



Our reference: FOI 090913

Mr Marcus Priest

By email: foi+request-389-57b22a60@righttoknow.org.au

Dear Mr Priest

Freedom of Information - Access decision letter

I refer to your request dated 19 September 2013 to the Department of Environment (the **Department**), in which you seek access under the *Freedom of Information Act 1982* (Cth) (the **FOI Act**) to a copy of the incoming government briefs (**IGBs**) prepared by the Department for the 2013 Federal election.

Authority

I am authorised by the Secretary of the Department under section 23 of the FOI Act to make a decision in relation to this request.

Materials relevant to making of the decision

In making this decision, I have referred to the following materials and advice:

- your FOI request;
- the IGBs;
- advice provided by Department officers;
- submissions made by relevant third parties;
- the relevant provisions of the FOI Act;
- guidelines issued by the Australian Information Commissioner (**AIC**) under section 93A of the FOI Act (**FOI guidelines**); and
- the AIC's decision in *Crowe and Department of the Treasury* [2013] AICmr 69.

Background

The Department has identified 3 documents as relevant and falling within the scope of your request.

Those documents are the brief prepared for the Coalition (**Volume 1 of the blue book**) and the draft brief prepared for the Labor Party (**Volume 1 of the red book**). In addition, there is administrative brief which is attached to both the blue and red book (**Volume 2 of the IGB**). The administrative is the same document for both the blue book and the red book.

The 'blue book' is a high level briefing provided to the Department's new Minister in the event that a newly elected (Coalition) government is formed following the federal election. The 'red book' is the brief prepared for a Minister in the event that a (Labor) government is returned. Collectively, the blue book and the red book together with the administrative brief are referred to as the IGBs.

The blue book and red book contain material specific to the election commitments of the party for which the brief is written. The briefs also identify the Department's view on policy priorities and challenges facing each policy area. The purpose of the blue book and red book are to enable and facilitate a smooth transition from one government to another following a general election. An incoming government places strong reliance on receiving a helpful and candid brief to assist in the transition to new government.

Reasons for the findings and decision

After considering your FOI request and relevant documentation, I have decided to:

- refuse access to Volume 1 of the blue and red books under the following exemptions contained within the FOI Act:
 - section 47C(1) (deliberative processes involved in the functions of the Department/ Minister); and
 - section 47E(d) (disclosure would have a substantial adverse affect on the proper and efficient conduct of the operations of the Department).
- provide partial access to Volume 2 of both the blue and red books (the administrative brief) subject to an exemption for personal privacy under s 47F of the FOI Act.

The detailed reasons for my decision are set out below.

A schedule of documents relevant to the FOI request is attached (**Attachment A**). The schedule outlines the three documents held by the Department that are relevant to your request and specifies whether the documents are able to be released or not. Where relevant, the schedule outlines the section of the FOI Act under which an exemption has been claimed for the documents.

Decision and reasons for decision – The blue book and red book

Section 47C – Deliberative Process

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

(1) A document is conditionally exempt if its disclosure under the Act would disclose matter (deliberative 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, deliberative processes involved in the functions of:

(a) an agency....

Volume 1 of the blue and red books contains deliberative matter which comprises opinions, advice and recommendations on a full range of issues which fall within the Department's portfolio. In particular, the blue book contain advice and opinions provided to the incoming government of the responsibilities within the portfolio, recommendations for implementing emerging policy issues and advice relating to the election commitments of the new government. Similarly, the red book contains detailed information and advice on policy issues affecting the Department and relevant election commitments provided by the Labor Party.

In *Crowe and Department of the Treasury* [2013] AICmr 69 (**Crowe's case**) the AIC has noted that briefs, generally, are 'created in preparation for a specific deliberative process within the Australian system of responsible parliamentary government'.¹ This statement makes clear the deliberative nature of briefs.

I note that deliberative matter does not include operational information or purely factual material. I acknowledge that parts of the blue book and red book may contain some factual material. However, I consider that it is not possible to separate the factual material from the deliberative material. In *Crowe's case*, the AIC noted that if factual material and deliberative material cannot be separated, then that material should not be classified as 'purely factual material'.² I am satisfied that the materials contained within Volume 1 of the blue and red books are not purely factual.

