[2015] AATA 462

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number | 2014/4493 |
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|  | APPLICANT |
| And | Secretary, Department of Education and Training |
|  | RESPONDENT |

# Decision

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| Tribunal | **Dr James Popple, Senior Member** |
| Date | **30 June 2015** |
| Place | **Canberra** |

The decision of the Department of Education and Training on 4 July 2014 is affirmed.

...............................[sgd].........................................

**James Popple, Senior Member**

# Catchwords

FREEDOM OF INFORMATION — Exempt documents — whether documents conditionally exempt — whether documents contain deliberative matter — whether modelling is purely factual material — public interest test — whether frankness and candour can be factor against access — whether fact that document is question time brief is factor against access — disclosure would damage operation of deregulated market — disclosure could adversely affect markets and financial frameworks — access at this time would, on balance, be contrary to the public interest — decision under review affirmed.

# Legislation

Freedom of Information Act 1982, ss 3, 4(1), 11A(5), 11B(3), 11B(4), 15, 22, 31B, 46(c), 47C, 47J, 61(1)(b), 93A

# Cases

Cleary and Department of Treasury (1993) 31 ALD 214

Crowe and Department of the Treasury [2013] AICmr 69

Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634

Francis and Department of Defence (2012) 59 AAR 35

Howard and Treasurer (1985) 7 ALD 626

McKinnon and Secretary, Department of Prime Minister and Cabinet (2007) 46 AAR 136

McKinnon and Secretary, Department of the Treasury (2004) 86 ALD 138

McKinnon v Secretary, Department of Treasury (2005) 145 FCR 70

McKinnon v Secretary, Department of the Treasury (2006) 228 CLR 423

Parnell and Attorney-General’s Department [2014] AICmr 71

Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development [2015] AATA 361

Waterford and Department of Treasury (No 2) (1984) 5 ALD 588

# Secondary Materials

Office of the Australian Information Commissioner, Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (October 2014)

# Reasons for decision

**James Popple, Senior Member**

**30 June 2015**

## Summary

1. I affirm the decision of the Department of Education and Training (the **Department**) to refuse the applicant access to documents he requested under the *Freedom of Information Act 1982* (the **FOI Act**). The documents requested are conditionally exempt under s 47C of the FOI Act, and access to the documents at this time would, on balance, be contrary to the public interest.

## Background

1. On 13 May 2014, when announcing its 2014–15 Budget, the Government announced that it plans to reform the higher education sector. The Department’s website describes some of those reforms—part of the “deregulation of the higher education system”—as follows:

From 1 January 2016 higher education providers such as universities, TAFEs [technical and further education institutions] and colleges in Australia would be able to set their own tuition fees for the courses that they offer. Fees would remain the responsibility of higher education providers. With these changes, some course fees may rise and some course fees may fall, as education providers compete for students and as Government funding increases for some courses. HECS [Higher Education Contributions Scheme] loans would continue to be available to students …[[1]](#footnote-2)

(In these reasons for decision, I use “**universities**” to mean those educational institutions to which these reforms would apply.)

1. On 23 May 2014, Mr Crispin Rovere applied to the Department[[2]](#footnote-3) under s 15 of the FOI Act for access to documents relating to the proposed reforms. On 30 May 2014, the Department advised Mr Rovere that it intended to refuse his request under s 24AA on the basis that the work involved in processing his request would substantially and unreasonably divert the resources of the agency from its other operations.
2. On 31 May 2014, Mr Rovere revised the scope of his request to the following:

1. Any documentation produced after 15 December 2013 not currently in the public domain that was used to brief the Minister on the deregulation of tertiary education funding and is of direct relevance to the changes to tertiary education funding announced in the 2014–15 Federal Budget as they relate to the following matters of public interest:

* projected increases in the average cost of university degrees in Australia over current forward projections
* the average financial impact on students resulting from HECS interest rate changes (for men and women)
* the impact on universities that currently have higher than average levels of students enrolled from low socioeconomic areas and backgrounds
* the projected changes to the distribution of university funding across the tertiary education sector (i.e. what proportion of total funding across the tertiary education sector is enjoyed by Group of Eight universities today as opposed to other universities, and the estimated change resulting from deregulation)
* the projected contribution mix of government funding and student contribution resulting from the changes announced in the 2014–15 Federal Budget (i.e. the origin and background of the 50% figure for student/government contribution)
* projected change in benefit derived by new university students in having a university degree
* projected costs incurred by new PhD students as a result of the 2014–15 Federal Budget.

