



18 October 2013

File:

FOI ref:

Dear

FREEDOM OF INFORMATION REQUEST

I refer to your request of _____ under the *Freedom of Information Act 1982* (the Act), seeking:

"information under the Freedom of Information Act, specifically the incoming government briefs."

I am an authorised decision maker under section 23 of the Act and the following is my decision in relation to your request.

Materials Relevant to Making of Decision

In making this decision, I have referred to the following materials, information and advice:

- the terms of your FOI request;
- advice provided by Treasury officers;
- the relevant provisions of the Act;
- guidelines issued by the Australian Information Commissioner ('FOI guidelines');
- decisions of the Australian Information Commissioner, in particular *Crowe and Department of the Treasury* [2013] AICmr 69 (29 August 2013) and *Cornerstone Legal Pty Ltd and Australian Securities and Investment Commission* [2013] AICmr 71 (10 September 2013);
- the 'Review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010*' by Dr Allan Hawke AC dated 1 July 2013; and
- the documents relevant to your request.

Decision

The Treasury has in its possession two documents that are relevant to your request, namely the incoming government briefs.

An incoming government brief (IGB) is briefing prepared by a department during the caretaker period before a federal election. The brief prepared for a Coalition government is known as the Blue book. The brief prepared for a Labor government is known as the Red book.

Having regard to the substantial guidance that has arisen in the last 12 months with respect to the operation of the Act, and in particular the recent Information Commissioner decision in *Crowe and Department of the Treasury*, I have decided that both documents are exempt in full. My reasons for this decision are set out below.

Exemptions claimed

Subsection 47E(d) — certain operations of an agency

Subsection 47E(d) provides that a document is conditionally exempt if its disclosure under the Act would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

For the exemption to apply, a decision-maker is required to assess the impact and scale of an expected effect from disclosure of the documents and find that it would be both 'substantial' and 'adverse' (paragraph 5.17 of the FOI guidelines).

Expected effect from disclosure of incoming government briefs

Incoming government briefs play an important role in Australia as ministers are regarded as immediately responsible for the portfolios they hold and, therefore, require comprehensive and frank briefs.

Treasury's incoming government briefs canvass issues relevant to the Treasurer's responsibilities, including sensitive issues requiring urgent attention. They are amongst the most important and highly confidential documents produced by the department. The briefings are candid in their advice and are prepared on the basis that they will be confidential to the government which is formed, or in the case of the unused book, stored on a completely restricted basis as required by the National Archives. If that confidentiality cannot be guaranteed, then future incoming government briefs are unlikely to be as comprehensive and, therefore, less useful to a new government in the initial stages of its administration.

The ongoing integrity of the incoming government brief process, and its contribution to future smooth transitions in government, relies on maintaining the confidentiality of the advice prepared.

Having regard to the above, and having consulted with senior officers within the Treasury, I find that disclosure of the documents would inhibit the Treasury's ability to provide effective and comprehensive incoming government briefs in the future. It is an operational requirement of the Treasury to provide comprehensive briefing to the Treasurer following his or her appointment. Failure to do so would impair the Treasurer's ability to inform Parliament of the actions and policies of the department and wider portfolio. Furthermore, failure to provide comprehensive briefings would reasonably be expected to interfere with the effectiveness of the relationship between the Department and the incoming government, which is central to the proper and efficient functioning of the Treasury.

I consider that the above effects would reasonably be expected to flow from disclosure of the documents, and would be both 'substantial' and 'adverse'. Accordingly, I find both documents to be conditionally exempt under subsection 47E(d).

Public interest

Access must generally be given to a conditionally exempt document unless access would, at that time, be contrary to the public interest.

Factors favouring disclosure

I have considered the factors in favour of disclosure, which include that disclosure would: promote the objects of the FOI Act; inform debate on a matter of public importance; or promote effective oversight of public expenditure (paragraph 6.23 of the FOI guidelines refers).

I am of the view that there is a degree of public interest in the contents of the incoming government brief for the government that formed.

I note, however, that the brief prepared for the party that did not form government (the Red book) is advice to a hypothetical government and will not form part of any government decision-making process. In this regard, there are clearly fewer public interest factors supporting disclosure of the Red book than the Blue book.

