



9 April 2018
FOI ref: 2187

Chris Gentle
By email: foi+request-4026-ed7f60e5@righttoknow.org.au

Freedom of Information Request – Decision

Dear Mr Gentle,

I refer to your request dated 15 August 2017 and received by the Department of the Treasury (the department) following a partial transfer from the Australian Bureau of Statistics on 30 August 2017, for access under the *Freedom of Information Act 1982* (the Act) to the following:

Correspondence, advice and ministerial communication related of the Treasurer's direction to the ABS (2) with regard to its definition of "elector" for the Marriage Law Postal Survey.

Decision

The department identified 24 documents that fall within the scope of your request. I have decided to exempt 21 documents in full, to grant access to two documents in part, and release three documents in full.

I am an authorised decision maker under section 23 of the Act.

Material Considered

The material to which I have had regard in making this decision includes:

- your request;
- the relevant provisions of the Act;
- guidelines issued by the Australian Information Commissioner; and
- the documents within the scope of your request.

Reasons for the Decision

The reason for my decision to refuse access to some documents is that they are exempt from disclosure under sections 34(3), 42 and 47C of the Act. Further details are set out below.

Section 34(3) – Cabinet documents

Section 34(3) provides that a document is exempt to the extent that it contains information the disclosure of which would reveal a Cabinet decision or deliberation, unless the existence of the deliberation or decision has been officially disclosed.

Section 42 – Legal professional privilege

Section 42 provides that a document is exempt if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege. A document will be privileged in legal proceedings if the main purpose of its creation was the giving or receiving of legal advice or for use in actual or anticipated litigation and privilege has not been waived. The privilege is for the client (in this case the department) to either assert or waive.

The following criteria need to be met for a document to be privileged in legal proceedings:

- there must be a legal adviser-client relationship;
- the communication must have been for the dominant purpose of giving or receiving legal advice or for use in actual or anticipated litigation;
- the advice given must be independent;
- the advice must be confidential in nature;
- privilege must not have been waived by the client, either expressly or implied.

I am satisfied that a number of documents subject to your request meet the above criteria, and are therefore exempt under section 42 of the Act.

Section 47C – Deliberative processes

Section 47C of the Act provides that a document is conditionally exempt if its disclosure would disclose deliberative material in the nature of opinions, advice or recommendations obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes of an agency or a Minister.

The documents you have requested contain 'deliberative material' for the purposes of section 47C. That is, recommendations and opinions in relation to the agency preparation of Government advice. A number of the documents are draft proposals and related opinion that differ from the final documents and therefore not comprised of purely factual material. Accordingly, that material is conditionally exempt under section 47C.

The main factors against disclosure are the fact that disclosure of the material could prejudice the advisory processes carried out within government, damage and interfere with the continuing consultations and deliberations involved with future matters and reveal confidential Cabinet deliberations.

I have decided that parts of the documents which are listed as exempt in accordance with this provision meet the criteria for conditional exemption. Where a document is assessed as conditionally exempt, access must be given subject to the public interest test in accordance with section 11A(5).

Public Interest

Section 11A(5) provides that an agency must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document would, on balance, be contrary to the public interest.

In order to assess whether release of the exempt material would be contrary to the public interest, I considered the following factors which favour disclosure:

- (a) disclosure would promote the objects of the FOI Act;
- (b) disclosure would inform debate on a matter of public importance;
- (c) disclosure would promote effective oversight of public expenditure; and

- (d) disclosure would allow a person to access his or her personal information.

I agree that disclosure would promote the objects of the FOI Act, may inform debate on a matter of public importance and may promote effective oversight of public expenditure. The documents do not relate to the applicant, and as such, disclosure would not allow the applicant access to their personal information.

I also considered the following factors which do not favour disclosure:

- (a) disclosure 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, the deliberative processes involved in the functions of an agency, a Minister or the Government of the Commonwealth; and
- (b) disclosure would reasonably be expected to impair the confidentiality of Cabinet processes and inhibit the full canvassing of issues in the development of Cabinet material.

As set out in section 11B(4) of the FOI Act, the following factors must not be taken into account in deciding whether access to the document would on balance, be contrary to the public interest:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss in confidence in the Commonwealth Government;
- (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
- (b) access to the document could result in any person misinterpreting or misunderstanding the document;
- (c) the author of the documents was (or is) of high seniority in the agency to which the request for access to the document was made; or
- (d) access to the document could result in confusion or unnecessary debate.

I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.

On balance, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure. I am satisfied that the public interest is to withhold the exempt material.

Irrelevant Material (Section 22)

I have also deleted material outside the scope of your request from the documents, under section 22 of the Act. This material consists of the names and contact details of Treasury employees below the Senior Executive Service.

Right of Review

A statement setting out your rights of review in this matter is attached.

Yours sincerely



Chris Leggett
Principal Adviser
Law Design Office

INFORMATION ON RIGHTS OF REVIEW

1. APPLICATION FOR INTERNAL REVIEW OF DECISION

Section 54 of the Freedom of Information Act gives you the right to apply for an internal review of the decision refusing to grant access to documents in accordance with your request.

Application for a review of the decision must be made in writing within 30 days of receipt of this letter.

No particular form is required but it would assist the decision-maker if you could set out in the application the grounds on which you consider that the decision should be reviewed.

Application for a review of the decision should be addressed to FOI@treasury.gov.au

OR

2. APPLICATION TO AUSTRALIAN INFORMATION COMMISSIONER (INFORMATION COMMISSIONER) FOR REVIEW OF DECISION

Section 54L of the Act gives you the right to seek a review of the decision from the Information Commissioner. An application for review must be made within 60 days of receiving the decision.

Applications for review must be in writing and must:

- give details of how notices must be sent to you; and
- include a copy of the notice of decision.

You should send your application for review to:

The Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

AND/OR

3. COMPLAINTS TO THE INFORMATION COMMISSIONER

Section 70 of the Act provides that a person may complain to the Information Commissioner about action taken by an agency in the exercise of powers or the performance of functions under the Act.

A complaint to the Information Commissioner must be in writing and identify the agency the complaint is about. It should be directed to the following address:

The Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

The Information Commissioner may decline to investigate the complaint in a number of circumstances, including that you did not exercise your right to ask the agency, the Information Commissioner, a court or tribunal to review the decision.