



8 November 2013

File: ER2013/03920  
FOI ref: 1411

MJ

Email: [foi+request-403-a2153083@righttoknow.org.au](mailto:foi+request-403-a2153083@righttoknow.org.au)

Dear MJ

### **FREEDOM OF INFORMATION REQUEST**

I refer to your request to access to documents under the *Freedom of Information Act 1982* (the Act) received by the Treasurer on 15 October 2013. The Treasury accepted transfer of this request on 28 October 2013, which sought in particular:

*"pages 22-23 of your incoming government brief".*

I am an authorised decision maker under section 23 of the Act and the following is my decision in relation to your request.

#### **Materials Relevant to Making of Decision**

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

- the terms of your FOI request;
- advice provided by Treasury officers;
- the relevant provisions of the Act;
- guidelines issued by the Australian Information Commissioner under section 93A of the Act ('FOI guidelines') and other Office of the Australian Information Commissioner (OAIC) guidance material;
- decisions of the Australian Information Commissioner, in particular *Crowe and Department of the Treasury* [2013] AICmr 69 (29 August 2013) and *Cornerstone Legal Pty Ltd and Australian Securities and Investment Commission* [2013] AICmr 71 (10 September 2013);
- the 'Review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010*' by Dr Allan Hawke AC dated 1 July 2013; and
- the documents relevant to your request.

## Decision

As your request was originally directed to the Treasurer, we have interpreted your request as seeking pages 22 and 23 of the incoming government brief provided to the Treasurer, known as the 'Blue book'.

I have decided that the pages you have requested of the Blue book are exempt from release.

I note that the Treasury has previously released parts of the 2007 and 2010 Red books, prepared for the party that formed government. As a general principle, I note that the OAIC, as part of their guidance to agencies, makes it clear that each case must be decided on its merits and, while precedents can be helpful, it is necessary to look out for specific circumstances that apply in each case (<http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-agency-resources/foi-agency-resource-1-twelve-tips-for-foi-decision-makers>).

My decision has also been informed by the substantial guidance provided in the past 12 months regarding the operation of the FOI Act and, in particular, the Information Commissioner decision in *Crowe and Department of the Treasury*.

Detailed reasons for this decision are set out below.

## Exemptions claimed

### Subsection 47E(d) — certain operations of an agency

Subsection 47E(d) provides that a document is conditionally exempt if its disclosure under the Act would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

For the exemption to apply, a decision-maker is required to assess the impact and scale of an expected effect from disclosure of the documents and find that it would be both 'substantial' and 'adverse' (paragraph 5.17 of the FOI guidelines).

### ***Expected effect from disclosure of incoming government briefs***

Incoming government briefs play an important role in Australia as ministers are regarded as immediately responsible for the portfolios they hold and, therefore, require comprehensive and frank briefs.

I note that your request sought access to two pages of the Blue book. However, in my view the release of part of the book would affect the Treasury's ability to prepare comprehensive incoming government briefings in the future and would interfere with the establishment of a trusting relationship with its ministers. I note that the decision of the Information Commissioner in *Crowe and Department of the Treasury* related to only six requested pages of the brief for the government that did not form, but was effectively a decision about the book as a whole.

Treasury's incoming government brief canvasses issues relevant to the Treasurer's responsibilities, including sensitive issues requiring urgent attention. It is amongst the most important and highly confidential documents produced by the department. The briefings are candid in their advice and are prepared on the basis that they will be confidential to the government which is formed. If that confidentiality cannot be guaranteed, then future incoming government briefs are unlikely to be as comprehensive and, therefore, less useful to a new government in the initial stages of its administration.

The ongoing integrity of the incoming government brief process, and its contribution to future smooth transitions in government, relies on maintaining the confidentiality of the entire contents of the book. Erosion of the principle of the confidentiality of the brief as a whole to protect this process would result even if only parts of the document were released.

Having regard to the above, and having consulted with senior officers within the Treasury, I find that disclosure of the pages would inhibit the Treasury's ability to provide effective and comprehensive incoming government briefs in the future. It is an operational requirement of the Treasury to provide comprehensive briefing to the Treasurer following his or her appointment. Failure to do so would impair the Treasurer's ability to inform Parliament of the actions and policies of the department and wider portfolio. Furthermore, failure to provide comprehensive briefings would reasonably be expected to interfere with the effectiveness of the relationship between the Department and the incoming government, which is central to the proper and efficient functioning of the Treasury.

I consider that the above effects would reasonably be expected to flow from disclosure of the pages, and would be both 'substantial' and 'adverse'. Accordingly, I find the pages to be conditionally exempt under subsection 47E(d).

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

Access must generally be given to a conditionally exempt document unless access would, at that time, be contrary to the public interest.

#### ***Factors favouring disclosure***

I have considered the factors in favour of disclosure, which include that disclosure would: promote the objects of the Act; inform debate on a matter of public importance; or promote effective oversight of public expenditure (paragraph 6.23 of the FOI guidelines refers).

I am of the view that there is a degree of public interest in the contents of the incoming government brief for the government that formed.

