



Australian Government

Department of Finance

Reference: FOI 22/55
Contact: FOI Team
E-mail: foi@finance.gov.au

JH

By email only: foi+request-9180-7592ed8b@righttoknow.org.au

Dear JH,

Freedom of Information Request – FOI 22/55

On 26 July 2022, the Department of Finance (Finance) received your email, in which you sought access under the Commonwealth *Freedom of Information Act 1982* (FOI Act) to the following:

I request the incoming government briefs provided from the Department to its respective Ministers since 21 May 2022.

I am not seeking drafts of the above documents.

Finance notified you that a request for the same documents was received prior to the receipt of your request, and that the document released to that applicant had been published on Finance's [FOI Disclosure Log](#).

In response, you sought to proceed with your request.

The purpose of this letter is to provide you with notice of my decision under the FOI Act.

Decision

I have identified documents that fall within the scope of your request, which consist of the following:

- Document 1 – contains volume 1 of the Incoming Government Brief (IGB) prepared for the Minister for Finance (Minister)
- Document 2 – contains volume 2 of the IGB prepared for the Minister for Finance.
- Document 3 – contains the IGB prepared for the Special Minister of State (SMOS).

I have decided to:

- release Document 1, with irrelevant information removed (being the same version of the document that is accessible on [Finance's Disclosure Log](#)); and
- refuse to release Documents 2 and 3, as these documents contain deliberative matter, which on balance, would not be in the public interest to release.

In making my decision, I have had regard to the following:

- the terms of your FOI request;
- the content of the documents that fall within the scope of your request;
- the relevant provisions of the FOI Act;
- the following FOI cases;
 - *Crowe and Department of the Treasury* [\[2013\] AICmr 69](#) (Crowe 1);
 - *Parnell & Dreyfus and Attorney-General's Department* [\[2014\] AICmr 71](#) (Parnell);
 - *Crowe and Department of Prime Minister and Cabinet* [\[2014\] AICmr 72](#) (Crowe 2);
 - *Dan Conifer and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [\[2017\] AICmr 117](#) (Dan Conifer); and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines).

Authorised decision-maker

I am authorised by the Secretary of Finance to grant or refuse access to documents.

Deliberative processes – section 47C

Section 47C of the FOI Act 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; or
- (b) a Minister; or
- (c) the Government of the Commonwealth.

Exceptions

(2) Deliberative matter does not include either of the following:

- (a) operational information (see section 8A);
- (b) purely factual material.

The FOI Guidelines at paragraphs 6.59-60 provide:

‘Deliberative process’ generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

The deliberative process must relate to the functions of an agency, minister or the government of the Commonwealth. ... [T]he functions include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, such as code of conduct investigations, may also be deliberative processes.

Incoming Government Briefs

In Crowe 1, the former Australian Information Commissioner, Professor John McMillan discussed incoming government briefs at [85]:

Incoming government briefs play an important role in the Australian system of responsible parliamentary government. Their purpose is to enable and facilitate a smooth transition from one government to another following a general election. A new government may be formed and commence governing immediately after the election result is known. The new government will place strong reliance on receiving a helpful incoming government brief.

The incoming government brief will be prepared prior to the date of the general election, when both the election outcome and the identity of the new Minister are unknown. Immediately a government is formed a department must establish a working and trusting relationship with a new Minister. The confidentiality of the discussions and briefing provided to the new Minister are essential at that early stage in developing a relationship that accords with the conventions of responsible parliamentary government.

In Crowe 2, the former Australian Information Commissioner, Professor John McMillan noted at [15] and [30] respectively:

An IGB contains expert and high level advice and commentary on issues that may require immediate Ministerial attention or policy development, or that remain the subject of current policy deliberation.

An IGB is a unique document that is prepared for a special purpose at a critical juncture in the system of responsible parliamentary government.

Deliberative matter

Documents 2 and 3 contain Finance's analysis, views and advice on portfolio issues that may arise for consideration by the Minister, the SMOS and the Government, including commentary on implementing the Government's policy commitments. These documents are intended to be a key resources in the deliberative processes of Finance and the Government.

