



Parnell and Prime Minister of Australia (No 2) [2011] **AICmr 12 (23 December 2011)**

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

Applicant:	Sean Parnell
Respondent:	Prime Minister of Australia
Decision date:	23 December 2011
Application number:	MR10/0001
Catchwords:	Freedom of information – Whether diary entry relating to political party function 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 19 November 2010, to refuse access to documents relating to meetings arranged for the Prime Minister at the time of an Australian Labor Party (**ALP**) annual conference. The documents are 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 them under the FOI Act.

Background

2. On 4 November 2010, the applicant, a journalist with *The Australian*, applied to the Office of the Prime Minister for access to the following documents:
 - ... diary entries, correspondence and other documents held by the Prime Minister's Office and detailing who Julia Gillard was asked to meet, and then met, as part of Labor Party business observer programs run in conjunction with state and federal Labor party conferences in 2008, 2009 and 2010.
3. On 19 November 2010 the Office of the Prime Minister wrote to the applicant refusing his request on the basis that the documents requested, if they existed, were not official documents of the minister as defined in s 4(1) of the FOI Act and were not therefore subject to the FOI Act. On 25 November 2010 the applicant sought Information Commissioner review of that decision under s 54L of the FOI Act.

Decision under review

4. The decision under review is the decision of the Office of the Prime Minister on 19 November 2010 to refuse the applicant's request on the basis that the documents relating to meetings arranged for the Prime Minister are not official documents of a minister to which the FOI Act applies.

Application of FOI Act to ministerial documents

5. 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 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'.
6. A similar issue arose in another case that I decided involving the same parties, *Parnell and Prime Minister of Australia* [2011] AICmr 10 (21 December 2011). In that case I decided that a letter sent to the Prime Minister by an organisation established to support the ALP (which is led by the Prime Minister) was not an official document of a minister. My decision applied Guidelines that I had issued under s 93A of the FOI Act.¹ The decision rested

¹ See *Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act* (FOI Guidelines) [2.17].

on a distinction between documents held by a minister that relate to official portfolio responsibilities and other documents that relate to the minister's activities as a member of a political party who has been elected to the Parliament. I decided that the letter in that case was a document of the latter kind.

The documents held by the Prime Minister's office

7. The Prime Minister's office has provided me with the only four documents held by the office that fit the description of the applicant's request. One is a diary record on ALP letterhead that briefly lists the meetings and conference commitments of the Prime Minister for three days. That document lists the time of each meeting, the name of the other party and the organisation to which the person presumably belonged. The other three documents are printouts from an electronic diary and record the same details.
8. My office also requested the Prime Minister's office on 7 December 2010 to provide examples of promotional material relating to the ALP business observer programs and comment on whether a connection existed between the programs and the affairs of any agency.
9. The Prime Minister's office responded on 14 January 2011 advising that no such promotional material was held in the office. The response commented that these are 'party political events, administered by the Australian Labor Party' and 'no agency or Department of State is involved in the organisation of these business observer programs, and in particular, the processes involved in the consideration of requests for meetings with Ministers as part of these programs are not any part of the business of any agency or department and are handled entirely by the Australian Labor Party possibly with input from the Prime Minister's political staff.'

Minister's contentions

10. The Prime Minister's office relied on the following considerations in support of its decision that the documents were not an official document of a minister:
 - ALP business observer programs are party political events organised and administered by the ALP in conjunction with party conferences
 - no Australian Government agency or department is involved in planning, promoting, organising or holding an ALP business observer program
 - there is no apparent connection between ALP business observer programs and the affairs of any Australian Government agency or department.

Applicant's contentions

11. The applicant submitted that the document was an official document of a minister, for the following reasons:

- the identity of the organiser of an ALP business observer program is irrelevant, as the Prime Minister attends numerous private and external functions in her role as Prime Minister
- a connection exists between the ALP business observer programs and the affairs of Australian Government agencies, as those participating in these programs are likely to do so in order to communicate views to the Prime Minister that are relevant to government policies or programs
- access has been granted to similar documents under access to information legislation in Western Australia and Queensland.

Findings

12. An underlying premise of the FOI Act is that not all documents held in a minister's office will be subject to the FOI Act. The Act applies only to 'official documents' that relate to the affairs of an agency or department of the Australian Government. As noted above and in the Guidelines, that description does not apply to documents of a purely personal or private nature held by a minister, nor to documents that relate to a minister's constituency responsibilities or that are of a party political nature.
13. Which side of the line a document falls will depend on the contents of the document. It is of course possible that a document can have a dual character and contain both 'official' and 'non-official' information (this is recognised in the definition of 'exempt document' in s 4 of the FOI Act). It is equally possible that documents of a similar kind could be classified differently having regard to their contents. This point was made in another IC review decision, *Parnell and Minister for Infrastructure and Transport* [2011] AICmr 3 (11 April 2011) at [14], noting that a character reference written by a minister on ministerial letterhead could be of a personal or an official character. The characterisation depends on the contents of the document.
14. That is why it is often necessary in a case such as this to inspect the document in question. Having done so, I have decided that the documents held by the Prime Minister's office that fit the description of the applicant's request are not official documents of a minister under the FOI Act. There is nothing in those documents that relate to the affairs of any Australian Government agency. It is speculative whether the affairs of Australian Government agencies were discussed by the Prime Minister at the business observer program meetings. However, it may be that that did not occur and that the discussion was confined to other issues, such as the affairs of the ALP conference that was being held at the same time.
15. The documents do not indicate what was discussed, why a meeting was arranged, and indeed whether the meeting went ahead and who attended. There is nothing in the content of the documents that characterise them as official documents of a minister under the FOI Act. That is the only issue to be resolved in this IC review. Whether there is a public interest in greater transparency surrounding contact between elected political leaders and

business or community representatives is not the issue to be resolved in this IC review. That is a debate for another forum.

16. I observe that a similar approach was adopted and conclusion reached by the NSW Administrative Decisions Tribunal, considering an appeal under the *Freedom of Information Act 1989 (NSW)*, in *Parnell v Office of the Premier of NSW* [2009] NSW ADT 42 (26 February 2009). The Tribunal concluded that entries in the NSW Premier's Diary concerning the NSW Labor Party Conference and Business Observers Program did not relate to the affairs of any NSW Government agency, but to the Premier's appointments in his capacity as a member of the ALP.² The Tribunal also commented that it was of limited assistance to consider the release of similar documents in other States, bearing in mind that information access legislation does not generally prevent the discretionary release of documents to which there is no legal right of access.³

Decision

17. Under s 55K of the FOI Act, I affirm the decision of the Office of the Prime Minister of 19 November 2010, to refuse Mr Parnell access to a diary entry of the Prime Minister, on the basis that the document is not an 'official document of a Minister' as defined in s 4(1) of the FOI Act.

Professor John McMillan
Australian Information Commissioner
23 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.

² [2009] NSWADT 42 at [33].

³ [2009] NSWADT 42 at [30].