#### ***Factors against disclosure***

As stated above and noted in *Crowe and the Department of the Treasury*, incoming government briefs provide a department's frank and honest advice on policy priorities and challenges facing a new government and are critical to ensuring a smooth transition from one government to another. The brief is prepared essentially as a communication limited to a specific audience — the Minister. Were it known that the brief would be disclosed publicly under FOI, there is a risk that the quality and value of the brief would be compromised, and it would be of less value to the Minister. In my view there is a public interest in providing a comprehensive, written brief to an incoming Treasurer.

I also find that release of the incoming government briefs would interfere with the establishment of an effective working relationship between the Treasury and the Treasurer. The need to develop a trusting relationship is particularly important in the early days of a new government, to set the tone for the future working relationship of the whole department. Disclosure of the incoming government brief would not be conducive to establishing a productive, trusting and effective relationship with the Treasurer and would adversely affect Treasury's effectiveness as a central policy agency, which I also find to be contrary to the public interest.

I am also of the view that disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information (paragraph 6.25 of the FOI guidelines refers). In developing incoming government briefs, Treasury consults broadly with other departments and obtains their views on election commitments, current policy commitments and suggested policy directions from the public service. Agencies would be less willing to share their views openly on policy options in the incoming government brief preparation context if they knew the briefs would be made publicly available and hence potentially cause damage to the public service's relationships with the ministers.

The 2013 federal election resulted in a change of government. As the Coalition government was in opposition prior to September 2013, the Blue book provided to the Treasurer, the Hon Joe Hockey MP, represents the first formal briefing from the Treasury. It is imperative that the Treasurer be provided with an opportunity to consider and reflect on the contents of the incoming government brief as he prepares to implement the government's election commitments.

*Irrelevant factors not considered*

I advise that I have not taken into account any of the irrelevant factors set out in subsection 11B(4) of the Act.

*Conclusion on public interest*

I have carefully considered the factors for and against disclosure of the pages. My conclusion is that the factors against disclosure outweigh the factors favouring disclosure.

Accordingly, I find that the pages are exempt in full under subsection 47E(d).

**Section 47C**

Paragraph 47C(1)(a) provides that 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 deliberative processes involved in the functions of an agency. Purely factual information is not conditionally exempt by operation of this section.

In *Crowe and Department of the Treasury* at paragraph 79, the Information Commissioner noted that incoming government briefs, generally, are 'created in preparation for a specific deliberative process within the Australian system of responsible parliamentary government.' The brief is by its nature comprised of opinion and advice about the key priority issues the government faces in the Treasury's realm of responsibility and influence, which as a central policy agency with carriage of economic policy touches on all social and corporate policy areas.

I find that parts of pages 22 to 23 are conditionally exempt under paragraph 47C(1)(a) of the Act.

***Public interest***

Access must generally be given to a conditionally exempt document unless access would, at that time, be contrary to the public interest.

***Factors favouring disclosure***

I have considered the factors in favour of disclosure, which include that disclosure would: promote the objects of the Act; inform debate on a matter of public importance; or promote effective oversight of public expenditure (paragraph 6.23 of the FOI guidelines refers).

I am of the view that there is a degree of public interest in the contents of the incoming government brief for the government that formed.

#### *Factors against disclosure*

As stated above and noted in *Crowe and the Department of the Treasury*, the incoming government brief provides a department's frank and honest advice on policy priorities and challenges facing a new government and is critical to ensuring a smooth transition from one government to another. Each brief is prepared essentially as a communication limited to a specific audience — the Minister. Were it known that the brief would be disclosed publicly under FOI, there is a risk that the quality and value of the brief would be compromised, and it would be of less value to the Minister. In my view there is a public interest in providing a comprehensive, written brief to an incoming Treasurer.

I also find that release of the pages would interfere with the establishment of an effective working relationship between the Treasury and the Treasurer. The need to develop a trusting relationship is particularly important in the early days of a new government, to set the tone for the future working relationship of the whole department. Disclosure of the pages would not be conducive to establishing a productive, trusting and effective relationship with the Treasurer and would adversely affect Treasury's effectiveness as a central policy agency, which I also find to be contrary to the public interest.

The 2013 federal election resulted in a change of government. As the Coalition government was in opposition prior to September 2013, the Blue book provided to the Treasurer, the Hon Joe Hockey MP, represented the first formal briefing from the Treasury. It is imperative that the Treasurer be provided with an opportunity to consider and reflect on the contents of the incoming government brief as he prepares to implement the government's election commitments.

#### *Irrelevant factors not considered*

I advise that I have not taken into account any of the irrelevant factors set out in subsection 11B(4).

#### *Conclusion on public interest*

I have carefully considered the factors for and against disclosure of the document. My conclusion is that the factors against disclosure outweigh the factors favouring disclosure.

Accordingly, I find that parts of pages 22 to 23 are exempt under paragraph 47C(1)(a).

#### **Charges**

There is no charge for this request.

#### **Rights of Review**

In accordance with paragraph 26(1)(c) of the Act, a statement setting out your rights of review under the Act is attached.

Yours sincerely

**SIGNED**

John Lonsdale  
A/g Executive Director  
Policy Coordination and Governance

**RIGHTS OF REVIEW — ACCESS REFUSED****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:

The Secretary  
The Treasury  
Langton Crescent  
PARKES ACT 2600  
Attention: Parliamentary and Legal Services Unit

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.