

## **FOI 22-218 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982**

1. I refer to the application by [REDACTED] of The Australian, under the *Freedom of Information Act 1982* (FOI Act), for access to the following:

*"I would like to FOI the incoming "red and blue" books written for Labor and the Coalition."*

### **FOI decision maker**

2. I am the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

### **Documents identified**

3. With due consideration of the context of the request, I have interpreted the request to refer to the volumes of the Incoming Government Briefing (IGB). The IGB is prepared to provide incoming Ministers with advice on program and policy matters relevant to their portfolio.
4. On this basis, I identified one document (comprising 10 volumes) as matching the description of the request.

### **Decision**

5. I have decided to partially release five volumes of the IGB in accordance with section 22 (access to edited copies with exempt or irrelevant matter deleted) of the FOI Act. Where I have redacted material, I have done so on the grounds that the material is considered exempt or conditionally exempt under:
  - a. section 33 [documents affecting national security, defence or international relations];
  - b. section 37 [documents affecting enforcement of law and protection of public safety];
  - c. section 45 [material obtained in confidence];
  - d. section 47 [trade secrets or commercially valuable information];
  - e. section 47B [Commonwealth-state relations];
  - f. section 47C [deliberative processes];
  - g. section 47D [financial or property interests of the Commonwealth];
  - h. section 47E [certain operations of agencies];
  - i. section 47F [personal privacy]; and
  - j. section 47G [business affairs] of the FOI Act.
6. I have further decided to deny access to the remaining five volumes of the document, on the basis that the content of these volumes meets the exemption provisions under:
  - a. section 33 [documents affecting national security, defence or international relations];
  - b. section 42 [legal professional privilege];
  - c. section 47B [Commonwealth-State relations];
  - d. section 47C [deliberative processes]; and
  - e. section 47E [certain operations of agencies] of the FOI Act.

7. I note that Subsection 22(1) of the FOI Act requires that, where a decision maker denies access to a document, they must consider releasing the document with exempt matter deleted, where possible.
8. I took subsection 22(1) into consideration in my review of each of the volumes that comprise the document and decided against releasing five of the volumes where they would be meaningless or of little or no value once the exempt material was removed.

**Material taken into account**

9. In making my decisions, I had regard to:
  - a. the terms of the request;
  - b. the content of the identified documents in issue;
  - c. relevant provisions of the FOI Act;
  - d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines);
  - e. advice received from subject matter experts within the department; and
  - f. advice received from third parties.
10. After considering these matters, I reviewed Section 11(B)(4) of the FOI Act, which identifies matters that must not be taken into account in determining if a document is exempt from release. I assessed that no part of the document has been exempted in part or in full for any of the reasons under 11(B)(4), nor have any of these matters been factors in determining the release or exemption from release of any material in this request.

***Reasons for decision***

**Section 33(a)(iii) - International relations of the Commonwealth**

11. I have identified information in the document that, if released, would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth. Paragraph 5.36 of the FOI Guidelines ('the Guidelines') describes international relations as the ability of the Australian Government to maintain good working relations with other governments and international organisations.
12. A number of the volumes that comprise the IGB contain information relating to Australia's relationships with foreign governments. They include advice or opinions on Australia's engagement with other countries and the position of other countries with regard to Australia's policy interests. Release of this information could reasonably be expected to cause damage to those relationships and would cause a loss of trust and confidence in the Australian Government, and foreign officials may be less willing to engage with Australian Government officials and Australian businesses in the future.
13. I considered that the national interest in not disclosing this information outweighed the public interest in disclosure.

**Section 33(a)(i) - Security of the Commonwealth**

14. Section 33(a)(i) of the FOI Act exempts a document if its disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth.
15. The term 'security of the Commonwealth' broadly refers to 'the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests'.
16. The term 'Damage' is not confined to loss or damage in monetary terms and the relevant damage may be of an intangible nature.
17. The material that I have decided not to release relates to matters that could be reasonably expected to damage the security of the Commonwealth if disclosed. This includes, for example,

information on funding and delivery arrangements for security at Australian airports and detail on the role of portfolio programs in supporting national security activities. I have formed the view that release of this type of information would pose security implications as it would provide sensitive information which could be used against the Commonwealth of Australia.

18. Accordingly, I consider the release of the information so marked would, or could reasonably be expected to, cause damage to the security of the Commonwealth and exempt the release of this information under section 33(a)(i) of the FOI Act.

#### **Section 37(2)(b) and (c) - Documents affecting enforcement of law and protection of public safety**

19. Section 37(2)(b) exempts documents which would disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches or evasions of the law. Specifically, documents are exempt where disclosure would prejudice the effectiveness of those methods or procedures.
20. Section 37(2)(c) further exempts material which could prejudice the maintenance or enforcement of lawful methods for the protection of public safety.
21. Following third party consultation, I have decided that the document includes several sections which would meet these criteria.
22. This includes material where disclosure could harm the operation of security at Australian airports, including the operation of security screening.
23. The material redacted is not currently in the public domain. Access to this material could be used by security threats to reduce the efficiency of Australia's lawful detection and prevention measures in these high-risk environments. This disclosure would consequently weaken the protection for public safety.
24. On this basis, I have decided that this content met the exemption requirements under Section 37(2)(b) and (c), and have decided not to release it.

