



Our Ref: LS4917 ~ file13/1193

Ms Sophia Wrightman
By email to foi+request-495-bcbfc2ac@righttoknow.org.au

Dear Ms Wrightman

Re Your FOI Request No. 4917

I refer to your email of 19 December 2013 4:08 PM in which you request documentation about religious duty excuse for non-voting under the [Freedom of Information Act 1982](#) (the 'FOI Act'). I have taken your request (the 'FOI Request') to be a request for:

documentation that expands or clarifies exactly what the AEC regards as "religious duty" in relation to subsection 245(14) of the *Commonwealth Electoral Act 1918*.

- 2 I have two purposes in writing to you. First I acknowledge receipt of your FOI Request. Secondly I am notifying you of my decision about your FOI Request.

SUMMARY

- 3 I, Paul Pirani, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

- 4 For the reasons that follow, I have:

- (a) not retrieved any documents that fall within the scope of your FOI Request; and
- (b) decided to refuse your FOI Request.

DECISION AND REASONS FOR DECISION

Decision

- 5 I have decided to refuse access to any documents that fall within the scope of your FOI Request because such documents are exempt documents under paragraph 37(2)(b) of the FOI Act.

Material taken into account

- 6 I have taken the following material into account in making my decision:
- (a) the content of the documents that could fall within the scope of your request;
 - (b) the FOI Act (specifically sections 37)
 - (c) the [Commonwealth Electoral Act 1918](#) (the 'Electoral Act') (specifically section 245);
 - (d) the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act

Reasons

- 7 My reasons for refusing access follow.
- 8 All the documents that you seek relate to the AEC's function of prosecuting electors for non-voting at a federal election.

The process for punishing non-voters

- 9 Subsection 245(1) of the [Commonwealth Electoral Act 1918](#) (the 'Electoral Act') provides that: 'it shall be the duty of every elector to vote at each election'.
- 10 Electors voting in person are required to have their names marked off the certified list of voters at the polling place before they are issued with ballot papers (see section 232 the Electoral Act). Declaration voters complete a declaration certificate before they vote that allows their names to be marked off the certified lists of voters before their votes are entered into the count.
- 11 Under section 245(2) of the Electoral Act, a list of the names and addresses of the electors who appear to have failed to vote at an election must be prepared for each division. After election day, the names and addresses on all certified lists of voters for all divisions across Australia are scanned by computer. This scanning process produces a report on apparent non-voters and apparent multiple voters.
- 12 Within three months after election day, each Divisional Returning Officer (DRO) must send by post a penalty notice to every elector whose name and address appears on the list of apparent non-voters.
- 13 The DRO is not required to send a penalty notice to electors who have died, were absent from Australia on election day, were known to be ineligible to vote at the election, or who have supplied a valid and sufficient reason for not voting. The penalty notice posted to an elector advises that he or she appears to have failed to vote at the election and that it is an offence to fail to vote at an election without a valid and sufficient reason. The elector is further

advised that if he or she does not wish to have the matter dealt with by a court, the elector may, within a specified time either:

- (a) Advise the DRO of the circumstances in which they did in fact vote
 - (b) Advise the DRO of the valid and sufficient reason why they did not vote, or
 - (c) Pay to the DRO a penalty of \$20.
- 14 If no reply is received to the first penalty notice, a second penalty notice must be sent by the DRO.
- 15 Under subsection 245(11) of the Electoral Act, if an elector is unable to respond to correspondence from the DRO because of absence from his or her residential address or because of physical incapacity, then another elector who has personal knowledge of the facts may respond on behalf of the elector who appears to have failed to vote.
- 16 If the elector pays to the DRO the \$20 penalty for failing to vote, then the matter ends there.
- 17 Where the elector writes to the DRO providing a reason for not voting, and the DRO is not satisfied that the reason provided is valid and sufficient, then the DRO must write again to the elector advising that the DRO is not satisfied, and that if the elector does not wish to have the matter dealt with by a court, the elector may, within a specified time period, pay to the DRO a penalty of \$20. If the elector then pays to the DRO the \$20 penalty for failing to vote, the matter ends there.
- 18 An elector may be prosecuted pursuant to section 245(15) of the Electoral Act for failing to vote at an election without a valid and sufficient reason, or for making a statement in response to a penalty notice, or to the further notice by the DRO, that is, to his or her knowledge, false or misleading in a material particular. The court may impose a maximum penalty of \$50. In addition, court costs may also be payable.

Valid and sufficient reasons

- 19 The original decision of the DRO as to whether a reason for not voting is valid and sufficient is based on the merits of each individual case, in accordance with the law as previously interpreted by the courts, and within the boundaries of administrative guidelines developed by the AEC to assist DROs.
- 20 Under subsection 245(14) of the Electoral Act the fact that an elector believes it to be a part of his or her religious duty to abstain from voting constitutes a valid and sufficient reason for not voting.

21 The decisions of the court on the interpretation of the term 'valid and sufficient reason' have developed over the years into a substantial body of law that guides the DROs in their decision-making in individual cases. The FOI Request relates to this body of documents.

Exemption of documents affecting enforcement of law

22 In so far as is material, subsection 37 of the FOI Act provides:

37 Documents affecting enforcement of law and protection of public safety

(2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

...

(b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures;

...

(3) In this section, law means law of the Commonwealth or of a State or Territory.

23 The Information Commissioner has issued guidelines under section 93A of the FOI Act (the 'Guidelines') to which I am required to have regard in making a decision about the FOI Act.

24 In so far as is material, the Guidelines at paragraphs 5.71 5.73 and 5.74 say:

5.73 Section 37 concerns the investigative or compliance activities of an agency and the enforcement or administration of the law, including the protection of public safety. It is not concerned with an agency's own obligations to comply with the law. The exemption applies, therefore, where an agency has a function connected with investigating breaches of the law or its enforcement or administration.

5.74 To be exempt under s 37(1)(a) or 37(1)(b) the document in question should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law.⁴⁵ This is not confined to court action or court processes, but extends to the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches. The exemption does not depend on the nature of the document or the purpose for which it was brought into existence. A document will be exempt if its disclosure would or could reasonably be expected to have one or more of the consequences set out in the categories listed in paragraph 5.71.

⁴⁵ Re Gold and Australian Federal Police and National Crime Authority [1994] AATA 382.

- 25 Consideration of what is a reasonable excuse for non-voting (including whether there is a religious duty for the purposes of subsection 245(14) of the CE Act) is a material part of the DRO's law enforcement functions. Guidance issued by the AEC to its DRO's in carrying out those functions fall within the scope of paragraph 37(2)(b) of the FOI Act.
- 26 It follows that all the documents that you request are exempt from release under the FOI Act.

YOUR REVIEW RIGHTS

- 27 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

- 28 Under section 54 of the FOI Act, you may apply in writing to AEC for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.
- 29 Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.
- 30 If you wish to have an internal review, you may apply by email to info@aec.gov.au or by letter to PO Box 6172 Kingston ACT 2604.

Information Commissioner review

- 31 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.australia.gov.au/forms/oaic/foi-review/>

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

- 32 More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/foi-portal/review_complaints.html#foi_merit_reviews.

QUESTIONS ABOUT THIS DECISION

33 If you wish to discuss this decision, please contact Owen Jones, Senior Lawyer whose contact details follow:

Phone: 02 6271 4528
Fax: 02 6293 7657
Email: owen.jones@aec.gov.au

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Paul Pirani', written in a cursive style.

Paul Pirani
Chief Legal Officer

23 December 2013