



FOI17/142; 17/8681

3 October 2017

Mr Richard Smith

By email only: [foi+request-3751-b5da0031@righttoknow.org.au](mailto:foi+request-3751-b5da0031@righttoknow.org.au)

Mr Smith,

**Freedom of Information request – FOI17/142**

I, Marc Roberts, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests made to the Attorney-General's Department (the department).

On 28 August 2017, you requested documents relating to legal advice and court attendances at the Victorian Supreme Court for the Minister for Health, Minister for Human Services, and the Assistant Minister to the Treasurer. Specifically, you sought access to:

*'Accordingly, I hereby request the following Government Information documents which I consider to be of great public importance:*

- a) Documents detailing the cost of provision of legal services incurred representing the Health Minister in preparation for, and during the hearing before the Victorian Supreme Court on Friday 16 June 2017, (including all Solicitor-General communications, letters, phonecalls, fees, transport including commonwealth car or hire cars, meals etc);*
- b) Documents detailing the cost of provision of legal services incurred representing the Human Services Minister in preparation for, and during the hearing before the Victorian Supreme Court on Friday 16 June 2017, (including all Solicitor-General communications, letters, phonecalls, fees, transport including commonwealth car or hire cars, meals etc);*
- c) Documents detailing the cost of provision of legal services incurred representing the Assistant Minister to the Treasurer in preparation for, and during the hearing before the Victorian Supreme Court on Friday 16 June 2017, (including all Solicitor-General communications, letters, phonecalls, fees, transport including commonwealth car or hire cars, meals etc);*
- d) Documents detailing the cost incurred by the Commonwealth for provision of legal services representing the Health Minister immediately following the first appearance on 16 June 2017 in preparation for, and during the hearing before the Victorian Supreme Court on Friday 23 June 2017, (including all Solicitor-General*

*communications, letters, phonecalls, fees, transport including commonwealth car or hire cars, meals etc);*

*e) Documents detailing the cost incurred by the Commonwealth for provision of legal services representing the Human Services Minister immediately following the first appearance on 16 June 2017 in preparation for, and during the hearing before the Victorian Supreme Court on Friday 23 June 2017, (including all Solicitor-General communications, letters, phonecalls, fees, transport including commonwealth car or hire cars, meals etc); and*

*f) Documents detailing the cost incurred by the Commonwealth for provision of legal services representing the Assistant Minister to the Treasurer immediately following the first appearance on 16 June 2017 in preparation for, and during the hearing before the Victorian Supreme Court on Friday 23 June 2017, (including all Solicitor-General communications, letters, phonecalls, fees, transport including commonwealth car or hire cars, meals etc);'*

I have identified that the department holds three documents that fall within the scope of your request. I did this by arranging for a comprehensive search of the department's electronic document management system and making inquiries of staff likely to be able to identify relevant documents. I am able to advise that all three documents came into the department's possession for the purpose of processing payments of legal assistance under the *Parliamentary Entitlements Regulations (1997) (the 'PE Regulations')*.

Under section 7(2) of the FOI Act, the department, which includes the Australian Government Solicitor (AGS), is exempt from the operation of the Act in relation to a document held by the department that is in respect of AGS activities. Section 7(2) relevantly provides that the departments specified in Part II of Schedule 2 'are exempt from the operation' of the Act 'in relation to documents referred to in... [Schedule 2] in relation to them.' Part II of Schedule 2 of the FOI Act relevantly specifies the department 'in relation to' 'documents in respect of activities undertaken by [AGS].'

The documents that I have identified as being captured by the scope of your request do not include documents held by AGS, which I consider to be documents in respect of AGS activities.

### **Material taken into account**

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

- the class of documents that the department holds that fall within the scope of the request
- the FOI Act (specifically section 42, section 47E, and section 47F), and
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

I have decided to refuse access in full to the three documents held by the department which fall within the scope of your request.

### **Exemption – legal professional privilege (section 42)**

Subsection 42(1) of the FOI Act relevantly states:

*(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.*

The documents captured by the scope of your request contain material that is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege. That is, the material removed under this provision comprises of material that was prepared for use in connection with actual or anticipated litigation. I am satisfied that if the exempted material was disclosed, this could reasonably be expected to result in an unintended waiver of legal professional privilege. The material summarises privileged communications and was produced for the dominant purpose of obtaining and/or providing legal advice.

