



Special Broadcasting Service

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27 July 2017

Mr Dominic Paul

By email to: foi+request-3582-0d78b4e2@righttoknow.org.au

Dear Mr Paul

Statement of Reasons in respect of Freedom of Information request 2017-05

1. Pursuant to s23(1) of the *Freedom of Information Act 1982* (Cth) (Act) I am an officer of the Agency acting within the scope of authority exercisable by me in accordance with arrangements approved by the principal officer of the agency.
2. I am authorised to make a decision, on behalf of the Agency, in relation to the Request.

The Request

3. On 28 May 2017, the Applicant made the Request to the Agency in the following terms:

Dear Special Broadcasting Service Corporation,

Please provide emails or other correspondence relating to the fact that the Australian Marriage Equality Organisation website: <http://www.australianmarriageequality.org/open-letter-of-support/> [accessed 28/05/2017] currently displays the SBS logo as one of a number of "Corporations that support Marriage Equality".

The date range for the information request may be limited to the period from 1 May 2017.

Yours faithfully,

Dominic Paul

Timeframe for responding to the Request

4. Pursuant to s15(5) of the Act, but subject to any extension of time, the Agency has until the end of 27 June 2017, being 30 days from the date of the Request, to notify the Applicant of its decision.
5. The Applicant was advised on 27 June 2017 that SBS was required to consult with a third party, and as such s15(6) provides that the timeframe for making a decision is extended by 30 days (from Tuesday 27 June to Thursday 27 July 2017).

Documents identified

6. I have identified 9 documents which fall within the scope of the Request (Documents).

7. I have reviewed the Documents. Documents 1-8
 - (a) consist of emails sent internally within the Agency;
 - (b) contain opinions or recommendations;
 - (c) do not relate to operational information, as defined in s8A of the Act;
 - (d) do not relate to purely factual material; and
 - (e) are not documents of the type specified in s47C(3) of the Act.
8. Document 9 is an email 'File Note' of a phone conversation.

Decision

9. I have decided to refuse access to Documents 1-8 on the basis that the documents are exempt documents pursuant to s31B(b) of the Act.
10. In particular, and as explained below, each of the Documents is conditionally exempt under s47C of the Act, and granting access to Documents 1-8 would, on balance, be contrary to the public interest pursuant to s11A of the Act.
11. I have decided to grant access to Document 9.
12. In making my decision I have:
 - (a) considered the Act and the FOI Guidelines;
 - (b) proceeded on the basis that the Agency is an agency under the Act; and
 - (c) proceeded on the basis that the Documents are the documents of the Agency.

REASONS FOR DECISION – DOCUMENTS 1-8

Public interest conditional exemptions – deliberative processes

13. Pursuant to s47C(1) of the Act, a document is conditionally exempt if its disclosure 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 [...] an agency"*.
14. Section 47C of the Act refers to such matter as "**deliberative matter**".
15. Pursuant to s47(2) of the Act, deliberative matter does not include (**Exceptions**):
 - (a) operational information. Operational information is defined in s8A of the Act to mean
 - "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)";* or
 - (b) purely factual matters.

16. Pursuant to s47C(3) of the Act, the conditional exemption created by s47C of the Act does not apply to (Exclusions):
 - (a) reports of scientific or technical experts;
 - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency; or
 - (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.
17. If it is determined that the disclosure of a document would disclose deliberative matter, the document is conditionally exempt from disclosure under the Act.

Consideration of Documents

18. Based upon my review of the Documents, I have found as follows:
 - (a) None of the Documents are subject to the Exceptions or the Exclusions.
 - (b) Each of the Documents contain deliberative matter, because:
 - (i) the Documents contain opinions and recommendations of employees of the Agency; and
 - (ii) the opinions and recommendations were made as part of a deliberative process, including the exercise of judgment; and
 - (iii) the deliberative process included deliberating over the role, function or policy of the Agency.
19. On the basis of the matters set out above, I have decided that the disclosure of the Documents is conditionally exempt pursuant to s47C of the Act.

Public interest test

20. Pursuant to s11A(5) of the Act, access to conditionally exempt documents should be granted unless access would, on balance, be contrary to the public interest.
21. In determining whether access to the Documents would, on balance, be contrary to the public interest, the Agency is, pursuant to s11B of the Act:
 - (a) required to consider the factors favouring disclosure, as set out in s11B(3) of the Act. These are whether access to the Documents would:
 - (i) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (ii) inform debate on a matter of public importance;
 - (iii) promote effective oversight of public expenditure; and
 - (iv) allow a person to access his or her own personal information;
 - (b) not to consider any irrelevant factors as set out in s11B(4) of the Act, being that:

- (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; and
 - (iv) access to the document could result in confusion or unnecessary debate; and
- (c) pursuant to s11B(5) of the Act, in working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A [of the Act].

