

ATTACHMENT A

From: Richard Smith [mailto:foi+request-3751-b5da0031@righttoknow.org.au]

Sent: Friday, 28 July 2017 4:57 PM

To: FOI Requests

Subject: TRIM: Freedom of Information request - Documents relating to legal advice and court attendance for the Commonwealth Ministers of Health, Human Services and Assistant to the Treasurer summoned before the Victorian Supreme Court

Dear Attorney-General's Department,

In June 2017, three Commonwealth Government Ministers, namely the Health Minister, Human Services Minister and Assistant Minister to the Treasurer were called to appear in two separate hearings before the Victorian Supreme Court to answer a possible criminal charge of Contempt of Court for reported comments that the Ministers had previously confirmed on the public record that they had made.

At the second hearing, one of the judges said "It should not have come to this, namely two court hearings...

But for the apologies and retractions we would have referred ... the ministers ... for prosecution for Contempt of Court."

As three Ministers were unable to attend the hearings personally, being immune from appearing as per the Parliamentary Privileges Act, the Commonwealth Solicitor-General appeared on their behalf.

The personal comments of these Ministers, and their initial refusal to apologise to the court has led to the taxpayer incurring legal costs to prepare for and appear at these two hearings.

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);

If this can be answered as informal request, please do so.

Otherwise, please proceed with this as a formal request under the Freedom of Information principles & framework, i.e. the Freedom of Information Act 1982 & other associated guidelines and regulations. .

Yours faithfully,

Richard Smith

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Please use this email address for all replies to this request:  
[foi+request-3751-b5da0031@righttoknow.org.au](mailto:foi+request-3751-b5da0031@righttoknow.org.au)

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Australian Government  
Attorney-General's Department

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)**

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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).*

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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

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- *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.

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### 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

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FOI17/142; 17/8681

ATTACHMENT C

From: Richard Smith [mailto:foi+request-3751-b5da0031@righttoknow.org.au]

Sent: Thursday, 12 October 2017 6:22 PM

To: FOI Requests

Subject: TRIM: Internal review of Freedom of Information request - Documents relating to legal advice and court attendance for the Commonwealth Ministers of Health, Human Services and Assistant to the Treasurer summoned before the Victorian Supreme Court

Dear Attorney-General's Department,

RE: FOI 17/142

Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request an internal review of Attorney-General's Department's handling of my FOI request 'Documents relating to legal advice and court attendance for the Commonwealth Ministers of Health, Human Services and Assistant to the Treasurer summoned before the Victorian Supreme Court'.

I have considered your letter of the 3 October refusing to release the three documents you have identified as falling within the scope of my request for Government Information.

I believe the Department has made an error in assessing my request for Government Information and I request an internal review to consider my request.

Below I provide an analysis of the points made by the Department in their response of 3 October to assist the Internal Reviewer.

Exemption - Legal Professional Privilege

I recognise that the concept of legal professional privilege is important to our legal system and to the proper and fair administration of justice.

However the Act does allow an agency the discretion to be able to create new documents containing a summary of information from information held by the agency, i.e. as per s17(1)(c) of the Act.

As my request is primarily aimed at the release of the cost to the taxpayer of the legal advice and representation, then this numerical data could be extracted and summarised for release without affecting legal professional privilege.

Indeed the information regarding the quantum of costs that I am seeking in my FOI request is no different to the information that would be provided to a court as the result in any legal proceedings where legal costs are awarded to one of the parties. This is able to be commonly undertaken in legal cases without impacting Legal Professional Privilege.

Therefore in this case, I do not believe that the Legal Professional Privilege exemption has been properly considered. I also believe that it is being improperly advanced as a valid reason to prevent the release of the cost of legal advice and representation of these three Ministers of the Crown.

## Public interest conditional exemption – personal privacy

In page 4 of your letter of 3 October, the Department has relied on the fact that the monetary amount of the claims for reimbursement for legal advice and representation is not publically known to contend that the release of this information would be an unreasonable disclosure of private information.

The subject of my request was for the details of the cost of legal advice and representation, not any other personal details of the three Ministers of the Crown.

As any other personal information could be redacted, the release of the costs would not be an unreasonable release of personal information.

### The four "Public Interest" factors against disclosure

I now turn to the four "Public Interest" factors that the Department has identified and relied on in refusing disclosure.

These are:

1. Could reasonably be expected to prejudice the protection of an individuals rights to privacy (6.29(a) of the FOI guidelines)
2. Could reasonably be expected to harm the interests of an individual or a group of individuals (6.29(k) of the FOI guidelines)
3. Could reasonably be expected to prejudice an agency's ability to obtain confidential information (6.29(d) of the FOI guidelines)
4. Could reasonably be expected to prejudice an agency's ability to obtain similar information in the future (6.29(i) of the FOI guidelines)

I detail below why I require a review of the Department's consideration and assessment of each of these factors.

