

S22(1)



S47E(d)

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**From:** RICHARDS, Janean [mailto:Janean.Richards@fahcsia.gov.au]**Sent:** Monday, 9 September 2013 3:01 pm**To:** Alderson, Karl**Cc:** CAREY, Joanna**Subject:** FW: FOI request - S47F(1) - incoming government briefs [DLM=Sensitive:Legal]**Importance:** High

Hi Karl

As discussed, a copy of our IGB FOI request is enclosed for your information.

Noting that we have not as yet briefed any incoming Minister, we'd appreciate your views on commencing processing of such a request.

Can you advise who we should direct further queries to relating to the processing of this request? We'd appreciate receiving copies of any further legal advice that you could provide to us too

Many thanks

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**Janean Richards**

**Chief Legal Officer & Group Manager**

**Legal & Compliance Group**

Department of Families, Housing, Community Services and Indigenous Affairs

**P:** 02 6146 0178 | **M:** S47F(1) | **F:** 02 6204 4972 | **E:** [janean.richards@fahcsia.gov.au](mailto:janean.richards@fahcsia.gov.au)

*The Corporate Cluster - helping FaHCSIA deliver through innovation and quality services*

FaHCSIA acknowledges the traditional owners of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures, and to the elders both past and present.

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**From:** CAREY, Joanna

**Sent:** Monday, 9 September 2013 11:05 AM

**To:** HAND, Felicity

**Cc:** RICHARDS, Janean

**Subject:** FOI request - S47F(1) - incoming government briefs [DLM=Sensitive:Legal]

**Importance:** High

Felicity,

We have received a FOI request for the Incoming Government Briefs (below), from a journalist at S47F(1)

We are urgently contacting AGD this morning to inform them. In the meantime, our FOI team will commence processing the request as per usual.

Kind regards,

Jo

**Joanna Carey**

**A/g Branch Manager**

**Public Law Branch**

Department of Families, Housing, Community Services and Indigenous Affairs

**P:** 6146 3511 | S47F(1) | **F:** 6204 7490 | **E:** [joanna.carey@fahcsia.gov.au](mailto:joanna.carey@fahcsia.gov.au)

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**From:** S47F(1)

**Sent:** Monday, 9 September 2013 10:24 AM

**To:** S47F(1)

**Subject:**

Good morning,

I write seeking information under the Freedom of Information Act, specifically the incoming government briefs. I expect the 30 days processing time will provide sufficient time for the Minister to peruse these documents and for the briefs to be released to S47F(1) in full. If this application at any stage appears too large to process, I stand willing to negotiate on scope at the earliest opportunity.

I advise that I am not interested in duplicate copies of documents or documents that have already been publicly released, or media releases, media articles or media statements. I also reserve the right to withdraw this request should the information I seek be released under FOI to individuals or organisations prior to finalisation of my FOI application, and ask that I be notified accordingly. If the estimate of charges is excessive, I reserve the right to narrow the scope of this application or, alternatively, split it into separate parts. I would also prefer documents to be released electronically via email.

Finally, given policies on disclosure logs differ across government, and remain a subject for debate, I would ask that S47F(1) be notified of the planned timing of the release of documents to us, and be given the full 10 business days allowed under the Act to research and prepare any articles for publication before the release is posted on any disclosure log. S47F(1) would also appreciate the option of being able to place the application on hold at any stage, in accordance with the Act, if timing or other factors become an issue. Your assistance on these matters would also help your agency provide any background or clarifying information.

If I can be of any assistance with the processing of any aspect of these requests, please do not hesitate to contact me on S47F(1)

Confirmation of receipt of this letter, and the scope of my request, would be appreciated. My postal address is:

S47F(1)

Kind regards,

S47F(1)

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S22(1)

**From:** Fredericks, David  
**Sent:** Tuesday, 22 October 2013 12:33 PM  
**To:** Mark.tucker@daff.gov.au; ian.robinson@communications.gov.au; steven.grzeskowiak@defence.gov.au; craig.storen@deewr.gov.au; stephen.oxley@environment.gov.au; Jenet.Connell@finance.gov.au; chris.moraitis@dfat.gov.au; Andrew.stuart@health.gov.au; barbara.bennett@humanservices.gov.au; Michael.Manthorpe@immi.gov.au; david.banham@infrastructure.gov.au; sue.weston@industry.gov.au; Elizabeth.Kelly@pmc.gov.au; subho.banerjee@ret.gov.au; Felicity.Hand@dss.gov.au; Steve.french@treasury.gov.au; narelle.dotta@dva.gov.au; Annwyn.godwyn@apsc.gov.au  
**Cc:** Fredericks, David; S47F(1) Walter, Andrew; Minogue, Matt  
**Subject:** FOI decision [SEC=UNCLASSIFIED]  
**Attachments:** Attorney-General's Department IGB FOI Decision.pdf

**UNCLASSIFIED**

Colleagues

You may be aware that AGD recently issued a decision in relation to a request for access to the department's incoming government brief.