Public Interest Test

Section 47C of the FOI Act is a conditional exemption. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest. Disclosure of conditionally exempt documents is required unless in the particular circumstances, and at the time of the decision, there is on balance countervailing harm which offsets the inherent public interest of giving access.

I have considered the public interest factors favouring the disclosure of the Volume 1 of the blue and red books namely:

¹ [2013] AICmr69 per Professor John McMillian at [79].

² [2013] AICmr69 per Professor John McMillian at [83].

- promoting the objects of the FOI Act;
- providing the community with access to government information;
- informing the community of government policies and issues within the portfolio;
- informing debate on matters of public importance;
- promoting effective oversight of public expenditure; and
- revealing reasons for government deliberations and decision making.

However, I consider that those interests are outweighed by public interest factors against disclosure, namely that disclosure would:

- prejudice the ability of the Department to provide an incoming Minister with frank and fearless advice on the policy priorities and challenges that face an incoming government; and
- compromise the new Minister's ability to quickly develop an understanding of the Department's operations and sensitivities.

Volume 1 of the blue book contains confidential advice for the Minister about implementing the policy agenda of the incoming government. Similarly, Volume 1 of the red book contains material specific to the election commitments of the Labor Party and provides confidential advice on the policy priorities and challenges relevant to the Labor Party.

Volume 1 of the blue and red books is prepared on the basis that they will be confidential to the government which is formed. If the briefs were not confidential they may include only bland information which is not comprehensive. This could compromise the quality and value of the briefs which may then be of limited value to a new government. The briefs were prepared in the expectation that they should not be publicly released irrespective of which party were ultimately to form government.

For the above reasons, I have decided that disclosure of the blue book and red book would, on balance, be contrary to the public interest. I have, therefore, decided to exempt the briefs in full under s 47C of the FOI Act.

Section 47E – Operations of an agency

Paragraph 47E(d) 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 the agency.

I have decided that disclosure of the Volume 1 of the blue and red books would, or could reasonably be expected to, prejudice or have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.

The briefs provide candid advice on the policy priorities and challenges facing a new Coalition government (contained in Volume 1 of the blue book) and a Labor government (contained in Volume 1 of the red book), and they are prepared on the basis that their content will remain confidential. If the content of the briefs were to be made public, future briefs would be less candid and comprehensive and therefore, less useful in providing advice to a current or incoming government. Accordingly, providing a less candid and comprehensive brief would impact upon the effectiveness of the relationship between the Department and the Minister.

Public Interest Test

Section 47E of the FOI Act is a conditional exemption. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

I have considered the public interest factors favouring the disclosure of the blue book and red book namely:

- promoting the objects of the FOI Act;
- informing debate on a matter of public importance;
- informing the community of government policies and issues within the portfolio;
- promoting effective oversight of public expenditure; and
- revealing reasons for government decision making.

However, I consider that those factors are outweighed by public interest factors against disclosure, namely that disclosure would:

- prejudice the Department's frank and honest advice on policy priorities and challenges facing the new government;
- compromise the quality and value of the brief to the Minister;
- not be conducive to establishing a productive working relationship with the Minister; and
- compromise the Department's role in managing the transition of government.

For the above reasons, I have decided to exempt the blue book and red book under section 47E(d) of the FOI Act.

Other exemptions relating to the IGBs

I have decided to exempt Volume 1 of the blue and red books under sections 47C and 47E(d) of the FOI Act. However, parts of the briefs may also be exempt under other exemptions in the FOI Act. Those other exemptions are:

- section 34 (Cabinet material);
- section 47B (damage to relations between the Commonwealth and State);
- section 47F (unreasonable disclosure of personal information);
- section 47G (material the release of which would adversely affect the business affairs of an organisation); and
- section 42 (material subject to legal professional privilege).

If a decision was made on each of the above mentioned exemptions, I am of the view that a practical refusal reason within the meaning of section 24AA of the FOI Act would exist. There is a substantial amount of confidential material within the blue book and red book and the time involved in processing the request within the Department and consulting with third parties would result in a substantial and unreasonable diversion of the resources of the Department.

Decision and reasons for decision – Administrative brief

The administrative brief is Volume 2 of the IGB and contains information of an administrative nature relating to the Department. It forms part of both the blue book and red book.