1. Could reasonably be expected to prejudice the protection of an individuals rights to privacy (6.29(a) of the FOI guidelines)

Considering that the three individuals subject to this FOI request are Ministers of the Crown, the normal requirement for the right to privacy would not apply. This is particularly the case in the circumstances of the court case, as it resulted from the three Ministers of the Crown making public statements.

The referenced subsection 6.29(a) of the FOI guidelines also, while not being exhaustive, list three examples protection of the individual's right to privacy. These are, a minor child, someone who is deceased and any information of a public servant which would "reveal information about their private disposition or personal life". Clearly that is not the case here.

I therefore do not consider that there is any merit in the view that disclosing how much it cost taxpayers to provide legal advice & representation to these three Ministers of the Crown could be reasonably be expected to prejudice the protection of these particular individuals rights to privacy.

2. Could reasonably be expected to harm the interests of an individual or a group of individuals (6.29(k) of the FOI guidelines)

In this case, disclosing the legal bills of these three Ministers of the Crown will not materially harm their interests, aside possibly from their political interests as the result of public opinion.

However disclosure relating to the political interests of these three elected Members of Parliament directly relates to one of the aims of the Act, namely "to promote Australia's representative democracy by increasing scrutiny, discussion, comment and review of government activities".

In your letter of 3 October, you have not provided any evidence of how these Ministers of the Crown's interests will be harmed.

I therefore do not consider that there is any merit in the view that disclosing how much it cost taxpayers to provide legal advice & representation to these three Ministers of the Crown could be reasonably be expected to harm the interests of these particular individuals.

3. Could reasonably be expected to prejudice an agency's ability to obtain confidential information (6.29(d) of the FOI guidelines)

In your letter of 3 October, you have not provided any evidence of how the Department's ability to obtain confidential information in the future would be harmed by the release of the monetary amount of these particular claims.

The disclosure of the Commonwealth's reimbursement of claims by members of parliament as per their Parliamentary Entitlements is by its nature a matter of public interest. The number of and value of these claims should be on the public record. If the documentation submitted to substantiate the claim does provide some confidential information (for example medical or personal information) then the Department should be able to manage this through redaction of the confidential information and by partial release to allow the public to have oversight that that Department is discharging its duties appropriately.

I therefore do not consider that there is any merit in the view that disclosing how much it cost taxpayers to provide legal advice & representation to these three Ministers of the Crown could be reasonably be expected to prejudice an agency's ability to obtain confidential information.

4. Could reasonably be expected to prejudice an agency's ability to obtain similar information in the future (6.29(l) of the FOI guidelines)

I find it hard to believe that the Department's administration of reimbursements as part of parliamentary entitlements is likely to be impacted by the disclosure of the monetary value of these three claims.

Indeed, previous publicity & public comment on members of parliament accessing allowances and other entitlements for travel, helicopters and accommodation has not adversely impacted the Commonwealth's ability to administer the payment & reimbursement of Parliamentary Entitlements.

In your letter of 3 October, you have not provided any evidence of how the Department's ability to obtain invoices, receipts and dockets in the future would be harmed by the release of the monetary amount of these particular claims.

I therefore do not consider that there is any merit in the view that disclosing how much it cost taxpayers to provide legal advice & representation to these three Ministers of the Crown could be reasonably be expected to harm the interests of these particular individuals.

In summary, I do not find any merit in the four points against public disclosure of the costs of legal advice and representation provided to the three Ministers of the Crown that where the subject of my request for Government Information. I contend that the Department's incorrect reliance on these four points as per my reasons above has caused it to err in assessing my request for the release of Government Information.

Right to Information

Finally, I contend that the Department, in refusing to release the identified documents is acting contrary to the spirit & aim of the Act, namely s3

Section 3 of the Act states:

"The Parliament also intends 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."

In refusing to release details of the cost to taxpayers of provision of legal advice and representation, the Department is not discharging its legislated duty to "facilitate and promote public access to information, promptly and at the lowest reasonable cost".

To assist the Internal Reviewer, a full history of my FOI request and all correspondence is available on the Internet at this address: [https://www.righttoknow.org.au/request/documents\\_relating\\_to\\_legal\\_advi](https://www.righttoknow.org.au/request/documents_relating_to_legal_advi)

I look forward to hearing from the Department regarding my request for an Internal Review of the handling of my request for Government Information of 28 August 2017.

Yours faithfully,

Richard Smith

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

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