

# Attachment B – Reasons: Freedom of Information Request No. LEX2846

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## Authority

As a Principal Government Lawyer, Legal and Procurement Branch, I am an authorised decision-maker under section 23 of the FOI Act.

## Retrieval process

To identify documents for your request, I arranged for relevant staff likely to be able identify documents to undertake a comprehensive search of the relevant electronic holdings used by the AEC. Relevant staff were interrogated on their findings, and confirmed comprehensive searches were undertaken and that further documents were unlikely to be within scope.

The scope of the request included documents that were created by and shared across government departments, particularly the Department of Finance.

## Relevant Documents

With regard to the Relevant Documents identified in Attachment A, I have decided:

- a) to grant access in full to Document Numbers 1, 2 and 14.
- b) to refuse access to Documents 3-13.

## Material taken into account

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

- a) the content of the documents that fall within the scope of your FOI Request;
- b) the FOI Act, specifically sections 42, 47C and 47E;
- c) the guidelines ('FOI Guidelines') issued by the Australian Information Commissioner under section 93A of the FOI Act;
- d) the FOI Guidance Notes, July 2011 issued by the Department of Prime Minister and Cabinet; and
- e) the *Privacy Act 1988*.

For the reasons set out below, I have decided that one or more of the following exemptions, identified in the schedule of documents at Attachment A for each document, applies to that document or part of it: sections 42, 47C and 47E.

## Section 42 – Legal professional privilege

Section 42(1) exempts a document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP).

A document is exempt from production on the ground of legal professional privilege if all of the following apply:

- i) there exists a lawyer-client relationship;
- ii) there have been confidential communications which are recorded in the document;
- iii) the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
- iv) the privilege has not been waived.

I find that disclosure of the documents exempted under section 42(1) would involve disclosure of documents that would be exempt from production in legal proceedings on the ground of legal professional privilege.

The AEC has a legal branch which is staffed by lawyers admitted to practice and who hold practising certificates. The lawyers in this branch provide independent legal advice. They do not work on policy or other issues.

There was also a legal adviser-client relationship between the Commonwealth and Australian Government Solicitors (AGS), within which confidential communications occurred for the purpose of receiving legal advice in connection with the drafting of the Electoral Legislation Amendment (COVID Enfranchisement) Bill 2022 and the Commonwealth Electoral (COVID Enfranchisement) Regulations 2022, including review and commentary on draft versions of the legislation. That advice was incorporated into the drafting process. Except for the final product as passed by the Parliament and available on the Federal Register of Legislation, we consider that the advice extends to all communication that is associated with that advice.

The documents to which the exemption has been applied contain communications which were at the time and remain confidential and were for the dominant purpose of providing legal advice. I am not aware of any information that would suggest privilege in the communications has been waived.

### **Section 47C – deliberative matter**

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation, 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; or
- b) a minister; or
- c) the Government of the Commonwealth

#### *Deliberative matter*

Part 6.52 of the OAIC FOI Guidelines provides that 'deliberative matter' is content that is in the nature of, or relating to either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded, or
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1))

The Administrative Appeals Tribunal decision of *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 explained that the meaning of the words 'opinion', 'advice' and 'recommendation' all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.

I have carefully reviewed the documents exempted under section 47C and consider that they include opinions, advice and recommendations. The opinions, advice and recommendations relate to the functions of the AEC under the *Commonwealth Electoral Act 1918* (Electoral Act) (Cth).

Section 47C does not extend to operational information or purely factual information. I have considered the substance of these documents and consider that while some purely factual information is contained within the relevant documents, this material relates to the advice and opinions being considered. To disclose these facts would disclose the nature of the advice being considered.

#### *Public interest*

Having concluded that the documents are conditionally exempt on the basis that they contain deliberative material, I now need to consider whether it would be contrary to the public interest for them to be disclosed to you in accordance with s 11A(5) of the FOI Act.

I consider that the public interest factors that weigh in favour of disclosure are:

- i) informing debate on a matter of public importance, namely how the AEC conducts federal elections; and
- ii) facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency.

