



Parnell and Prime Minister of Australia **[2011] AICmr 10 (21 December 2011)**

Decision and reasons for decision of Australian Information Commissioner, Professor John McMillan

Applicant:	Sean Parnell
Respondent:	Prime Minister of Australia
Decision date:	21 December 2011
Application number:	MR11/00064
Catchwords:	Freedom of information – Whether letter to Prime Minister from a political organisation is an official document of a Minister – (CTH) <i>Freedom of Information Act 1982 s 4(1)</i>

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Summary

1. I affirm the decision of the Office of the Prime Minister of 9 February 2011, to refuse Mr Parnell access to a letter sent by EMILY's List Australia to the Prime Minister. The letter is not an 'official document of a Minister' as defined in s 4(1) of the *Freedom of Information Act 1982* (FOI Act), and accordingly there is no right of access to it under the FOI Act.

Background

2. On 1 November 2010, the applicant, a journalist with *The Australian*, applied to the Prime Minister for access to the following documents:

All letters and emails from 'church organisations', and the organisation known as Emily's List, congratulating Prime Minister Julia Gillard or otherwise commenting on the election result.

'Church organisations' are defined as the following organisations and/or their representatives: the Catholic Church, Anglican Church, Uniting Church, Presbyterian Church, Baptist Church, Lutheran Church, Australian Christian Churches, Hillsong, Exclusive Brethren, Islamic Association of Australia and Australian Federation of Islamic Councils.
3. On 9 February 2011 the Office of the Prime Minister replied to the applicant advising that two relevant letters from 'church organisations' were located. The Office denied access to both letters: one on the basis that it was exempt under s 47G (business), and the other under s 47F (personal privacy).
4. The letter to Mr Parnell also advised that a letter from EMILY's List Australia had been located, but that it was not an 'official document of a Minister' to which the FOI Act applied.
5. On 21 March 2011 the applicant requested, under s 54L of the FOI Act, Information Commissioner review of the decision of the Prime Minister's Office not to provide him with access to the letter from EMILY's List Australia. The applicant has clarified that he is not seeking IC review of the decision in relation to the other two letters from church organisations.

Decision under review

6. The decision under review is the decision made on behalf of the Prime Minister on 9 February 2011, that the letter from EMILY's List Australia was not an 'official document of a Minister' as defined in s 4(1) of the FOI Act.

Application of FOI Act to ministerial documents

7. The right of access to documents under the FOI Act extends to an 'official document of a Minister' (s 11(1)(b)). Section 4(1) of the Act relevantly defines this term as 'a document that is in the possession of a Minister ... in his or her capacity as a Minister, being a document that relates to the affairs of an agency or of a Department of State'.

8. In my role as Australian Information Commissioner I have issued Guidelines under s 93A of the FOI Act to which regard must be had by those performing a function or exercising a power under the FOI Act. The Guidelines state at [2.17]:

The term ['official document of a Minister'] does not extend to the personal documents of a minister or the minister's staff, documents of a party political nature, or documents held in the minister's capacity as a local member of parliament unless the correspondence concerns an agency within the minister's portfolio.

9. In his request for IC Review, the applicant argued that:

The decision-maker has wrongly taken the view that [the letter from EMILY's List Australia] is not an 'official document of a Minister' under the Act. Given the organisation actively lobbied the Prime Minister during the election campaign on several issues, and briefed her advisers, and that the Prime Minister can use her position to bring affect to requested policy changes and the like, this is clearly an 'official document of a Minister' under the Act. The Prime Minister is also a member of the organisation and has spoken in support of it in the past. If a company, organisation or individual lobbies a government or minister on an issue related to their portfolio responsibilities, and especially if those parties have a relationship, that correspondence must be made public in the interests of transparency of decision-making.

