



Australian Private Hospitals Association and Department of the Treasury [2014] AICmr 4 (16 January 2014)

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

Applicant: Australian Private Hospitals Association

Respondent: Department of the Treasury

Decision date: 16 January 2014

Application number: MR11/00230

Catchwords: Freedom of information — Whether giving access would disclose information that would reasonably be regarded as irrelevant to the request — Cabinet documents — Whether disclosure of documents would reveal Cabinet deliberations — Whether disclosure would disclose commercially valuable information — Whether documents disclose deliberative matter — Whether contrary to public interest to release conditionally exempt document — (CTH) *Freedom of Information Act 1982* ss 22, 34, 47, 47C

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Summary

1. I set aside the decision of the Department of the Treasury (**Treasury**) of 12 August 2011 and substitute my decision, under ss 11A(5) and 22 of the *Freedom of Information Act 1982* (the **FOI Act**), granting access to three of the documents, one modified by deletions.

Background

2. On 12 May 2009, the Hon Wayne Swan MP, then Deputy Prime Minister and Treasurer and the Hon Nicola Roxon MP, then Minister for Health and Ageing, issued a joint media release headed 'Rebalancing support for private health insurance', about the introduction of a tiered system for assessing the private health insurance rebate.
3. On 10 June 2011, the Australian Private Hospitals Association (**APHA**), applied to Treasury for access to documents relating to the Treasury modelling referred to in the media release, documents relied upon to substantiate statements made in the media release, documents containing revisions of or variations to the Treasury modelling, and copies of any similar or alternative models to the Treasury modelling.
4. On 21 July 2011, APHA revised the scope of its request to:
 1. The final version of the 'Treasury modelling' referred to in the Deputy Prime Minister and Treasurer's Media Release ... as well as:
 - instructions to prepare the model;
 - modelling assumptions; and
 - modelling conditions or disclaimers.
 2. The final version of the 2009 model referred to in part 1 of this request which contains the latest updates.
 3. Final versions of key documents held by the Treasury that were used to substantiate the statements made in the Deputy Prime Minister and Treasurer's media release.
 4. Key models or documents equivalent to [those] covered by parts 1 and 2 of this request that may be held by the Department of Health and Ageing.
5. On 12 August 2011, Treasury advised that it had identified five documents within the scope of the applicant's request. Treasury released one document in full (document 3), exempted two documents in full (documents 1 and 2) and released two documents in part (documents 4 and 5). It also edited some of the documents to remove material it considered irrelevant (s 22). Treasury relied on the cabinet documents exemption (s 34), the commercially valuable information exemption (s 47) and the deliberative processes exemption (s 47C).

6. Treasury also advised that it had sought to transfer part 4 of APHA's request to the Department of Health and Ageing (under s 16), but the Department of Health and Ageing had not agreed to the transfer.¹
7. On 15 August 2011, APHA sought IC review under s 54L of the FOI Act.

Decision under review

8. The decision under review is the decision of Treasury on 12 August 2011 to refuse APHA's request for access to four of the documents within the scope of the request: documents 1, 2, 4 and 5.

Cabinet documents exemption (s 34)

9. Section 34(1) of the FOI Act relevantly provides:

Cabinet documents

General rules

- (1) A document is an exempt document if:
 - (a) both of the following are satisfied:
 - (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;
 - (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or
 - (b) it is an official record of Cabinet; or
 - (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or
 - (d) it is a draft document to which paragraph (a), (b) or (c) applies.
 - (2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.
 - (3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.
10. Document 1 is the final version of the 2009 Treasury model that is referred to in the media release. In its reasons for decision, Treasury decided that document 1 was exempt under s 34(3) because it 'discloses or canvases policy options that were considered by Cabinet'. The release of this document, Treasury says, 'would allow inferences to be drawn about Cabinet deliberations.'

¹ Section 16(1) of the FOI Act provides that, in certain circumstances, an agency may transfer an FOI request to another agency, but only with the agreement of the receiving agency. It is not clear why the Department of Health and Ageing did not agree to the transfer of part 4 of APHA's request.

11. In submissions to the Office of the Australian Information Commissioner (**OAIC**), Treasury said that the original version of the 2009 Treasury model was prepared for the dominant purpose of generating information to be submitted to Cabinet and outputs of the model were discussed by the Strategic Priorities and Budget Committee of Cabinet. Treasury further advised that, whilst the model was subsequently amended to incorporate updated data, the amended model did not reflect any policy changes. This amended model was the Treasury modelling referred to in the media release. So, although the original model may have been prepared for the dominant purpose of submission for consideration by the Cabinet, that appears not to be true of the amended model (document 1).
12. However, I have examined a copy of document 1 and am satisfied that it contains information the disclosure of which would reveal Cabinet deliberations that have not been officially disclosed regarding options for a tiered system for assessing the private health insurance rebate. Accordingly, document 1 is exempt under s 34(3) of the FOI Act.
13. It is not reasonably practical for Treasury to provide APHA with an edited copy under s 22, having regard to the extent of the modifications that would be required.

