



26 August 2022
FOI Ref 3143

JH

By email: foi+request-9192-xxxxxxx@xxxxxxxxxx.xxx.xx

Dear JH

Freedom of Information Request – Decision on the incoming government briefs

I refer to your request to Treasury on 27 July 2022, for access under the *Freedom of Information Act 1982* (the **FOI Act**) to the following:

Consistent with the Freedom of Information Act 1982, 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.

I am an authorised decision maker under section 23 of the FOI Act.

Decision

Incoming government briefs (**IGBs**) are prepared by a department during the caretaker period before a federal election. Your request seeks access to the IGBs that were provided to incoming Ministers since 21 May 2021. There are seven documents within scope of your request.

Documents 1 and 2 are the IGB in two volumes given to the Treasurer, the Hon Jim Chalmers MP. Document 3 is the IGB given to the Assistant Treasurer and Minister for Financial Services, the Hon Stephen Jones MP. Documents 4, 5 and 6 are the IGB with two attachments given to the Minister for Housing, Minister for Homelessness and Minister for Small Business, the Hon Julie Collins MP. Document 7 is the IGB given to the Assistant Minister for Competition, Charities and the Treasury, the Hon Dr Andrew Leigh MP.

I have decided to refuse access to Volume 1 of the Treasurer's IGB (document 1) in full, with information exempt under sections 47C and 47E(d) of the FOI Act. I have decided to grant access to documents 2, 3, 4, 5, 6 and 7 in part. Some material in document 2 is exempt under section 42 (legal professional privilege). I have decided that there is material in each of these documents exempt under sections 47C and 47E(d) of the FOI Act. Irrelevant information has been deleted under section 22 of the FOI Act. Copies of the documents I have decided to release are attached, edited under section 22 of the FOI Act to remove exempt and irrelevant material.

treasury.gov.au

@treasury_AU

@commonwealthtreasury

@australian-treasury

Langton Crescent
Parkes ACT 2600
Australia

P: +61 2 6263 2800

I consider there are other exemptions that apply to material I have exempted in each document. However, as I have decided to exempt that material under the provisions already mentioned, I do not propose to go through those exemptions in this letter. Further information regarding my decision is set out below.

Material Considered

The material to which I have had regard in making this decision includes:

- the scope of the FOI request;
- the content of the IGBs;
- the relevant provisions of the FOI Act;
- advice from subject matter experts within the Treasury;
- relevant case law; and
- the guidelines issued by the Australian Information Commissioner.

Irrelevant material deleted under section 22

Section 22 of the FOI Act allows the deletion of information that is irrelevant to your request.

The IGBs contain photos and direct contact details of Senior Executive Offices and Board members. We informed you in our acknowledgement email that it is our usual practice not to include the personal information of government employees and invited you to inform us if you did not agree with us processing the request on this basis. As we did not hear from you, the personal information of government employees has been excluded from the scope of your request and deleted under section 22 of the FOI Act.

Legal Professional Privilege - Section 42

Section 42 provides that a document is exempt if it would be privileged from production in legal proceedings on the ground of legal professional privilege.

The following criteria need to be met for a document to be privileged in legal proceedings:

- there must be a legal adviser-client relationship;
- the communication must have been for the dominant purpose of giving or receiving legal advice or for use in actual or anticipated litigation;
- the advice given must be independent;
- the advice must be confidential in nature; and
- privilege must not have been waived by the client, either expressly or impliedly.

Legal professional privilege has two limbs – advice privilege and litigation privilege. The IGBs contain communications on legal issues and litigation. The communications were made for the dominant purpose of sharing confidential legal advice with the incoming Ministers and confidentiality in those communications has been maintained.

I am satisfied that the relevant material satisfies the elements of privileged material set out above in the context of actual or anticipated litigation. I am also satisfied the claim to legal professional privilege in the relevant material has not been waived, either expressly or impliedly. I have therefore decided that those parts of document 2 are exempt under section 42(1) of the FOI Act.

Deliberative matter - Section 47C

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

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

Subsection 47C(2) of the FOI Act specifically excludes operational information and purely factual material from deliberative matter.

The whole of document 1 and a substantial portion of documents 2 to 7 are comprised of deliberative material. The proposition that IGBs will contain deliberative material was supported in *Crowe and Department of the Treasury* [2013] AICmr 69 (**Crowe**), *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 (**Dreyfus**) and *Conifer and the Department of the Prime Minister and Cabinet (No 2)* AICmr117 [2017] (**Conifer**). I am therefore satisfied that those parts of documents 2 to 7 and the whole of document 1 are conditionally exempt under s 47C of the FOI Act.

Section 47E(d) – prejudice to agency operations

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 the agency.*

Disclosure of the whole of document 1 and parts of documents 2 to 7 would reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Treasury. In particular, it would have that effect on the Treasury's ability to prepare future IGBs.

Treasury's IGBs canvass issues relevant to the portfolio Ministers' responsibilities, including sensitive issues and decisions requiring urgent attention. IGBs provide frank and honest advice on the policy priorities and challenges facing a new or returning government. They are extremely sensitive documents, and are treated as such within the Treasury. If the confidentiality of the documents cannot be guaranteed, future IGBs are unlikely to be as comprehensive – and therefore will be less useful to a new or returned government as they negotiate implementation of their election commitments and establishment of their policy agenda.