Purely factual material

The factual material contained in Documents 2 and 3 is integral to the deliberative content and purpose of the brief. It would be impractical to attempt to separate the factual material from the deliberative matter, as they are inextricably intertwined, and cannot be appropriately excised.

I am satisfied that Documents 2 and 3 contain deliberative matter.

Public interest test

Subsection 11A(5) of the FOI Act provides:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Having formed the view that Documents 2 and 3 are conditionally exempt under section 47C of the FOI Act, I am required to consider the public interest test for the purposes of determining whether giving access to the conditionally exempt documents would, on balance, be contrary to the public interest.

Factors favouring release

Section 11B of the FOI Act provides:

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

The FOI Guidelines provide a non-exhaustive list of factors that may favour disclosure at paragraph 6.19.

I consider the following factors in favour of release are relevant and attribute moderate weight to them:

- promotes the objects of the FOI Act by providing access to documents held by the Government
- inform public debate on the implementation of the policy commitments of an incoming Government
- enable public scrutiny, discussion, comment and review of the quality of the advice prepared by Finance for an incoming Minister and SMOS
- provide access to the informed opinions of Finance on important matters of national policy.

Factors against release

The FOI Guidelines provide a non-exhaustive list of factors that weigh against disclosure at paragraph 6.22.

In Crowe 1, the former Australian Information Commissioner, Professor John McMillan reviewed the nature and role of an Incoming Government Brief at 85:

Part of the value of an incoming government brief is that it provides a department's frank and honest advice on the policy priorities and challenges facing a new government. A department may perceive the need to raise difficult questions for the Minister about implementing the policy agenda of the incoming government. The advice is prepared before the identity of the new Minister is known, and in that sense differs from other advice that may be prepared at the Minister's request or as part of the department's normal support and advising function. The context is unique and requires that confidential advice can be prepared by the department for the incoming Minister, without endangering the impending development of a proper working relationship with the Minister.

Another special feature of an incoming government brief is that it is prepared essentially as a communication limited to an audience that may comprise only one person – the new Minister. If it is known that the brief will be disclosed publicly under the FOI Act, there is a risk that it will be tailored to a different audience or with different interests in mind. This could compromise the quality and value of the brief and make it less relevant to its specific circumstance.

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. An incoming brief that is not confidential may include only bland material that will not raise concern, and possibly be of less value to a new government. An associated risk is that the brief will not be comprehensive and will be replaced by oral briefings to the new Minister.

In Dan Conifer, the former Australian Information Commissioner, Timothy Pilgrim, noted at [42]:

‘the context in which an IGB is prepared is unique, whereby the advice contained in the IGB is prepared before the identity of the new Minister is known, rather than as part of the department’s usual support or advising functions. If there was an expectation that the contents of the IGB would be publicly released, it is reasonably foreseeable that any advice or discussions about potentially controversial issues would be unnecessarily censored or toned down, which would compromise the quality of the IGB.

I consider that there is significant public interest in preserving the role of IGBs in providing Finance’s frank and honest advice on policy considerations, priorities and challenges facing a new government.

Irrelevant factors

Section 11B of the FOI Act provides:

- (1) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

I have not taken into account any of the irrelevant factors listed above.

Balancing public interest factors

The FOI Guidelines provide:

To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts of the matter at the time the decision is made.

While I acknowledge that there is public interest in providing access to the IGBs to inform public debate on the implementation of the policy commitments of an incoming government, together with providing access to the informed opinions of Finance on important matters of national policy, on balance, I consider that the factors against disclosure outweigh the factors favouring disclosure. This is because there is a clear public interest benefit in the continuation of Finance’s ability to provide expert and high level advice and commentary on issues that may require immediate Ministerial attention or policy development, or that remain the subject of current policy deliberation. Particularly during a critical juncture in the system of responsible parliamentary government, being a change of government.

I am satisfied that the public interest factors against disclosure outweigh the public interest factors in favour of disclosure. Giving access to Documents 2 and 3 would be contrary to the public interest.

Charges

I have decided that a charge is not payable in this matter.

Review and appeal rights

You are entitled to request an internal review or a review by the Office of the Australian Information Commissioner of my decision. The process for review and appeal rights is set out at **Attachment A**.

Publication

The document released to you is accessible on Finance's [FOI Disclosure Log](#).