Factors against disclosure

As stated above and noted in *Crowe and the Department of the Treasury*, incoming government briefs provide a department's frank and honest advice on policy priorities and challenges facing a new government and are critical to ensuring a smooth transition from one government to another. Each brief is prepared essentially as a communication limited to a specific audience — the Minister. Were it known that the brief would be disclosed publicly under FOI, there is a risk that the quality and value of the brief would be compromised, and it would be of less value to the Minister. In my view there is a public interest in providing a comprehensive, written brief to an incoming Treasurer.

I also find that release of the incoming government briefs would interfere with the establishment of an effective working relationship between the Treasury and the Treasurer. The need to develop a trusting relationship is particularly important in the early days of a new government, to set the tone for the future working relationship of the whole department. Disclosure of the incoming government brief would not be conducive to establishing a productive, trusting and effective relationship with the Treasurer and would adversely affect Treasury's effectiveness as a central policy agency, which I also find to be contrary to the public interest.

I am also of the view that disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information (paragraph 6.25 of the guidelines refers). In developing incoming government briefs, Treasury consults broadly with other departments and obtains their views on election commitments, current policy commitments and suggested policy directions from the public service. Agencies would be less willing to share their views openly on policy options in the incoming government brief preparation context if they knew the briefs would be made publicly available and hence potentially cause damage to the public service's relationships with the ministers.

Additional factors against disclosure applying to the Blue book

The 2013 federal election resulted in a change of government. As the Coalition government was in opposition prior to September 2013, the Blue book provided to the Treasurer, the Hon Joe Hockey MP, represents the first formal briefing from the Treasury. It is imperative that the Treasurer be provided with an opportunity to consider and reflect on the contents of the incoming government brief as he prepares to implement the government's election commitments.

Additional factors against disclosure applying to the Red book

I have set out below a range of public interest factors against disclosure, drawn from *Crowe and Department of the Treasury*, which I consider to be relevant to this decision:

- The brief prepared to the party that does not form government is never provided to that party, nor does it have the opportunity to consider and respond to it. Circulation of the brief is limited, even within the department. Public release of any portion of the brief would compromise the department's role in managing the transition from one government to another.
- Public release of the confidential advice prepared for a party that did not form government could complicate the relationship between the public service and the Ministers who have formed government.
- It is a convention of Cabinet government that the Cabinet papers of one government are not available to the Ministers of another. By extension, the high level advice, which is on par with Cabinet briefing, that was prepared for a party in the expectation that it may (but did not) form government should not be released publicly under the FOI Act.

Irrelevant factors not considered

I advise that I have not taken into account any of the irrelevant factors set out in subsection 11B(4).

Conclusion on public interest

I have carefully considered the factors for and against disclosure of the documents. My conclusion is that, both in the case of the Blue book and the Red book, the factors against disclosure outweigh the factors favouring disclosure.

Accordingly, I find that both documents are exempt in full under subsection 47E(d).

Other exemptions

In light of the decision I have reached under subsection 47E(d), it is not necessary for me to consider the possible application of other exemption provisions under the Act. However, I note that all or parts of both documents may be exempt under a number of other exemption provisions. In particular, given the deliberative material contained in the documents, I am of the view that exemptions under section 47C (deliberative processes) and, in the case of the Red book, section 34 (the Cabinet exemption) will apply.

If I were to make a decision on the applicability of the each exemption provision by undertaking a detailed examination of every page of both documents, I am of the view that a practical refusal reason within the meaning of section 24AA would exist as processing the request would result in a substantial and unreasonable diversion of resources within the meaning of section 24 of the Act. There is a significant volume of material within the incoming government briefs, and a decision on access on a basis other than a class claim would require exhaustive consultation with senior officers in the department and with other agencies.

Rights of Review

In accordance with paragraph 26(1)(c) of the Act, a statement setting out your rights of review under the Act is attached.

Yours sincerely

RIGHTS OF REVIEW — ACCESS REFUSED**INFORMATION ON RIGHTS OF REVIEW****1. APPLICATION FOR INTERNAL REVIEW OF DECISION**

Section 54 of the Freedom of Information 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.

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.

Application for a review of the decision should be addressed to:

The Secretary
The Treasury
Langton Crescent
PARKES ACT 2600
Attention: Parliamentary and Legal Services Unit

OR

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

Section 54L of the 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.

Applications 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 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 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.