


FREEDOM OF INFORMATION

PROTECTION OF INCOMING GOVERNMENT BRIEFS FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT 1982 (FOI ACT) AND THE ARCHIVES ACT 1983

1. This Department considers that the red and blue incoming government briefs (IGBs) are some of the most important and most sensitive briefings that Departments prepare. The brief that is prepared for the party that is not successful is a particularly sensitive document and many departments had, until recently, routinely destroyed the unused brief once the election result was clear.
2. The Director –General of the National Archives of Australia (NAA) has now made a statutory determination that has the effect that incoming government briefs, both red and blue, must be retained by Departments and deposited in the NAA.
3. Both the used and unused IGBs have been increasingly the subject of FOI requests. The Information Commissioner, John McMillan, has recently upheld a decision by the Treasury to decline to release portions of Treasury's 2010 blue book under FOI.
4. The Commissioner stated that a strongly influential factor in his decision to exempt portions of the blue book was the need to safeguard the tradition by which a Minister in a newly elected government can receive a confidential brief from the public service that provides constructive and candid commentary for the Minister's consideration.
5. The Commissioner did not however find that IGBs were exempt as a class of documents. The outcome of future FOI requests will continue to depend on the facts and circumstances of each case. Purely factual material will have to be released.
6. The requirement that we now retain copies of both sets of the IGBs for the Archives will, nevertheless increase the likelihood of FOI requests being made. While the Information Commissioner's decision is very supportive of the protection of IGBs under FOI there remains the possibility of the AAT or the Courts holding otherwise. There also remains a risk that sensitive material will be inadvertently released by an FOI decision maker.
7. The Archives Act 1983 makes provision for the Minister to give the Director-General directions (section 7) and to make a determination that a class of documents is not required to be transferred to the care of the NAA (section 29). There may be scope to use these provisions to limit the current archival requirement for retention and transfer of IGBs
8. The 2010 reforms to the Freedom of Information Act 1982 included a statutory requirement for a review after 2 years. That Independent review was released in August 2013 and recommends the FOI Act be amended to include a new exemption for incoming government and incoming Minister briefs, question time briefs and estimates briefings (Recommendation 13), with the exemption being conditional on a balancing of public interest considerations.

9. The confidentiality of both red and blue books will be tested by requests for access under the FOI Act in the coming weeks. Indeed, many departments received a request for access to the blue book in the week before this election.
10. Following the 2010 election a number of agencies put extracts of their Red IGBs on their websites. The Department will not voluntarily release or publish any part of the 2013 IGBs and we will be looking to protect as much sensitive information as we can under the FOI Act.
11. We recommend that you ^{s47C} 

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