Section 47F – Personal information

Section 47F of the FOI Act relevantly provides:

- (1) *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).*
- (2) *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:*
 - (a) *the extent to which the information is well known;*
 - (b) *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;*
 - (c) *the availability of the information from publicly accessible sources;*
 - (d) *any other matters that the agency or Minister considers relevant.*

Section 47F of the FOI Act is a conditional exemption. Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

The administrative brief contains personal information being the mobile phone numbers of Senior Executive Service (SES) staff members of the Department. I have decided that it would be unreasonable to disclose the mobile phone numbers of SES staff that appear in the Administrative brief.

In making this decision I have considered the following factors:

- that the information is not well known;
- that the individuals identified in the documents are not widely known to have been involved in the matters dealt with in the documents; and
- that the information is not readily accessible from publicly available sources.

Public Interest Test

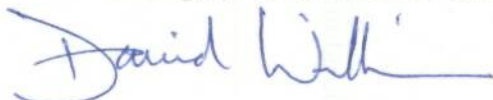
To disclose the mobile telephone numbers of SES staff would in my view be contrary to the public interest. While I acknowledge factors favouring disclosure on public interest grounds (namely open disclosure of information), I consider that those interests are outweighed by public interest factors against disclosure, namely that disclosure would prejudice the protection of the privacy of the SES staff within the Department. It would be inappropriate for the Department not to respect the privacy of SES staff members in the administrative brief that falls within the scope of the application.

For the above reasons, I have decided to partially exempt the administrative brief under section 47F of the FOI Act.

Conclusion

I have decided to:

- exempt Volume 1 of the blue and red books in full pursuant to exemptions under sections 47C and 47E(d) of the FOI Act; and
- release Volume 2 of the IGB (the administrative brief) in part pursuant to an exemption under section 47F of the FOI Act .



David Williams

Assistant Secretary
Governance and Legal Branch

13 November 2013

Attachment A

Doc. No.	Description of document	Decision	Exemptions
1	IGB (volume 1) (the blue book)	Exempt	<ul style="list-style-type: none"> • Section 47C(1) (deliberative processes involved in the functions of the Department/Minister); and • Section 47E(d) (disclosure would have a substantial adverse affect on the proper and efficient conduct of the operations of the Department).
2	IGB (volume 1) (the red book)	Exempt	<ul style="list-style-type: none"> • Section 47C(1) (deliberative processes involved in the functions of the Department/Minister); and • Section 47E(d) (disclosure would have a substantial adverse affect on the proper and efficient conduct of the operations of the Department).
3	IGB (volume 2) (the administrative brief)	Partially exempt	<ul style="list-style-type: none"> • Section 47F (unreasonable disclose of personal information).

Internal Review

If you wish to seek an internal review, you must apply to the Department within 30 days after the day you are notified of this decision.

An application for internal review of the decision made must be made in writing. No particular form is required but it is helpful if you set out in the application the grounds on which you consider that the decision should be reviewed. Your application for an internal review should be sent to:

By post

FOI Contact Officer
Legal Section
Department of the Environment
GPO Box 787
Canberra ACT 2601

By email

Email: foi@environment.gov.au

Review by the Australian Information Commissioner

Alternatively, you may seek a review of my decision by the Australian Information Commissioner (AIC).

The option to seek an internal review (see above) does not prevent you from seeking a review by the AIC at a later stage – this is because the AIC can also review an internal review.

If you wish to seek a review of my decision by the AIC you must apply within 60 days after the day on which notice of this decision was given to you or after the day on which notice of the internal review decision was given.

Your application must be in writing and must provide details of how notices may be sent to you and include a copy of this decision letter. The AIC also suggests that your application sets out why you are objecting to the decision. Your application can be lodged in one of the following ways:

Online: www.oaic.gov.au

Post: GPO Box 2999, Canberra ACT 2601

Fax: +61 2 9284 9666

Email: enquiries@oaic.gov.au

In person: Level 3, 25 National Circuit Forrester, ACT, or at
Level 8, Piccadilly Tower, 133 Castlereagh Street, Sydney, NSW

Complaints

You may also make a complaint to the AIC if you have concerns about how the Department has handled this part (or any part) of your request under the FOI Act.

Applicants who wish to make a complaint to the Ombudsman will find information on the Ombudsman's website at <http://www.ombudsman.gov.au/>.