Findings

14. Document 1 is exempt under s 34(3) of the FOI Act.

Commercially valuable information exemption (s 47)

15. Section 47(1) of the FOI Act provides:

Documents disclosing trade secrets or commercially valuable information

- (1) A document is an exempt document if its disclosure under this Act would disclose:

- (a) trade secrets; or
- (b) 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.

16. 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:

It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property. The following factors may assist in deciding in a particular case whether information has a commercial value:

- whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent it detracts from its intrinsic commercial value
 - whether the information confers a competitive advantage on the agency or person to whom it relates—for example, if it lowers the cost of production or allows access to markets not available to competitors
 - whether a genuine ‘arm’s-length’ buyer would be prepared to pay to obtain that information
 - whether the information is still current or out of date (out of date information may no longer have any value)
 - whether disclosing the information would reduce the value of a business operation or commercial activity—reflected, perhaps, in a lower share price.²
17. Treasury exempted part of documents 1 and 2 on the basis that they each contain commercially valuable information. I have already found that document 1 is exempt in full under s 34(3), so it is not necessary for me to consider the application of s 47 to that document.
18. Document 2 is the most recent updated version of the Treasury modelling. In its reasons for decision and in its submissions to the OAIC, Treasury said that the document contains commercially valuable information provided by a third party through a subscription arrangement with that third party. The terms of the subscription provided that the information could not be disclosed. As the information was provided as part of a subscription service, Treasury said that the disclosure of the information could reasonably be expected to diminish the commercial value of the information.
19. I have examined a copy of document 2. I accept that some of the information in document 2 was provided to Treasury under a subscription service agreement, and that one of the conditions of this service was that the information provided not be disclosed. As the information is provided under a subscription agreement, presumably the information is known only to the third party providing it and those who pay a subscription fee to access it. I am satisfied that the information is not well known. Furthermore, given that the information is available for purchase, I am satisfied that an arm’s-length buyer would be prepared to pay for it. The information is commercially valuable.
20. Treasury also said that the information in document 2 may be used to derive estimates of the Government’s forecasts of future health insurance premium increases, the disclosure of which may impair future negotiations between the Government and the private health insurance industry. For this reason,

² Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* [5.189] (footnotes omitted).

Treasury also considered the information to be commercially valuable to the Government.

21. I do not think that this information is commercially valuable to the Government in this context. The Guidelines explain that the commercial value referred to in s 47(1)(b) is 'a commercial value either to an agency or to another person or body'.³ But I think that, for a document to have a commercial value to an agency, it would have to relate to that agency's commercial activities or business operations. I accept that disclosure of the information in document 2 may impair future negotiations between the Government and the private health insurance industry, and that those negotiations could affect the amount that the Government pays through the private health insurance rebate. But providing a rebate is not a commercial activity.
22. The information in document 2 is not of commercial value to the Government in its capacity as the provider of health insurance premiums. Its commercial value is to people and organisations in the private health insurance industry. The information may be of commercial value to the Government through its ownership of Medibank, a private health insurer. Because I have already found that the information in document 2 is commercially valuable, I do not need to further consider that possibility.

Findings

23. The information that Treasury exempted from document 2 under s 47 of the FOI Act is commercially valuable information.

Deliberative processes exemption (s 47C)

24. 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; ...

25. In its reasons for decision and in its submissions to the OAIC, Treasury said that document 2 was created to assist the Government to consider different options for a tiered system for assessing the private health insurance rebate. At the time document 2 was created, means testing of the private health

³ *Guidelines* [5.188].

insurance rebate was an ongoing policy issue for the Government. Treasury also claimed that, because the information is contained in a spreadsheet which contains interacting formulae, it is not possible to separate the factual material in document 2 from the deliberative matter without diminishing the integrity of the information within the document.

26. 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.⁴

27. Document 2 is the most recent updated version of the Treasury modelling, covered by part 2 of APHA’s FOI request. The document contains details of available options for a tiered system for assessing the private health insurance rebate, including estimated costings and comparisons of the options canvassed. This is deliberative matter for the purposes of s 47C of the FOI Act.

28. Since APHA submitted its FOI request, a tiered system for assessing the private health insurance rebate has been implemented. Even though the Government’s decision has been made and announced, I am satisfied that document 2 is conditionally exempt under s 47C of the FOI Act because of its consideration and comparison of the different available options. This material reflects Treasury’s (and the Government’s) thinking processes about the available policy options concerning the private health insurance rebate.