I enclose an edited version of AGD's decision for your information.

And note a reminder that a decision on whether or not to release a particular document or particular information is, of course, a matter for the decision maker to consider taking into account the individual circumstances of the particular request.

Regards.

David.

**David Fredericks**

Deputy Secretary | Civil Justice and Legal Services Group  
 Attorney-General's Department  
 T: (02) 6141 3175 | E: [david.fredericks@ag.gov.au](mailto:david.fredericks@ag.gov.au)

We acknowledge the traditional custodians of this land and  
 celebrate their ongoing culture and contribution to society.





**Australian Government**  
**Attorney-General's Department**

[REDACTED]

18 October 2013

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**Freedom of Information Request** [REDACTED]

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

**Summary**

I am an officer authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI requests.

You requested access to:

- (a) *All briefs (and related attachments to briefs and any other related materials) prepared in the event of a returned Labor Government (referred to as 'the Red Book');*
- (b) *All briefs (and related attachments to briefs and any other related materials) prepared in the event of a newly elected Coalition Government (referred to as 'the Blue Book');*
- (c) *Any other materials, including any briefs providing an overview of the Attorney-General's Portfolio and the Related Support Services (referred to as 'the administration brief').*

**Decision and reasons for decision**

*The Red Book*

With regard to the documents referred to in paragraph (a), above, I have found that the documents do not exist. The Department prepares one incoming government brief to be provided to the new Minister.

*The Blue Book*

With regard to the documents requested in paragraph (b), above, I have found one document that falls within the scope of your request. The details of this document are provided in the Schedule of Documents.



I consider the document is conditionally exempt from disclosure under paragraphs 47C(1)(a) and 47E(d) of the FOI Act as its disclosure would disclose deliberative matter and would have a substantial adverse effect on the proper and efficient conduct of the operations of the Department. I further consider that access to this document would, on balance, be contrary to the public interest under subsection 11A(5) of the FOI Act. Accordingly, I have found that the document is exempt from disclosure under the FOI Act.

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

- (1) A document is conditionally exempt if its disclosure under this 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, the deliberative processes involved in the functions of:
- (a) 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 an agency.

Detailed and comprehensive briefings are prepared by the Department for incoming Ministers responsible for the portfolio in which the Department falls. Fundamentally, an incoming government brief is 'necessary, particularly when a new government was formed, to ensure a smooth transition between governments and to assist the expedient establishment of the new Government and new Ministers in portfolios.'<sup>1</sup>

The incoming government brief contains detailed information about the Attorney-General's portfolio; the responsibilities of the Ministers; relevant election commitments; issues affecting the portfolio, and agencies within the portfolio.

An incoming government brief forms a crucial part of the Department's responsibility for providing incoming Ministers with frank and fearless advice concerning issues affecting the Department and the portfolio. Ministers are responsible for their portfolio and as Dr Allan Hawke AC noted in his review of freedom of information legislation in 2013:

Ministers need to be fully informed on all matters in order to discharge these responsibilities effectively.<sup>2</sup>

I am of the view that the disclosure of the document referred to in paragraph (b) above would disclose deliberative matter. Specifically, the document contains matter in the nature of opinion, advice and recommendations prepared for the purposes of the deliberative processes of the Department. The Department also considers that disclosing the document would, on balance, be contrary to the public interest.

#### *Deliberative processes (section 47C)*

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

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, advice or recommendation

<sup>1</sup> See *Crowe and Department of the Treasury* [2013] AICmr 69 per Professor John McMillan at [17]

<sup>2</sup> Mr Allan Hawke AC 2013, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, p. 49



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:

(a) an agency...

I note that deliberative matter does not include operational information or purely factual material. I have found that the document referred to in paragraph (b), above, contains operational information and purely factual material. Notwithstanding, the reasons as to why I have decided that the document referred to in paragraph (b) is exempt in full is discussed further below.

The document referred to in paragraph (b), above, contains the advice of the Department on a full range of issues which fall within the Department's portfolio. The document also includes advice and recommendations of the Department consistent with the policies of the new Government enunciated by them in the lead up to the September 2013 election. The document contains the opinions, advice and recommendations of the Department to properly advise the new Government of the responsibilities within the portfolio, emerging issues relevant to the portfolio, and options for progressing the agenda of the new Government.

