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Tribunal rules on disclosure of incoming government brief

A recent decision of the Administrative Appeals Tribunal has provided valuable guidance on the treatment of incoming government briefs (IGBs) when access to them is requested under the *Freedom of Information Act 1982 (Cth)* (FOI Act).

The decision in *Dreyfus and Secretary, Attorney-General's Department* [2015] AATA 962 concerns the IGB prepared at the 2013 election for a Coalition government Attorney-General. The applicant, (now) shadow Attorney-General the Hon Mark Dreyfus QC MP, sought access to the IGB under the FOI Act shortly after the result of the 2013 election was known. The Attorney-General's Department refused access. Mr Dreyfus appealed to the Office of the Australian Information Commissioner, who made a decision releasing some parts of the IGB but refusing access to others on the grounds that it contained deliberative material the disclosure of which would, on balance, be contrary to the public interest (s 47C FOI Act). The applicant appealed to the Tribunal.

The arguments

Before Justice Bennett, the Secretary argued that the whole of the IGB was properly classified as deliberative. The Secretary acknowledged that some material was factual in nature but argued that it was too intertwined with the deliberative material to allow for editing and release of the non-deliberative portions. While accepting that disclosure would advance the objects of accountability and transparency, the Secretary argued that the capacity of the public service to give confidential advice to new ministers was crucial to the process of government, and the public interest in the effective continuity of government outweighed the interest in disclosure.

The applicant argued that no part of the IGB was exempt on deliberative grounds. The applicant emphasised that public servants have an overarching obligation to give frank and honest advice to their ministers, regardless of the operation of the FOI Act, and argued that IGBs could, and should, be prepared on the expectation that they will be released publicly.

Findings

In her decision, Justice Bennett:

- found that there were portions of the brief which could be characterised as purely factual, were capable of discrete disclosure, and ought to be disclosed
- accepted that other material that might be considered factual was inextricably intertwined with deliberative material and could not be sensibly excised
- in relation to material which her Honour accepted was deliberative in nature, found that the public interest favoured exemption rather than disclosure.

In ruling on the public interest, her Honour observed (at [107]):

The combination of factors against release in the public interest include the nature of an IGB to a new Minister in a newly elected incoming Government, the evidence ... explaining the importance of maintaining the confidentiality of not only the content of this IGB but also on the preparation of future IGBs, the need for continuity of frankness, candour and completeness in the advice and commentary contained in IGBs, the extent of deliberative matter contained in such a document and the impact on the preparation of future IGBs if access were granted ... [The] context requires preparation of the document unhindered by apprehension that the IGB, prepared as a confidential brief to an incoming new Attorney-General, will be released. These factors were relevant when the IGB was being prepared and remain relevant today.

Implications

The decision is the most authoritative ruling to date on the treatment of FOI Act requests for access to IGBs. It largely confirms the reasoning developed by the Australian Information Commissioner in a series of decisions (including the decision appealed from in this matter). From the Tribunal's decision, 2 propositions emerge clearly:

- An IGB will not be automatically exempt in its entirety on deliberative grounds. Where purely factual material can be viewed in isolation without revealing the deliberative content, it generally will not be exempt under s 47C.
- For material that is properly classed as deliberative, there are powerful public interest considerations in favour of exemption arising from the special nature and role of an IGB.

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