



Combined Pensioners and Superannuants Association of NSW Inc and Deputy Prime Minister and Treasurer [2013] AICmr 70 (3 September 2013)

Decision and reasons for decision of
Freedom of Information Commissioner, Dr James Popple

Applicant:	Combined Pensioners and Superannuants Association of NSW Inc
Respondent:	Deputy Prime Minister and Treasurer
Decision date:	3 September 2013
Application number:	MR12/00306
Catchwords:	Freedom of information — Whether document contains deliberative matter — Whether contrary to public interest to release conditionally exempt document — (CTH) <i>Freedom of Information Act 1982</i> ss 11A(5), 47C

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Summary

1. I set aside the decision of the Deputy Prime Minister and Treasurer of 7 August 2012 and substitute my decision, under ss 11A(5) of the *Freedom of Information Act 1982* (the **FOI Act**), granting access to a copy of the document sought.

Background

2. In June 2011, the Productivity Commission released a report *Caring for Older Australians*.¹ Recommendation 8.1 of that report was that the Government should establish a Government-backed Australian Aged Home Care Credit scheme. In May 2012, the Government released its response to the Productivity Commission's report.² The response stated that the Government did not support recommendation 8.1 at that time, and gave some reasons for the Government's decision.
3. On 4 June 2012, the Combined Pensioners and Superannuants Association of New South Wales Inc (the **CPSA**) applied to the Hon Wayne Swan, Deputy Prime Minister and Treasurer for access to:

... all documents constituting advice by the federal Treasury to Government and Government departments and agencies concerning equity releases as an option to fund private co-contributions as proposed in the Productivity Commission's draft and final reports *Caring for Older Australians*.

4. On 7 August 2012, the Office of the Deputy Prime Minister and Treasurer (the **Office**), on behalf of the Minister, advised that one document had been identified within the scope of the applicant's request. The Office said that this document was exempt under s 47C of the FOI Act because it 'contains deliberative material that was prepared to brief a small group of Ministers on matters subject to ongoing consideration by Cabinet'.
5. On 13 August 2012, the CPSA sought IC review of this decision under s 54L of the FOI Act.

Decision under review

6. The decision under review is the decision of the Office, on behalf of the Deputy Prime Minister and Treasurer, on 7 August 2012 to refuse the CPSA's request.

¹ See <http://www.pc.gov.au/projects/inquiry/aged-care/report>.

² See <http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-aged-care-review-measures-techdoc-htmlversion.htm>.

Deliberative processes exemption (s 47C)

7. Section 47C(1) of the FOI Act relevantly provides:

Public interest conditional exemptions — deliberative processes

General rule

- (1) A document is conditionally exempt if its disclosure under this 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 processes involved in the functions of:

- (a) an agency; or
- (b) a Minister ...

8. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. As the Guidelines explain:

... the deliberative processes involved in the functions of an agency are its thinking processes—the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or course of action.³

9. I have examined the document that is the subject of this IC review. It is a brief, apparently prepared by the Treasury, titled 'Government run aged care home credit scheme'. It provides an overview of the proposed scheme, including information about its scope and delivery as well as a discussion of possible risks and benefits.
10. In its reasons for decision, the Office said—and I accept—that the document was prepared for the purpose of briefing a small group of Ministers about the proposed scheme, presumably during the finalisation of the Government's response to the Productivity Commission's report.
11. Given the content of the document, and its intended audience, I am satisfied that the document contains deliberative matter for the purposes of s 47C.

Findings

12. The document is conditionally exempt under s 47C of the FOI Act.

³ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* [6.62].

The public interest test (s 11A(5))

13. I have found that the document that is the subject of this IC review is conditionally exempt under s 47C of the FOI Act. Section 11A(5) provides that, if a document is conditionally exempt, it must be disclosed 'unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest'. As the Guidelines explain, [t]he pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure'.⁴
14. Of the factors favouring disclosure set out in s 11B(3), one is relevant to this IC review: promoting the objects of the FOI Act. The Guidelines also include a non-exhaustive list of further factors that favour disclosure.⁵ Several of those factors are relevant to this IC review: disclosure would inform the community of the Government's operations; reveal further reasons for a government decision and background or contextual information that informed that decision; and enhance the scrutiny of government decision making.
15. The Guidelines also include a non-exhaustive list of factors against disclosure.⁶ None of those factors is relevant to this IC review.
16. In its decision, the Office said that disclosure of the document that is the subject of this IC review would be contrary to the public interest because it would be 'likely to inhibit the full canvassing of issues and options in the development of Cabinet material'. The Office also said that 'there is a strong public interest in maintaining a confidential relationship between Ministers and agencies so as to allow agencies and Ministers the scope to explore and develop appropriate policy responses in relation to significant and sensitive policy issues'.
17. It is important that issues and options can be confidentially canvassed between ministers and the public service when policy is developed.⁷ This is recognised in several provisions of the FOI Act. For example, Cabinet documents are exempted under s 34. But s 34 has not been invoked in this case; the document that is the subject of this IC review, although it is classified 'Cabinet-in-Confidence', is probably not a Cabinet document for the purposes of s 34.
18. Section 47C, too, can apply to documents that record communications between ministers and agencies during the development of policy. But, because s 47C is a conditional exemption, a document is only exempt under s 47C if giving access to it would be contrary to the public interest.

⁴ *Guidelines* [6.12].

⁵ *Guidelines* [6.25].

⁶ *Guidelines* [6.29].

⁷ The Australian Information Commissioner recently considered this point in the context of an FOI request for an incoming government brief prepared for a party that was unable to form government: see *Crowe and Department of the Treasury* [2013] AICmr 69.

19. In this IC review, the policy development process has been finalised and the Government has announced its response. The document that is the subject of this IC review does not appear to be sensitive. It is an objective, professional analysis of the proposal for a Government-run aged care home credit scheme. It discusses options, but does not favour one option over another. I do not think that its disclosure will have any adverse effect on the future relationship between agencies and ministers, or the process of policy development.
20. In balancing these factors—for and against disclosure—I give the greatest weight in this IC review to the factors in favour of disclosure, noting that I have not identified any factors against disclosure.

Findings

21. Giving the CPSA access to the document that I have found to be conditionally exempt under s 47C would not, on balance, be contrary to the public interest.

Decision

22. Under s 55K of the FOI Act, I set aside the decision of the Deputy Prime Minister and Treasurer of 7 August 2012 and decide, in substitution for that decision, that the document is not exempt.

James Popple
Freedom of Information Commissioner

3 September 2013

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 \$816, 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.