The Australian Information Commissioner has noted that the fact the political party to which the brief was directed did not form government 'does not rob the brief of its deliberative nature.'<sup>3</sup> Incoming government briefs, generally, are 'created in preparation for a specific deliberative process within the Australian system of responsible parliamentary government.'<sup>4</sup> This statement makes clear that the brief prepared for the political party that formed government is more likely to be deliberative in nature.

*Certain operations of agencies (section 47E)*

I consider that disclosure of the document referred to in paragraph (b), above, 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.<sup>5</sup> The document is prepared by the Department to ensure the new Minister is provided frank and honest advice on issues affecting the Department and the portfolio. I consider the disclosure of the document would have a substantial adverse effect on the proper and efficient conduct of the operations of the Department for the following reasons.

If the document is disclosed, I consider there would be a substantial adverse effect on the Department's ability to establish and maintain a good working relationship with the new Minister. I consider that the disclosure of the document would impede the development of an effective working relationship between the Department and the new Minister, such that the disclosure of the document would have a substantial adverse effect on the Department to properly and efficiently conduct its operations. Principal to these operations include the provision of frank and honest advice to the new Minister on what the Department considers to be the policy priorities and challenges facing the portfolio presently and into the future.

Further, the disclosure of the document would have a substantial adverse effect on the development of this relationship in a way that will accord with the conventions of responsible parliamentary government. Consistent with this view, the Hon. Tony Abbott MP, as he then was, noted that 'the release of the incoming government briefs would contravene the Westminster conventions'.<sup>6</sup>

*Public interest considerations*

As noted, I consider that disclosing the document would, on balance, be contrary to the public interest. I have found that the benefit to the public resulting from disclosure of the document is

<sup>3</sup> [2013] AICmr 69 per Professor John McMillan at [79].

<sup>4</sup> [2013] AICmr 69 per Professor John McMillan at [79].

<sup>5</sup> See paragraph 47E(d) of the FOI Act.

<sup>6</sup> See [2013] AICmr 69 per Professor John McMillan at [87].



outweighed by the benefit to the public of withholding the document. In accordance with subsection 11B(3) of the FOI Act, in reaching this decision, I note the following in respect of factors favouring disclosure.

An object of the FOI Act is to give the Australian community access to information held by the Government of the Commonwealth and to facilitate an increase in the public participation in Government processes, with a view to promoting better-informed decision-making. Although the information contained in the document may contribute to the achievement of these objectives, I do not consider that disclosing the form in which the information is presented to the Minister could further inform public debate on these issues. As noted above, the document is for use by the new Minister for the purpose of understanding the issues affecting the Department and the portfolio, and to identify strategies for meeting election commitments. It contains information, some of which may be publicly available, presented in the context of advice, opinion and recommendations as part of a deliberative document for use by the new Minister in managing the Department's and the portfolio's priorities.<sup>7</sup>

Some of the information in the document about the department, including information concerning public expenditure, is publicly available. For example, the Department's organisation chart is available at <http://www.ag.gov.au/About/Documents/Attorney-Generals%20Department%20Organisational%20Chart.PDF>; a description of the Department's senior management is available at <http://www.ag.gov.au/About/Seniormanagement/Pages/default.aspx>; the Administrative Arrangements Order is available at <http://www.comlaw.gov.au/Details/C2013G00742/Download>, and the portfolio budget statements are available at <http://www.ag.gov.au/Publications/Budgets/Budget2013-14/Pages/default.aspx>. Other information concerning the Department is available on the Department's website at [www.ag.gov.au](http://www.ag.gov.au).

Disclosure of the way in which that information is presented to the Minister cannot be said to further inform public debate.

I do not consider that access to the document could reasonably promote the effective oversight of public expenditure. As noted above, the portfolio budget statements are publicly available. The document does not provide detailed information public expenditure, rather suggesting approaches to meeting priorities within the portfolio.

I do not consider the document affects a person's ability to access his or her own personal information. The document only contains personal information of individuals that is available to those individuals, such as information concerning appointments.<sup>8</sup>

The FOI Act does not list relevant factors against disclosure of a document. However, the Guidelines do identify possible factors against disclosure.

As part of further considerations explored below, I consider that the disclosure of the document as a whole, that is, an incoming government brief, is strongly against the public interest, as its disclosure will compromise the Department's ability to function effectively and efficiently. The Information Commissioner has noted, the confidentiality of the briefing provided to the new Minister is 'essential at... (the) early stage in developing a relationship that accords with the conventions of responsible parliamentary government.'<sup>9</sup> The disclosure of the document will materially affect the Department's ability to properly inform the new Minister through the provision of confidential and sensitive advice.