#### **Section 42 – Documents subject to legal professional privilege**

25. Section 42(1) of the FOI Act 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). For the purpose of the privilege, 'advice' extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context. The Guidelines note that the legal advice will be privileged if the main purpose of its creation was for giving or receiving legal advice or for use in actual or anticipated litigation.
26. I have considered information in a number of the volumes that draws on legal advice to inform advice to the incoming government on issues such as the extent of legal risk attached to particular policies or programs. This advice was created by the department's legal advisers for the purpose of provision of advice to ministers.
27. For this reason, I have decided that the sections of the document that draw on legal advice to the department are exempt from disclosure.

#### **Section 45 – Documents containing material obtained in confidence**

28. Documents are exempt from release under Section 45 if it would constitute a breach of confidence owed to a person or body other than a Minister (or Ministerial staff, or others acting in the capacity of the Minister or their staff), the Commonwealth, or Commonwealth agencies (including officers of an agency).
29. Several sections of the document include material provided to the department and the Commonwealth in confidence, with an express expectation that this confidence would be maintained.
30. This includes material provided to the department or other agencies as part of its regulatory functions, including where other persons or bodies have provided in-confidence advice or

submissions on these functions. This includes advice provided by industry in the aviation and telecommunications sectors.

31. In deciding to redact this material, I have taken into account the balance of public interest between the benefits of releasing the material, including to support informed public debate, and the harm to the entities whose confidence would be breached.

#### **Section 47 – Trade secrets or commercially valuable information**

32. A document is exempt from release under 47 if it would disclose: trade secrets; or any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.
33. This includes exposing – and thereby devaluing - commercially valuable information owned by Commonwealth-owned Corporations and the department or the Commonwealth's private sector commercial partners.
34. I identified several sections in the document which met the conditions of this exemption.
35. These included, but were not limited to, information on internal commercial decisions and positions on contracting, contract negotiations and current and future financial arrangements of Commonwealth owned Corporations.
36. I decided that releasing this information would directly impact the value of the information and/or the commercial value of the Corporation's property, or would disclose the Corporation's trade secrets.

#### **Section 47B - Commonwealth-state relations**

37. Under Section 47B, I have decided to conditionally exempt several sections in the document where the content:
  - a. *would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or*
  - b. *would divulge information or matter communicated in confidence by or on behalf of the Government or an authority of a State, to the Government or an authority of the Commonwealth, including to the department.*
38. Effective delivery of a large number of the department's programs and responsibilities rely on partnerships with state and territory governments and agencies. An effective working relationship, involving trust and open communication, is central to these partnerships.
39. Examples of matters where I have decided to conditionally exempt material include information relating to negotiations on future or ongoing State delivered programs; the department's advice on progress by states in implementing certain programs and policies, and frank advice provided by states, in confidence, on the implementation arrangements for Commonwealth programs.
40. I considered the harm that would be caused by release of this information includes the risk of state governments and authorities withholding information in the future which is required to efficiently manage Commonwealth programs and the achievement of policy objectives.
41. In making this decision, I decided that release of the exempt information would harm Commonwealth-state relationships and the department's capacity to effectively deliver programs, policies and regulations. It is my view that this harm would outweigh the benefits to informed public debate which could be achieved by release of the information.

### **Section 47C – Deliberative processes**

42. Several sections in the document contain information relating to opinions, advice and recommendations for the purpose of informing the incoming government and aiding decision making.
43. On review, I have decided that this material is conditionally exempt under subsection 47C(1) of the FOI Act which states:

*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, the deliberative process involved in the functions of...an agency...or a Minister.*

44. Many sections of the document contain material which was produced for the purpose of providing opinion and advice for consideration by the incoming government, including advice on the implementation of the government's plans.
45. The document also contains material about the department's policy forming processes, dealing with the merit and expedience of particular issues, and proposing options for consideration closely intertwined with factual information. This information provided within the document is still being considered and deliberated upon by Ministers.
46. There is a risk, if this material was released, that the department would have options curtailed by the premature release of sensitive considerations, with a resultant detrimental impact on planning and implementation of portfolio policies and programs.
47. Release of the deliberative matter contained in the document would harm the smooth operation of the department's business including the ability for the department to present and communicate frank preliminary advice at the highest levels of Government.
48. Taking the above into consideration, I am satisfied that the information noted as conditionally exempt under section 47C of the FOI Act should not be released.
49. In making my decision, I took into account the requirement that these exemptions could not be either (a) operational material; or (b) purely factual material.