10. According to its official website,¹ EMILY's List Australia is a non-profit incorporated association that was established on 11 November 1996 to support progressive Australian Labor Party (ALP) women candidates and female Members of Parliament. The name 'EMILY's List' is an acronym: 'Early Money is Like Yeast – it helps to raise the dough for campaigns'.² The purposes of the association as stated in its Constitution are:

(a) to provide support, including financial support, to women candidates in federal, state, territory and local government elections who:

- (i) have been endorsed by the ALP;
- (ii) are contesting winnable positions; and
- (iii) have been approved by the Committee;

additional to the normal support provided to candidates by the ALP; and

(b) to provide support, including financial support, to groups of women members of the ALP for activities that encourage and educate women who:

- (i) are members of the ALP; and
- (ii) may become candidates in federal, state, territory and local government elections.³

¹ See www.emilyslist.org.au

² EMILY's List, *Our History* (2011) www.emilyslist.org.au/about-us/our-history.

³ *EMILY's List (Australia) Incorporated Constitution* (2011), cl 3(1).

Findings

11. For the purposes of this review I viewed the letter from EMILY's List Australia to the Prime Minister. Although caution is needed in describing the contents of a document to which access is not granted under the FOI Act, it will help to explain my decision if I briefly describe the contents of the letter.
12. It was a letter sent in September 2010 congratulating the Prime Minister on her election as Prime Minister, and commenting on her personal qualities as a leader. The letter: outlines the assistance that EMILY's List Australia provided to women ALP candidates during the 2010 election campaign; made proposals as to how the Prime Minister could support the organisation; briefly commented on the alignment between research undertaken by the organisation on a particular topic and the announced policies of major political parties including the ALP; and attached a similar letter sent to the National Secretary of the ALP. The letter to the Prime Minister does not refer to any particular department or agency of the Australian Government, nor to any specific legislation or program administered by the Australian Government.
13. The responsibilities of the Prime Minister are broad and extend potentially to all the nation's affairs, including the affairs of each agency or Department of the Australian Government. It is likely that most correspondence to the Prime Minister (as could be said of the letter in this case) is crafted directly or indirectly to influence the way that the Prime Minister approaches the task of governing the nation. That line of reasoning, unless balanced against other considerations, could lead to the conclusion that all correspondence to the Prime Minister, except letters of a purely private and personal nature, could be classified as 'official documents' of the Prime Minister for FOI purposes.
14. However, I do not believe that ss 4(1) and 11(1)(b) of the FOI Act are to be applied in that way. The sections place a boundary on the documents in the possession of a Minister that are subject to the FOI Act. Further, I believe that the distinctions drawn in [2.17] of the Guidelines (quoted earlier) correctly chart that boundary. The particular distinction that is relevant to this case is between the official portfolio responsibilities of a Minister and a Minister's activities as a member of a political party who has been elected to the Parliament. A similar approach was adopted by the Administrative Appeals Tribunal in *Re Michael Nassib Said and John Dawkins, MP* (1993) 30 ALD 242.
15. In my view, the letter in this case relates to the activities of the Prime Minister as the leader of a political party that has been elected to government. The letter does not relate 'to the affairs of an agency or of a Department of State'. It is not therefore a document that is an 'official document of a Minister' to which the FOI Act applies.
16. The issue that I have dealt with in this case is not the same as whether access can be refused to a document on the basis that it is an exempt or conditionally exempt document under the FOI Act. In that case it is usual to consider whether the contents of a document make public disclosure inappropriate. Questions of transparency in decision making and the public interest in open government are

also to the fore. Whether a document is 'an official document of a Minister' is an issue of a different kind: it is a question of whether the FOI Act applies to the document, having regard to the statutory boundary that Parliament has imposed.

Decision

17. Under s 55K of the FOI Act, I affirm the decision of the Office of the Prime Minister of 9 February 2011, to refuse Mr Parnell access to correspondence between EMILY's List Australia and the Prime Minister, on the basis that this correspondence was not an 'official document of a Minister' as defined in s 4(1) of the *Freedom of Information Act 1982*(FOI Act).

Professor John McMillan
Information Commissioner

21 December 2011

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$777, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.