<sup>7</sup> See paragraph 11B(3)(b) of the FOI Act.

<sup>8</sup> See paragraph 11B(3)(d) of the FOI Act.

<sup>9</sup> [2013] AICmr 69 per Professor John McMillan at [85].



The document is presented to a particular audience: the new Minister. Should the document be disclosed, I consider the proper and efficient conduct of the Department's operations will be adversely affected as the Department would, in the future, tailor the document to the new audience: the public. If this were to occur, I consider the document would lose its value to the new Minister and would compromise the Department's ability to meet its responsibilities in accordance with the convention of responsible parliamentary government. For example, if the document is disclosed, the material contained in future incoming government briefs would be tailored to a different audience and, as such, would not contain the necessary frank and honest advice required to properly inform the new Minister of the responsibilities of the Department and portfolio, and the challenges and priorities present and in the future facing the Department and portfolio. This will seriously undermine the ability of the Minister to support decision-making with the advice of the Department. This would have a substantial adverse effect on the Department to properly and efficiently conduct its operations, as it would not be in a position to properly brief the new Minister in the nature and manner that is expected in accordance with responsible parliamentary government.

The document provides detailed advice to the Minister on issues affecting the Department and the portfolio. If the confidentiality of the document cannot be assured and an incoming government brief is tailored to an audience other than the new Minister, the document will lose its utility as a document containing the frank and honest advice of the Department on issues affecting the Department and the portfolio. Due to the nature of the material covered in the document, the removal of confidential material will compromise the value of the document as providing a comprehensive tool for the new Minister to quickly develop an understanding of the Department's and portfolio's operations.<sup>10</sup>

For these reasons, I consider that disclosing the document would, on balance, be contrary to the public interest. I have found that the benefit to the public resulting from disclosure of the document is outweighed by the benefit to the public of withholding the document.

#### *The administration brief*

With regard to the documents referred to in paragraph (c), above, I have found that the documents do not exist. The Department did not prepare briefings providing an overview of the Attorney-General's Portfolio and the Related Support Services separate to the incoming government brief referred to in paragraph (b), above. This information is contained in this briefing.

#### *Other exemptions*

I consider that were the document considered for edited release under section 22 of the FOI Act, other exemptions under the FOI Act would apply. The material contained in the documents may potentially be exempt under the following provisions of the FOI Act. I note this is not an exhaustive list of the potential exemptions.

- Material relating to Australia's dealings with foreign countries, including in the Department's capacity as the International Crime Cooperation Central Authority (subparagraph 33(a)(iii) – Documents affecting international relations/paragraph 37(1)(a) – Documents affecting the enforcement of law and protection of public safety/subsection 45(1) – Documents containing material obtained in confidence);
- Material relating to advice on the operation and application of international law (subparagraph 33(a)(iii) – Documents affecting international relations/subsection 42(1) – Documents subject to legal professional privilege);

<sup>10</sup> It is important to note that the Information Commissioner has stated that an exemption under paragraph 47E(d) of the FOI Act 'could apply to the entirety of a document, including the factual material contained in the document', see [2013] AICmr 69 per Professor John McMillan at [95].



- Material relating to the administration of national security legislation, including the *Australian Security Intelligence Organisation Act 1979* (subparagraph 33(a)(iii) – Documents affecting international relations/subsection 38(1) – Documents to which secrecy provisions of enactments apply), and
- Material relating to the Constitution of Australia (subsection 42(1) – Documents subject to legal professional privilege).

### **Material taken into account**

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

- the FOI Act;
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act;
- the material that comes within the scope of your request, and
- *Crowe and Department of the Treasury* [2013] AICmr 69.

### **Your review rights**

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**

Under section 54 of the FOI Act, you may apply in writing to the Attorney-General's Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, and be lodged in one of the following ways:

online: [foi@ag.gov.au](mailto:foi@ag.gov.au)  
 post: FOI and Privacy Section  
 Office of Corporate Counsel,  
 Attorney-General's Department,  
 3-5 National Circuit  
 Barton, ACT 2600

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.

### **Information Commissioner review**

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.business.gov.au/aba/oaic/foi-review/>  
 email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
 post: GPO Box 2999, Canberra ACT 2601  
 in person: Level 3, 175 Pitt Street, Sydney NSW

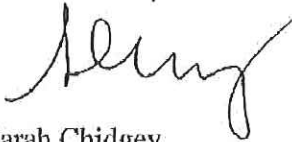
More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.



**Questions about this decision**

If you wish to discuss this decision, please contact the Department by email at [foi@ag.gov.au](mailto:foi@ag.gov.au).