If you have any questions in regards to this request, please contact the FOI Team on the above contact details.

Yours sincerely,



Kelly Hoffmeister
Assistant Secretary
Corporate Services Division | Business Enabling Services
Department of Finance
19 August 2022



Australian Government

Department of Finance

Freedom of Information – Your Review Rights

If you disagree with a decision made by the Department of Finance (Finance) or the Minister for Finance (Minister) under the *Freedom of Information Act 1982* (the FOI Act) you can have the decision reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request, if you have made a contention against the release of the documents that has not been agreed to by Finance or the Minister, or if your application to have your personal information amended was not accepted. There are two ways you can seek a review of our decision: an internal review (IR) by Finance or the Minister, or an external review (ER) by the Australian Information Commissioner (IC).

Internal Review (IR)

If, Finance or the Minister (we/our), makes a Freedom of Information (FOI) decision that you disagree with, you can seek a review of the original decision. The review will be carried out by a different decision maker, usually someone at a more senior level.

You must apply for an IR within 30 calendar days of being notified of the decision or charge, unless we agree to extend your time. You should contact us if you wish to seek an extension.

We are required to make an IR decision within 30 calendar days of receiving your application. If we do not make an IR decision within this timeframe, then the original decision stands.

Review by the Australian Information Commissioner (IC)

The Office of the Australian Information Commissioner (OAIC) is an independent office who can undertake an ER of our decision under the FOI Act. The IC can review access refusal decisions, access grant decisions, refusals to extend the period for applying for an IR, and IR decisions.

If you are objecting to a decision to refuse access to a document, impose a charge, or a refusal to amend personal information, you must apply in writing to the IC within 60 calendar days of receiving our decision.

Third parties

If you are a third party objecting to a decision to grant someone else access to your information, you must apply to the IC within 30 calendar days of being notified of our decision to release your information. Further assistance is located [here](#).

Do I have to go through the internal review process?

No. You may apply directly to the OAIC for an ER by the IC.

If I apply for an internal review, do I lose the opportunity to apply for an external review?

No. You have the same ER rights of our IR decision as you do with our original decision. This means you can apply for an ER of the original decision or of the IR decision.

Do I have to pay for an internal review or external review?

No. Both the IR and ER are free.

How do I apply?

Internal review

To apply for an IR of the decision of either Finance or the Minister, you must send your review in writing. We both use the same contact details, and you must send your review request in writing.

In your written correspondence, please include the following:

- a statement that you are seeking a review of our decision;
- attach a copy of the decision you are seeking a review of; and
- state the reasons why you consider the original decision maker made the wrong decision.

Email: foi@finance.gov.au

Post: The FOI Coordinator
Legal and Assurance Branch
Department of Finance
One Canberra Avenue
FORREST ACT 2603

External review (Information Commissioner Review)

For an ER, you must apply to the OAIC in writing. The OAIC ask that you commence a review by completing their online form [here](#).

Your application must include a copy of the notice of our decision that you are objecting to, and your contact details. You should also set out why you are objecting to the decision.

Email: FOIDR@oaic.gov.au

Post: Office of the Australian Information
Commissioner
GPO Box 5218
Sydney NSW 2001

The IC's enquiries phone line is 1300 363 992.

Can I appeal the Information Commissioner's external review decision?

Yes. You can appeal the Information Commissioner's ER decision to the Administrative Appeals Tribunal (AAT).

There is a fee for lodging an AAT application (as at 1 June 2022 it is \$962).

Further information is accessible [here](#).

The AAT's number is 1800 228 333.

Complaints

Making a complaint to the Office of the Australian Information Commissioner

You may make a written complaint to the OAIC about actions taken by us in relation to your application.

Further information on lodging a complaint is accessible [here](#).

Investigation by the Commonwealth Ombudsman

The Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be, or has been, investigated by the IC, the Ombudsman will consult with the IC to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate the complaint, then they are to transfer all relevant documents and information to the IC.

The IC can also transfer a complaint to the Ombudsman where appropriate. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. You will be notified in writing if your complaint is transferred.

Complaints to the Ombudsman should be made online [here](#).

The Ombudsman's number is 1300 362 072.