#### **Public interest conditional exemption – operations of agencies (section 47E)**

Section 47E of the FOI Act relevantly provides:

*A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:*

*(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

I am satisfied that the material I have identified as potentially falling within the scope of your request are documents that fall within the conditional exemption for operations of agencies.

Disclosure of the exempted material would adversely affect the operations of the department. That is, the disclosure of matter exempted under section 47E could reasonably be expected to have a detrimental effect on the department's 'proper and efficient' operations or its ability to undertake its expected activities in an expected manner.

The documents at hand were provided to the department for a clear and specific purpose, that is, to allow the department to fulfil its role in administering the PE Regulations. I am satisfied that disclosure of the documents outside of this purpose would cause administrative inefficiencies for the department in future administration of the PE Regulations.

Under the FOI Act, access to a document covered by a conditional exemption must generally be given unless doing so would be contrary to the public interest. My weighing of the public interest factors is at page four.

#### **Public interest conditional exemption – personal privacy (section 47F)**

Subsection 47F(1) of the FOI Act relevantly provides that:

*A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

Section 4 of the FOI Act provides that ‘personal information’ has the same meaning as in the *Privacy Act 1988* (Privacy Act). Section 6 of the Privacy Act provides that:

*personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

- (a) whether the information or opinion is true or not; and*
- (b) whether the information or opinion is recorded in a material form or not.*

Subsection 47F(2) of the FOI Act relevantly provides:

*In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:*

- (c) the extent to which the information is well known;*
- (d) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*
- (e) the availability of the information from publicly accessible sources;*
- (f) any other matters that the agency or Minister considers relevant.*

The documents falling within the scope of the request contain personal information about third parties that is not publicly accessible. I am satisfied that disclosure of this personal information would be unreasonable and the material is therefore conditionally exempt under section 47F of the FOI Act.

Under the FOI Act, access to a document covered by a conditional exemption must generally be given unless doing so would be contrary to the public interest. My weighing of the public interest factors follows.

### ***Public interest considerations***

Under the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest to do so. My weighing of the public interest factors follows.

I consider that any disclosure of the aforementioned exempted material would, on balance, be contrary to the public interest. I have found that the benefit to the public resulting from disclosure of the documents is outweighed by the benefit to the public of withholding the document.

### **Factors favouring disclosure**

Section 11B of the FOI Act lists the public interest factors favouring access. Of these factors, I consider two are relevant to your request:

- *Inform the community of the Government’s operations* (subclause 6.25(a)(i) of the FOI Guidelines); and

- *Promote effective oversight of public expenditure* (subclause 6.25(c) of the FOI Guidelines).

#### Factors against disclosure

- *Could reasonably be expected to prejudice the protection of an individual's right to privacy* (subclause 6.29(a) of the FOI Guidelines);
- *Could reasonably be expected to harm the interests of an individual or group of individuals* (subclause 6.29(k) of the FOI Guidelines);
- *Could reasonably be expected to prejudice an agency's ability to obtain confidential information* (subclause 6.29(d) of the FOI Guidelines); and
- *Could reasonably be expected to prejudice an agency's ability to obtain similar information in the future* (subclause 6.29(i) of the FOI Guidelines).

On balance, I consider that the factors against access outweigh the factors favouring access and that access to the relevant information in the documents would be contrary to the public interest.

#### **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.

#### **Internal review**

Under section 54 of the FOI Act, you may apply in writing to the department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, and be lodged in one of the following ways:

Email: [foi@ag.gov.au](mailto:foi@ag.gov.au)

Post: Freedom of Information and Parliamentary Section  
Strategy and Delivery Division  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Where possible please attach reasons why you believe review of this decision is necessary. The internal review will be carried out by another officer within 30 days.

### **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.business.gov.au/aba/oaic/foi-review/>  
Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
Post: GPO Box 5218, SYDNEY NSW 2001  
In person: Level 3, 175 Pitt Street, SYDNEY NSW 2000

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

### **Questions about this decision**

If you wish to discuss this decision, please contact Courtney, FOI case manager, by telephone on (02) 6141 6666 or by email [foi@ag.gov.au](mailto:foi@ag.gov.au).

Yours sincerely



Marc Roberts  
A/g Assistant Secretary