I consider that the public interest factors that weigh against disclosure are:

- i) the importance of maintaining the full and frank exchange of ideas between agencies, for the purpose of canvassing issues surrounding drafting of legislation, which involves a rigorous consultation process between relevant agencies;
- ii) disclosure could reduce the full and frank testing of ideas between agencies, which ultimately would result in less rigorously tested policy proposals and draft legislation in the future;
- iii) disclosure could reasonably be expected to prejudice the AEC's ability to obtain similar information in the future;
- iv) disclosure could reasonably be expected to prejudice the AEC's ability to attain the objects of the consultation process conducted by the AEC;
- v) disclosure could reasonably be expected to prejudice the AEC's management function and ability to perform its functions; and
- vi) disclosure could reasonably be expected to prejudice the effective and efficient functioning of the AEC.

I consider that these factors take on additional weight when considering that the AEC is an independent statutory body. It is crucial to the proper functioning and integrity<sup>1</sup> of the AEC that it is

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<sup>1</sup> The proper function and integrity reflects that type of practice identified in *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 that sustains a claim of frankness and candour.

able to provide frank and fulsome advice to government and to seek information from government on the operation of the Australian electoral framework especially during the delivery of an electoral event.

Taking into account the above matters, on balance, I consider that disclosure of the information in the document exempted under section 47C, is contrary to the public interest.

### **Section 47E – Certain operations of agencies**

Section 47E of the FOI Act conditionally exempts a document if their disclosure would reasonably be expected to affect certain operations of agencies on one or more of the following grounds:

- a) prejudice to the effectiveness of procedures or methods for the conduct of tests, examinations or audits;
- b) prejudice to the attainment of the objects of particular tests, examinations or audits;
- c) a substantial adverse effect on the management or assessment of personnel; or
- d) a substantial adverse effect on the proper and efficient conduct of operations.

#### *Certain operations of agencies*

I have carefully reviewed the relevant documents and consider that it is relevant to take into account whether the release of these documents could have a substantial adverse effect on the proper and efficient conduct of operations.

The AEC is an independent statutory authority. It is funded to deliver one purpose and one outcome: *Maintain an impartial and independent electoral system for eligible voters through active electoral roll management, efficient delivery of polling services, and targeted education and public awareness programs.*

Government agencies require the ability to have full and frank conversations in relation to policy discussions, particular involving amendments to legislation, to ensure that all pertinent issues are canvassed, and that the legislation is ultimately fit for purpose. The release of this information could reasonably be expected to impact agencies willingness to engage in similar conversations in the future, which would have a detrimental impact upon the AEC (and the Department of Finance) to be able to engage with other agencies to assist with providing policy advice and support on electoral matters to the Minister for Finance who is responsible for legal and policy framework for elections and referendums, including electoral legislation.

#### *The public interest*

Having concluded that the documents are conditionally exempt on the basis that their disclosure would reasonably be expected to affect certain operations of agencies, I now need to consider whether it would be contrary to the public interest for them to be disclosed to you in accordance with s 11A(5) of the FOI Act.

I consider that the public interest factors that weigh in favour of disclosure are:

- i) promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (section 3(2)(b) of the FOI Act);
- ii) informing debate on a matter of public importance, namely how the AEC conducts federal elections; and
- iii) facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency.

I consider that the public interest factors that weigh against disclosure are:

- i) the importance of maintaining the full and frank exchange of ideas between agencies, for the purpose of canvassing issues surrounding drafting of legislation, which involves a rigorous consultation process between relevant agencies;
- ii) disclosure could reduce the full and frank testing of ideas between agencies, which ultimately would result in less rigorously tested policy proposals and draft legislation in the future;
- iii) disclosure could reasonably be expected to prejudice the AEC's ability to obtain similar information in the future;
- iv) disclosure could reasonably be expected to prejudice the AEC's ability to attain the objects of the consultation process conducted by the AEC;
- v) disclosure could reasonably be expected to prejudice the AEC's management function and ability to perform its functions;
- vi) disclosure could reasonably be expected to prejudice the effective and efficient functioning of the AEC.

I consider that these factors take on additional weight when considering that the AEC is an independent statutory body. It is crucial to the proper functioning and integrity<sup>2</sup> of the AEC that it is able to provide frank and fulsome advice to government and to seek information from government on the operation of the Australian electoral framework especially during the delivery of an electoral event.

Taking into account the above matters, on balance, I consider that disclosure of the information in documents exempted under section 47E, is contrary to the public interest.

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<sup>2</sup> The proper function and integrity reflects that type of practice identified in *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 that sustains a claim of frankness and candour.