



Australian Government
Department of Foreign Affairs and Trade

File No: 13/16655
FOI Ref: 1309-F650

8 November 2013

To: 'MJ'
Right to Know
Sent by email to: foi+request-407-37d0384b@righttoknow.org.au

Dear MJ

Re: Freedom of Information Request

I refer to your request of 19 September 2013 for access under the *Freedom of Information Act 1982* ('FOI Act') to the Minister of Foreign Affairs for:

"pages 20-23 of your incoming government brief"

You were notified on 16 October that, as your request was sent directly to the Department's FOI inbox, and given that preparation of the brief which is the subject of your request is the portfolio responsibility of the Department, the Department would proceed to process your request.

I am authorised under section 23 of the FOI Act to make access decisions, and have been appointed to be the decision-maker on your request in line with Departmental procedures.

Your request identifies four pages contained in one document:

- the incoming government brief prepared for the Foreign Minister.

Decision

After careful consideration of the terms and context of your request, and with due regard to recent guidance provided by the Australian Information Commissioner on the operation of relevant exemptions of the FOI Act, I have decided to refuse access in full to document in question. Consequently, access to pp20-23 of that document is also refused in full.

Section 26 of the FOI Act provides that where access to a document has been denied in full or in part, a statement must be provided to the applicant setting out the findings on material

questions of fact, the material on which those findings were based, and the reasons for the decision. Please find this information below.

Material considered

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

- your request and the document which falls within the scope of your request;
- the FOI Act;
- the Guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act;
- views of relevant areas of the Department;
- recent decisions of the Australian Information Commissioner, in particular *Crowe and Department of Treasury [2013] AICmr 69 (29 August 2013)* and *Cornerstone Legal Pty Ltd and Australian Securities and Investment Commission [2013] AICmr 71 (10 September 2013)*; and
- the “*Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*” by Dr Allan Hawke AC of 1 July 2013.

Reasons for my decision, including any material findings of fact

Certain operations of agency - conditional exemption section 47E(d)

I have determined that the brief prepared by this Department for the incoming Foreign Minister following the 7 September 2013 election is exempt in full pursuant to section 47E(d) of the FOI Act and that consequently pp20-23 of this document are also exempt. The reasons for my decision relate to the nature of the document containing pp20-23 rather than an examination of the content of the particular pages. Section 47E(d) provides that a document is conditionally exempt “if its disclosure under this 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”.

Specific harm

Consistent with Part 6 of the Australian Information Commissioner’s Guidelines, I have considered the specific harm that would follow disclosure of the document and determined that it would be both ‘substantial’ and ‘adverse’. In brief, disclosure could reasonably be expected to:

- *jeopardise the effectiveness of the Department’s relationship with its new Ministers;*
- *place at risk the Department’s ability to manage the smooth transition of portfolio responsibilities to Ministers of a newly formed government; and*
- *inhibit departmental officers from providing frank and comprehensive written briefing to portfolio Ministers, which is a proper and efficient function of this Department.*

In my view, the harm caused by disclosure would be both ‘substantial’ and ‘adverse’.

In the lead up to a general election, this Department prepares comprehensive confidential briefing covering the agenda and priorities of the Labor and Coalition parties, election commitments, the risks and costs, and timeframe and mechanisms for delivery. The purpose of incoming government briefs is to ensure that portfolio Ministers are, immediately on assuming office, in a position to inform and explain the actions and policies of the Department to Parliament, responsible and accountable for the Department's past and future expenditure and well-placed to take a different course of action, should Ministers so determine. It is a fundamental role of the Department, critical when there is a change of government, to ensure that Ministers are fully informed on all matters so that they are in a position to discharge these responsibilities effectively.

Given this Department's portfolio responsibilities relating to Australia's foreign policy, trade and aid agendas, it is considered essential to provide our Ministers with comprehensive and confidential written briefing so they are in the best possible position to pursue Australia's national interests with other countries and to represent Australia in international fora as soon as they take up their appointments. It is not uncommon for our portfolio Ministers to be representing Australia overseas within days of assuming portfolio responsibilities. For this reason, the early establishment of an effective working relationship between the Department and our Ministers is fundamental to the proper and efficient conduct of this Department's operations.

It is the Department's long-standing practice that briefs drafted for incoming Ministers are prepared and accessed by only a select group of departmental officers working closely with the Secretary. The incoming government briefs are among the most closely protected documents in the Department. Only those with direct responsibility for their preparation, or for communicating the contents to the Ministers, have access to these briefs. This practice has developed in order to provide the Department's incoming Ministers with the benefit of full, rigorous analysis and judgements of the utmost candour across the broad range of foreign and trade policy priorities and challenges facing a new government.