Findings

29. Document 2 is conditionally exempt under s 47C of the FOI Act.

Irrelevant matter (s 22)

30. Section 22(1) of the FOI Act relevantly provides:

Access to edited copies with exempt or irrelevant matter deleted

Scope

(1) This section applies if:

(a) an agency or Minister decides:

- (i) to refuse to give access to an exempt document; or
 - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access;
- and

⁴ *Guidelines* [6.62].

- (b) it is possible for the agency or Minister to prepare a copy (an *edited copy*) of the document, modified by deletions, ensuring that:
 - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
 - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; ...

Section 22(2) requires an agency or a minister to prepare an edited copy and give the applicant access to it.

- 31. Treasury edited documents 1, 2, 4 and 5 by deleting information that it decided was not relevant to APHA's request. I have already found that document 1 is exempt in full under s 34(3), so it is not necessary for me to consider whether that document also contains irrelevant material.
- 32. I agree with Treasury that the information it edited from document 2 is irrelevant to APHA's request. The information in document 2 does not relate to policy costings or estimates of the effects of the various policy options as they relate to the Treasury modelling discussed in the media release.
- 33. I have examined unedited copies of documents 4 and 5. I do not agree with Treasury that the material it deleted from documents 4 and 5 is irrelevant to APHA's request.
- 34. Treasury edited the information from the documents on the basis that it contains historical and projected statistical information that was not relevant to substantiating statements made in the media release or related to periods outside the period relevant to substantiating statements made in the media release.
- 35. APHA sought access to, amongst other things, '[f]inal versions of key documents held by Treasury that were used to substantiate the statements made in the Deputy Prime Minister and Treasurer's media release'.
- 36. Whilst the media release mentions only two specific time periods, '2010–11' and '2046–47', I am not satisfied that these were the only periods that were considered in preparing the media release or the underlying policy of reforming the private health insurance rebate system. In my view, the information in documents 4 and 5 is relevant to APHA's request because it relates to statements made in the media release and to the policy that the media release announced.

Findings

- 37. The information that Treasury deleted, on the basis of irrelevance, from documents 4 and 5, is relevant to APHA's request.

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

38. I have found that the document 2 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'.⁵
39. Of the factors favouring disclosure set out in s 11B(3), two are relevant to this IC review: promoting the objects of the FOI Act and promoting effective oversight of public expenditure. The Guidelines also include a non-exhaustive list of further factors that favour disclosure.⁶ 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.
40. The Guidelines also include a non-exhaustive list of factors against disclosure.⁷ None of those factors is relevant to this IC review.
41. In its decision, Treasury said that disclosure of the document that is the subject of this IC review would be contrary to the public interest because it is important that Ministers retain the ability to develop, discuss and negotiate options to implement announced policy changes. Treasury said that the document was created to allow Government to consider options for the means testing of the private health insurance rebate.
42. Furthermore, in submissions to the OAIC, Treasury said that 'numbers within a modelling spreadsheet interact with each other in a complex manner which is fundamentally different to other written documents. Given the complex interdependencies inherent in the model through the many formulae and cross-references, ... it would be extremely difficult to separate factual material from the exempt material without fundamentally diminishing the integrity of the information contained within the document'.
43. As was the case in *Combined Pensioners and Superannuants Association of NSW Inc and Deputy Prime Minister and Treasurer* [2013] AICmr 70, in this IC review the policy consideration process has been finalised and the Government has announced and implemented its decision. Document 2 does not appear to be sensitive; it is an objective and professional analysis of the estimated costing effects of the options considered. It discusses two options, but does not favour one option over another. With the exception of the

⁵ Guidelines [6.12].

⁶ Guidelines [6.25].

⁷ Guidelines [6.29].

information that I have found exempt under s 47, I do not think the disclosure of document 2 will have any adverse effect on Government's ability to discuss and negotiate policy options or the process of policy development.

44. Further, I am satisfied that document 2 can be edited so as to remove the information that I have found is exempt under s 47 without affecting the integrity of the remaining information.
45. 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

46. Giving APHA access to document 2, which I have found to be conditionally exempt under s 47C would not, on balance, be contrary to the public interest.

Decision

47. Under s 55K of the FOI Act, I set aside Treasury's decision of 12 August 2011 and decide, in substitution for that decision, that:
 - document 1 is exempt
 - document 2 is exempt, however a copy of the document should be provided to APHA, edited so as not to disclose the information that Treasury considered exempt under s 47 and irrelevant under s 22, and
 - documents 4 and 5 are not exempt and should be provided to APHA.

James Popple
Freedom of Information Commissioner

16 January 2014

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.