Accordingly, I am satisfied the whole of document 1 and a substantial part of documents 2 to 7 are conditionally exempt under section 47E(d) of the FOI Act.

Public Interest Test

As I have decided the whole of document 1 and portions of documents 2 to 7 are conditionally exempt under sections 47C and 47E(d) of the FOI Act, I am required to consider whether release of that material is contrary to the public interest.

To determine whether disclosure of a conditionally exempt document would be contrary to the public interest, I must consider those public interest factors favouring access to the document and weigh them against those public interest factors against access. If satisfied that the public interest factors against access outweigh those favouring access, I may decide the release of the document would be contrary to the public interest, and consequently exempt it from release.

Section 11B(3) provides that the public interest factors that favour access to conditionally exempt documents include whether access to the document would:

- 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.

I find granting access to all of document 1 and the conditionally exempt parts of documents 2 to 7 would arguably promote the objects of the FOI Act and inform debate on a range of matters of public importance. I do not consider that the other factors in section 11B(3) add any weight to releasing the documents in this matter.

In Crowe, the Information Commissioner discussed the public interest factors against release of material in IGBs. The Commissioner referred to the incoming government as 'new', when referring to both the party already in government and the party hoping to form government after being in opposition. It is helpful to set out the Commissioner's comments at paragraph 85 in full:

- 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.
- 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.

I consider all of these factors are relevant to, and mitigate against, the release of any part of document 1 and the conditionally exempt parts of documents 2 to 7. I have not taken into account any of the matters in section 11B(4). On balance, I am satisfied the release of this material would be contrary to the public interest. I have therefore decided document 1 is exempt in full, and documents 2 to 7 are exempt in part, under sections 47C and 47E(d) of the FOI Act.

Rights of Review

A statement setting out your rights of review in this matter is attached.

Disclosure Log

The Treasury publishes documents disclosed in response to FOI requests on the Treasury website on the same day that the decision is sent to an applicant. This is consistent with the arrangements established by section 11C of the FOI Act.

Yours sincerely


Signature

Oliver Richards
Assistant Secretary
Budget Strategy Branch

FOI 3143 Document Schedule

Doc No.	Description	Decision
1.	IGB Treasurer – volume 1	Refuse in full <ul style="list-style-type: none"> - Section 47C – deliberative - Section 47E(d) – operations of agencies - Section 22 – irrelevant information
2.	IGB Treasurer – volume 2	Release in part <ul style="list-style-type: none"> - Section 42 – Legal professional privilege - Section 47C – deliberative - Section 47E(d) – operations of agencies - Section 22 – irrelevant information
3.	IGB - Assistant Treasurer and Minister for Financial Services	Release in part <ul style="list-style-type: none"> - Section 47C – deliberative - Section 47E(d) – operations of agencies - Section 22 – irrelevant information
4.	IGB - Minister for Housing, Minister for Homelessness, Minister for Small Business	Release in part <ul style="list-style-type: none"> - Section 47C – deliberative - Section 47E(d) – operations of agencies - Section 22 – irrelevant information
5.	IGB (document 4) Attachment 1 - Housing	Release in part <ul style="list-style-type: none"> - Section 47C – deliberative - Section 47E(d) – operations of agencies - Section 22 – irrelevant information
6.	IGB (document 4) Attachment 2 – Small Business	Release in part <ul style="list-style-type: none"> - Section 47C – deliberative - Section 47E(d) – operations of agencies - Section 22 – irrelevant information
7.	IGB - Assistant Minister for Competition, Charities and the Treasury	Release in part <ul style="list-style-type: none"> - Section 47C – deliberative - Section 47E(d) – operations of agencies - Section 22 – irrelevant information

INFORMATION ON RIGHTS OF REVIEW

1. APPLICATION FOR INTERNAL REVIEW OF DECISION

Section 54 of the FOI Act gives you the right to apply for an internal review of the decision refusing to grant access to documents in accordance with your request.

An application for a review of the decision must be made in writing within 30 days of receipt of this letter.

No particular form is required but it would assist the decision-maker if you could set out in the application the grounds on which you consider that the decision should be reviewed.

An application for a review of the decision should be emailed to FOI@Treasury.gov.au.

OR

2. APPLICATION TO AUSTRALIAN INFORMATION COMMISSIONER (INFORMATION COMMISSIONER) FOR REVIEW OF DECISION

Section 54L of the FOI Act gives you the right to seek a review of the decision from the Information Commissioner. An application for review must be made within 60 days of receiving the decision.

An application for review must be in writing and must:

- give details of how notices must be sent to you; and
- include a copy of the notice of decision.

You should send your application for review to:

The Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

AND/OR

3. COMPLAINTS TO THE INFORMATION COMMISSIONER

Section 70 of the FOI Act provides that a person may complain to the Information Commissioner about action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

A complaint to the Information Commissioner must be in writing and identify the agency the complaint is about. It should be directed to the following address:

The Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

The Information Commissioner may decline to investigate the complaint in a number of circumstances, including that you did not exercise your right to ask the agency, the Information Commissioner, a court or tribunal to review the decision.