### **Section 47D – Financial or property interests of the Commonwealth**

50. A document is conditionally exempt if its disclosure under the FOI Act would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency. The exemption relates both to expenditure and revenue-generating activities.
51. In the context of the IGB, this exemption is relevant to advice or information on departmental programs that operate in a competitive market. Advice provided to the minister on the financial aspects of such programs – such as the rate of return on assets – could be expected to have a substantial adverse effect on the competitiveness of the program if that information was disclosed to competitors.
52. For this reason, I have decided not to disclose this information and advice to ministers. Further, I consider that release would be contrary to the public interest and that this factor weighs strongly against disclosure.

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

53. Section 47E conditionally exempts documents where they would either:
- a. *prejudice an agency's effectiveness or attainment of tests, examinations or audits*
  - b. *have a substantial adverse effect on the agency's management or assessment of personnel; or*
  - c. *have a substantial adverse effect on the proper and efficient conduction of operations of an agency.*
54. I am satisfied that the disclosure of parts of the document would, or could reasonably be expected to meet these criteria.
55. Specifically, release of this content could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of operations of the department and other agencies and entities in the portfolio.
56. Incoming Government Briefings provide extensive and frank information and advice to ministers on the operation of the department, its implementation of policies and programs, and on the operations and governance of portfolio agencies.
57. The capacity to provide this advice in a frank manner is integral to the usefulness of the briefing to ministers; establishment of open and trusted communication between decision-makers and the department; and the department's operational methods and procedures.
58. Disclosure of this advice would substantially harm the effectiveness of the department's, and other portfolio entities', operations. It would substantially prejudice the advice delivered to the minister and how that advice would be considered.
59. Addressing this harm would require the department, and potentially its portfolio entities, to change how it conducts its operations and procedures – with the risk of introducing less efficient or effective processes or practices.
60. I recognise that disclosing this material could also be in the public interest, such as where it supported informed debate on matters of public importance, or promoted efficient oversight of public expenditure. However, on balance, the disclosure of this material and the corresponding adverse effects on the conduct of the operations of the department and other portfolio entities would be contrary to the public interest.
61. Taking the above into consideration, I am satisfied that the information noted as conditionally exempt under section 47E of the FOI Act should not be released.

### **Section 47F – Personal privacy**

62. A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
63. In considering whether material within the document should be considered conditionally exempt under Section 47F, I took into account the extent to which the information was already well known, and the extent to which the persons referred to would be known to be associated with the matters discussed.
64. Where possible, I sought to avoid exempting information which could identify departmental officers who are responsible for providing policy advice on matters.
65. However, these individuals' mobile telephone numbers and other personal information is not generally known. I have decided to conditionally exempt personal contact details for some people referenced in the document, where those details were not publicly available.

## **Section 47G – Business affairs**

66. A document is conditionally exempt if it would disclose information that would, or could reasonably be expected to, unreasonably adversely affect a person in respect of their lawful business or professional affairs or could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.
67. I decided that this conditional exemption applied to a small amount of material across the document, largely in relation to businesses who provide information about their business activities to the department in confidence, including but not limited to supporting the department's regulatory functions.
68. The department must protect its capacity to obtain such information in confidence where it informs and enhances the usefulness of its advice to ministers and government.
69. Taking the above into consideration, I am satisfied that the information noted as conditionally exempt under section 47G of the FOI Act should not be released.

## **Release of Conditionally Exempt Documents**

70. Section 47C allows for conditional exemption of material. Section 11A(5) of the FOI Act provides that if a document is conditionally exempt, it must be disclosed unless access to the document at that time would, on balance, be contrary to the public interest.
71. In assessing whether disclosure would be, on balance, contrary to the public interest, I considered the Guidelines together with a range of factors set out in section 11B(3) of the FOI Act. I took into consideration that the FOI Act provides for releasing documents where they:
  - 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; and/or*
  - d. *allow a person to access his or her own personal information.*
72. I considered arguments that some of the conditionally exempted materials could promote the objects of the Act. On balance, I decided that disclosure of the specific conditionally exempt material would not support these objects. For example, it would not increase public participation in the department's activities.
73. Further, while disclosure could support informed debate on these matters, on balance I decided that the release of the conditionally exempt material would harm informed debate.
74. While I accept there is a public interest in ensuring that the department undertakes its functions in a transparent and proper manner, there is also a public interest in maintaining the confidentiality of some material contained in the document while that content is still in deliberative stages.
75. I consider that there is a strong public interest in preventing an adverse effect on the ability of the department to both receive and prepare frank advice, the premature release of which could impede the effective completion of the matters under deliberation.
76. After weighing all of the above, I consider that on balance the public interest factors against disclosure outweigh the factors for disclosure of the identified conditionally exempt material in the document. Accordingly, I have decided that the specific material is exempt under sections 47B, 47C, 47D, 47E, 47F and 47G of the FOI Act.

**Further Information**

77. The document matching the scope of this request contained a dissemination limiting marker. As the document is approved for public release, it has been declassified.



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