With these practices in mind, and having consulted with senior officers within the Department, I am of the view that disclosure of all or part of the incoming government briefs could reasonably be expected to adversely alter the way in which the Department prepares future briefings for incoming Ministers. In particular, departmental officers would be inhibited from providing robust and comprehensive written briefings for incoming Ministers if it were known that such documents would be open to public scrutiny and debate almost immediately they were provided to the Minister.

The impact of a failure to fully brief a new Minister was considered by the Australian Information Commissioner in *Crowe and the Department of Treasury* [2013], and again in *Cornerstone Legal Pty Ltd and Australian Securities and Investment Commission* [2013] para 38, where he noted that "the smooth transition from one government to another following a general election could be detrimentally affected if government departments were reluctant in incoming government briefs to provide candid and potentially controversial advice on the policy priorities and challenges facing a new government".

Failure to provide comprehensive written briefings to our portfolio Ministers would result in less than fully informed Ministers, a circumstance that could reasonably be expected to have a substantial and adverse impact on the Department's proper and efficient operations. Failure

to adequately brief our Ministers could undermine the early development of open and constructive dialogue based on mutual trust. I am also of the view that disclosure at this time could impair the Department's ability to manage the smooth transition of portfolio responsibilities to a new government.

Public interest test

Section 11A of the FOI Act requires that access must be provided in the case of conditionally exempt material unless that access would, on balance, be contrary to the public interest at this time. In assessing the public interest in this matter, I have had regard to the Guidelines issued by the Office of the Australian Information Commissioner in determining whether disclosure would be in the public interest.

Factors in favour of disclosure

- *promote the objects of the FOI Act, which include 'increasing scrutiny, discussion, comment and review of the Government's activities';*
- *inform the public of the Government's operations; and*
- *provide the public with access to the informed opinion of the Department on important matters of national policy.*

Factors against disclosure at this time

- *would in future inhibit departmental officers from providing frank and comprehensive briefings to newly appointed Ministers;*
- *failure to adequately brief incoming Ministers immediately on taking up their appointment would have an adverse impact on their ability to discharge their responsibilities and would thereby jeopardise the smooth transition from one government to another;*
- *failure to adequately brief incoming Ministers would undermine the Department's relationship with the Government; and*

I have discussed these factors in more depth in identifying the specific harm which could reasonably be expected to result from disclosure. In addition, I have also had regard to the following factor against release outlined in *Crowe and Department of Treasury [2013] AICmr 69 [85]*:

- *It is important, in the early days of a new government, that the public service is not drawn into political controversy, or required publicly to defend the advice provided to a new government.*

For the reasons outlined above, I judge that the public interest is weighted against disclosure of the document at this time.

Other exemptions

Notwithstanding that I have decided to fully exempt the document under section 47E(d) of the FOI Act, I note that all or a substantial proportion of the document may also be exempt under a number of other provisions including sections 47C(1) (deliberative processes), 33(a)(iii) (damage to international relations) and 34(1)(c) (material for Cabinet consideration).

Your review rights

Internal review

Under the provisions of section 54 of the FOI Act, you are entitled to request a review of my access refusal decision.

Your request in writing within 30 days of receiving this letter should be directed to:

Director
Freedom of Information and Privacy Law Section
Department of Foreign Affairs and Trade
R G Casey Building
John McEwen Crescent
BARTON ACT 0221

Australian Information Commissioner

Under the provisions of section 54 of the FOI Act, you are entitled to request a review by the Australian Information Commissioner of my access decision. You may also make a complaint to the Australian Information Commissioner under section 70 on the Department's performance of its functions or the exercise of power under the FOI Act.

Your request for review or complaint should be directed to:

GPO Box 2999, Canberra ACT 2601
Telephone: 1300 363 992
Fax: (02) 9284 9666
Email: enquiries@oaic.gov.au

Complaints to the Commonwealth Ombudsman

You may complain to the Ombudsman concerning actions taken by an agency in the exercise of its powers or, more specifically, the performance of its functions under the FOI Act. There is no fee for making a complaint. The Ombudsman will conduct an independent investigation of your complaint.

You may complain to the Ombudsman by calling or writing to:

Commonwealth Ombudsman
GPO Box 442
Canberra ACT 2601
Telephone: 1300 362 072
Fax: (02) 6249 7829

Should you have any queries regarding this matter, please contact Ms Indra McCormick on (02) 6261 3056 or by email to: foi@dfat.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Amanda Gorely', with a stylized flourish at the end.

Amanda Gorely
Assistant Secretary
Domestic Legal Branch