Consideration of reasons favouring disclosure

22. None of the criteria favouring disclosure, as specified in s11B(3) of the Act (and including the objectives specified in ss 3 and 3A of the Act, which I have considered), are satisfied.
23. In particular, in respect of promoting the objectives of the Act:
- (a) the Documents, being deliberative matter and not a final decision or position of the Agency, do not constitute the reason for a particular decision of the Agency; and
 - (b) the disclosure of the Documents, insofar as they are deliberative matter and not the reason for a particular decision, would not enhance the scrutiny of the Agency's decision making.
24. In particular, in respect of *informing debate on a matter of public importance*:
- (a) the Documents are in respect of a deliberative matter, not a final position or decision;
 - (b) the Documents would not assist in revealing or substantiating any misconduct on the part of the Agency or any employee of the Agency or anyone else; and
 - (c) the Documents are not relevant to the Agency's policies, expenditure or editorial decisions.
25. In particular, in respect of *promoting effective oversight of public expenditure*:
- (a) the Documents have no relevance to the expenditure of public funds by the Agency; and
 - (b) the creation of the Documents did not involve any expenditure by the Agency.

26. In particular, in respect of *allowing a person to access their own personal information*, none of the Documents contain any personal information of the Applicant.
27. I have accordingly decided that there are no factors favouring access to the Documents.

No consideration of irrelevant matters

28. I have not considered any irrelevant matters, including those contained in s11B(4) of the Act, in making my decision.

Consideration of the Guidelines

29. I have considered the FOI Guidelines in making my decision.
30. My consideration of the FOI Guidelines has included consideration of the public interest factors against disclosure, as identified at section 6.22 of the FOI Guidelines.
31. In respect of the matters identified at section 6.22 of the FOI Guidelines, the disclosure of the Documents could reasonably be expected, at least to some degree, to prejudice the management functions of the Agency if documents containing deliberative matter were disclosed, particularly in circumstances where there were no factors favouring disclosure. For instance, and whilst appreciating the importance of transparency in government, disclosure may impact upon the ability or willingness of employees of the Agency to participate in deliberation with confidence, or for officers and managers of the agency to engage in deliberation.

Conclusion on the public interest test

32. Based upon the above, I have decided that granting access to the Documents would, on balance, be contrary to the public interest. This is because, and without considering irrelevant factors:
 - (a) I have not been able to identify any factors favouring disclosure; and
 - (b) I have been able to identify a factor against disclosure.

Other matters – s22 of the Act

33. Section 47C of the Act creates a conditional exemption to an entire document. Section 31B of the Act makes a conditionally exempt document exempt from production if granting access to the document would, on balance, be contrary to the public interest pursuant to s11A(5) of the Act.
34. To the extent that it applies, s22 of the Act requires me to consider if it would be reasonably practical for edited copies of any of the Documents to be provided in response to the Request.
35. Based upon the nature of the Documents, I do not consider that it is possible or practicable to prepare and provide edited copies of the Documents.

DOCUMENT 9

Third Party Consultation

36. Third Party Consultation was carried out with Ms Emma Dawson, identified in Document 9. During the Consultation, Ms Dawson noted two inaccuracies in the Document.
- (a) Emma Dawson was not Minister Conroy's Chief of Staff. Ms Dawson was his Senior Policy Adviser with responsibility for broadcasting (among other responsibilities), which included SBS.
 - (b) The conversation between Ms Dawson and Mr Ebeid must have taken place prior to 23 December 2012, as Ms Dawson left the Minister's employ on 18 January 2013, and due to leave, Ms Dawson had not seen Minister Conroy since the week prior to Christmas 2012.

Review rights

37. Section 54 of the FOI Act gives you the right to apply for an internal review of the decision not to release documents in accordance with your request. Application for the review of a decision must be made in writing within 30 days of the receipt of this letter.
38. No particular form is required but it would assist the decision-maker if you would set out in the application the grounds on which you consider the decision should be reviewed. Applications for review should be emailed to foi@sbs.com.au and addressed to:

General Counsel
SBS
Locked Bag 028
Crows Nest NSW 1585

Review by the Information Commissioner

39. You may also apply to the Information Commissioner for review as follows:
- review of access refusal decision (s. 54L(2)(a));
 - a decision made by SBS on internal review of an access refusal decision (s. 54L(2)(b)); or
 - if you have made an application for an internal review of the decision and no decision is made within 30 days (ss. 54D; 54L(2)(b)).
40. Information about this review process is available from the Office of the Australian Information Commissioner – see www.oaic.gov.au for more information (Tel: 1300 363 992; Email: enquiries@oaic.gov.au).



Clare O'Neil

In my capacity as officer of Special Broadcasting Service Corporation and exercising authority exercisable by me in accordance with arrangements approved by the Principal Officer of Special Broadcasting Service Corporation being Michael Ebeid AM