Yours sincerely



Sarah Chidgey

Assistant Secretary

Attorney-General's Department

## FREEDOM OF INFORMATION

Issues: S22(1), FOI and Incoming Government Briefs (IGBs)

### Key points

S22(1)



### FOI and Incoming Government Briefs (IGBs)

- My Department and I have received various requests for access to IGBs. These requests seek access to differing material.
- A decision on whether or not to release material under the FOI Act is a matter for the individual decision maker, taking into account the contents of the particular document, any exemptions that may be relevant and the individual circumstances of the request.
- I asked the Department to process the requests received directly by my office in accordance with the FOI Act.
- I have been advised that the Department has refused access to material, in accordance with the FOI Act, on the basis that disclosure would reveal deliberative material and have a substantial and adverse effect on the proper and efficient conduct of the operations of the Department and that access to the material would, on balance, be contrary to the public interest.
- While my Department provides general policy advice to other departments on the operation of the FOI Act, it cannot and does not, provide directions to other departments on how requests should be processed. It is up to individual decision makers to make their own decisions based on the circumstances of each request.

Clearance officer: Andrew Walter      Phone: 6141 3615  
Division: CLD  
Date Updated: 01/11/2013

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THE ATTORNEY-GENERAL'S DEPARTMENT



S22(1)  


Clearance officer: Andrew Walter      Phone: 6141 3615  
Division: CLD  
Date Updated: 01/11/2013

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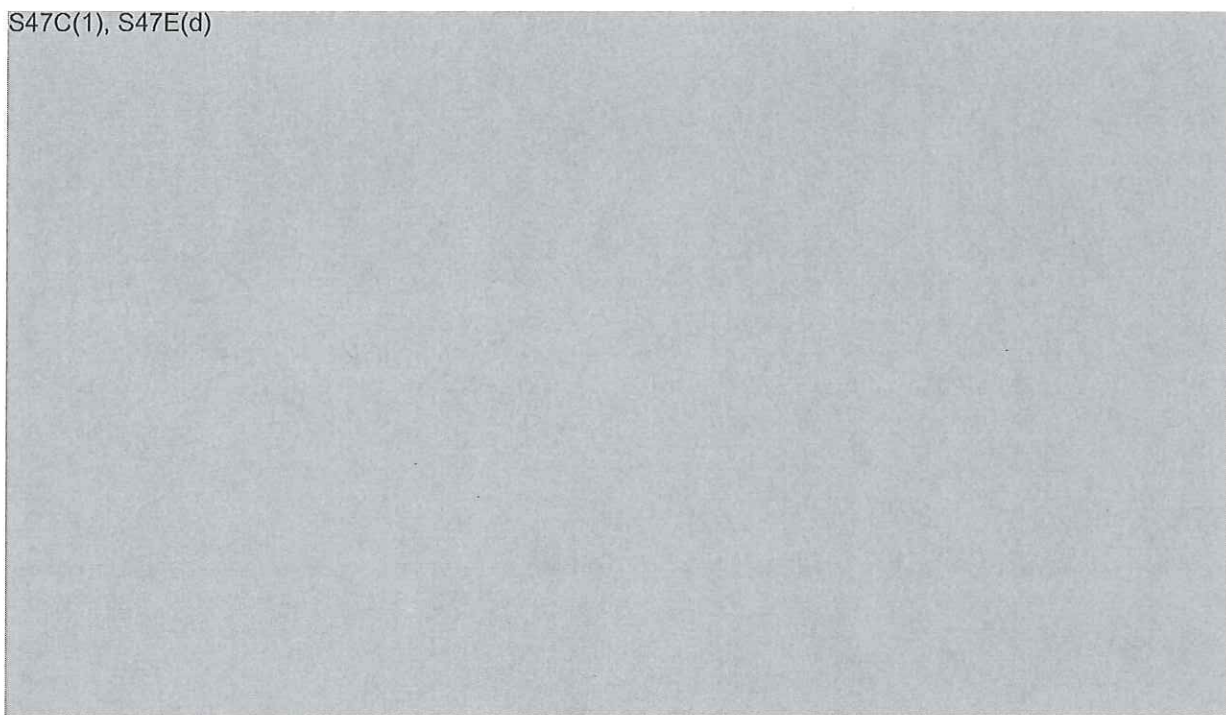
**Background**

S22(1)



*FOI and Incoming Government Briefs (IGBs)*

S47C(1), S47E(d)



Clearance officer: Andrew Walter      Phone: 6141 3615  
Division: CLD  
Date Updated: 01/11/2013

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