegate's consideration of all of the available material, the AEC concluded at that time that there was insufficient evidence that pointed to AHPT being an "associated entity" with reporting obligations under Part XX of the Electoral Act.

The operations of AHPT and its possible disclosure obligations were raised again in 2003 following the conviction in the Queensland Supreme Court of Ms Pauline Hanson in relation to that state's party registration and election funding laws. This led to another delegate of the AEC in 2004 to review the available material and to issue a notice under the authority of subsection 316(3A) of the Electoral Act. That notice purported to seek the disclosure of records and other information from Mr Abbott as the financial controller of the Trust seeking records and information to allow the AEC to conclude whether there was a disclosure obligation for AHPT as an "associated entity" (the relevant arm of the definition having been amended in 1999 to now read "an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties").

Mr Abbott exercised his right under subsection 316(3B) of the Electoral Act and requested that the decision to issue the notice be reviewed by the Electoral Commission, the three person body established under section 6 of the Electoral Act. In accordance with subsection 316(3C) the full Electoral Commission met and considered the matter, including obtaining further independent legal advice. It concluded that there was no information available to it on which it could conclude that there were "reasonable grounds" to believe that AHPT is, or was at the time, an "associated entity" and duly set aside the second delegate's decision to issue the notice of investigation.

The 2004 decision of the Electoral Commission to set aside the subsection 316(3A) notice takes into account the requirement for there to be "reasonable grounds to believe that a

person is capable of producing documents or other things, or giving evidence, relating to whether an entity is, or was at a particular time, an associated entity”.

The AEC has external legal advice on the scope of “reasonable grounds”. The advice refers to the High Court decision in *George v Rockett* (1990) 170 CLR 104 at 115 (not dealing with the Electoral Act but with the Queensland Criminal Code Act) where the court stated that:

‘When a statute prescribes that there must be “reasonable grounds” for a state of mind – including suspicion or belief – it requires the existence of facts that are sufficient to induce the state of mind in a reasonable person.’

Accordingly, facts must exist which are sufficient to induce the state of mind in a reasonable person before this power can be lawfully exercised. External legal advice also indicates that the “reasonable grounds” test also applies to the question of whether an entity was an associated entity, otherwise the reasons for inquiring about the entity would remain unchallenged.

The powers of the AEC to compel the production of evidence and other information under subsection 316(3A) of the Electoral Act were and are limited.

It follows that your FOI request as presently worded is flawed in as much as it assumes that the AEC made a judgment that Mr Abbott “misled” the AEC in his 1998 letter in response to the AEC’s request that he disclose his donors to the AHPT. The above chain of events makes it clear that the AEC has never formed a view that Mr Abbott “misled” it. It also follows that there are no documents on the possession of the AEC that answer your request as currently formulated. Accordingly, unless your request is appropriately amended, it is my intention to refuse access to documents in accordance with your request.

I am notifying you that I wish to undertake a request consultation process in accordance with section 24AB of the FOI Act. I will be the contact person for that process. The consultation period is 14 days after you receive this notice. I note that this will expire during the period between Christmas and the New Year when the AEC closes its offices. In this circumstance it would be appropriate to extend the consultation period to expire on 11 January 2013. Please let me know whether you wish to seek this extension. It would be appropriate to use the consultation as an opportunity for you to provide such information concerning the documents requested as is reasonably necessary to enable the AEC to identify the documents.

I note that the consultation period operates to extend the time for complying with your request: see section 24A(8) of the FOI Act.

I attach to this letter a copy of the AEC’s notification about the outcome of its investigation of the Australians for Honest Politics Trust published on its website. I note that AEC records indicate that you were previously provided with a number of documents about this matter in relation to an earlier FOI request.

Is there any other information that I may provide you with to assist with the consultation?

I am also writing in response to your further request in relation to this matter, that the documents be provided free of charge. I note that you said in support of this request the following:

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

At this stage I am not persuaded that it is in the public interest to provide documents in relation to your request free of charge. I note that already you have been given extensive access to AEC documents in relation to the Australians for Honest Politics Trust under the FOI Act. The decision about charging for access will be finally determined when a decision is made about your request as an outcome of the consultation process. If charges are made, you will be then advised of your review rights.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Paul Pirani', with a stylized, cursive script.

Paul Pirani
Chief Legal Officer

17 December 2012

Australians for Honest Politics

Updated: 18 July 2012

This advice sets out the AEC's conclusion in relation to the matter described below:

Matter considered:

Whether the Australians for Honest Politics trust fund is an associated entity.

When matter raised:

In September 1998 and then again on 26 August 2003.

How matter raised:

Media reports

Legislative provisions:

Part XX of the *Commonwealth Electoral Act 1918*, sections 287 and 314AEA of the Act. S 287 of the Act defines an associated entity as "an entity that (a) is controlled by one or more registered political parties; or (b) operates wholly or to a significant extent for the benefit of one or more registered political parties". With respect to the demand powers for obtaining further information, the AEC must have reasonable grounds to believe both that an entity is or was an **associated entity** and that a person is capable of producing documents or other things, or of giving evidence relating to whether an entity is or was an **associated entity** in order to issue notices under s 316(3A) of the Act.

AEC process:

The AEC reviewed additional information obtained, material previously provided and media reports. The AEC also sought legal advice. Further, the AEC issued notices under s 316(3A) of the Act requiring that certain information relating to whether Australians for Honest Politics is or was an associated entity be provided to the AEC. Following a request to review the decision to issue one such notice, the Electoral Commission (as constituted under section 6 of the Act) met to consider the request. The Commission set aside the decision to issue the notice.

AEC conclusion:

The AEC has determined this issue based on all the information available to it. On the basis of that information and consistent with the trust deed, the AEC has now concluded that the Australians for Honest Politics trust fund did not meet the definition of associated entity under the Act. Thus, the AEC's decision in June 1999 – that the Australians for Honest Politics trust fund did not constitute an associated entity – was and remains correct.

Date: 15 July 2004

http://www.aec.gov.au/Parties_and_Representatives/compliance/AEC_Advice/honest-politics.htm