2. Any correspondence between the Department and/or the Minister’s office, and the Chancellor’s and/or Vice Chancellor’s office of the Australian National University, dated from 7 September 2013, that relates to the deregulation of university fees relevant to changes in tertiary education funding announced in the 2014–15 Federal Budget.

3. Up to the five most relevant documents held by the Department, in the public domain or otherwise, dated from 1 July 2013 that estimates the average level of productivity of an Australian worker with a tertiary degree as compared with an Australian worker without a tertiary degree, and the estimated additional value tertiary education has for the overall Australian economy in terms of productivity.

1. The Department identified 8020 pages of documents falling within the revised scope of Mr Rovere’s request. On 4 July 2014, the Department granted access to all or part of 66 pages and refused access to the remainder.[[3]](#footnote-4) In doing so, the Department relied on the Cabinet documents exemption (s 34 of the FOI Act), the deliberative processes exemption (s 47C), the personal privacy exemption (s 47F) and the economy exemption (s 47J). The Department gave Mr Rovere access to edited copies of some of the documents, modified by the deletion of exempt and irrelevant material.
2. On 10 July 2014, Mr Rovere applied to the Information Commissioner under s 54L of the FOI Act for review of the Department’s decision. On 25 August 2014, the Information Commissioner decided, under s 54W(b), not to undertake that review on the basis that the interests of the administration of the FOI Act made it desirable that the decision be considered by the Tribunal.
3. On 21 October 2014, Mr Rovere applied to the Tribunal, under s 57A(1)(b) of the FOI Act and s 29(1) of the *Administrative Appeals Tribunal Act 1975* (the **AAT Act**), for review of that decision.

## Decision under review

1. The decision under review is the Department’s decision on 4 July 2014 not to grant Mr Rovere access to all of the documents that he requested.
2. Mr Rovere and the Department came to various agreements before and at the hearing. Mr Rovere now seeks access only to documents that the Department says are exempt under s 47C of the FOI Act. At the hearing, the Department provided a schedule of the documents that are still in dispute: 45 documents, including 34 spreadsheets, comprising 7932 pages.

## Issue

1. The issue in this review is whether the 45 documents in dispute (the **documents**) are exempt under the FOI Act. That depends on whether:

* the documents are conditionally exempt under s 47C (the deliberative processes exemption); and
* access to the documents would, on balance, be contrary to the public interest.

1. Because of s 61(1)(b) of the FOI Act, the Department has the onus of establishing that its decision was justified.

## The FOI Guidelines

1. The Australian Information Commissioner has issued guidelines (the **FOI Guidelines**) under s 93A(1) of the FOI Act. Section 93A(2) provides that “regard must be had” to the FOI Guidelines for the purposes of performing a function, or exercising a power, under the FOI Act. The FOI Guidelines are not binding, but decision-makers, including this Tribunal, should apply the FOI Guidelines unless there are cogent reasons to the contrary. This was the conclusion reached by Jarvis DP in *Francis and Department of Defence*,[[4]](#footnote-5) citing *Drake and Minister for Immigration and Ethnic Affairs (No 2)*.[[5]](#footnote-6) In *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development*, Forgie DP disagreed with Jarvis DP’s conclusion.[[6]](#footnote-7) She concluded, instead, that:

The regard that [the Tribunal] has to the Guidelines must be tempered by its obligation to make correct decisions under the FOI Act. Its obligation to do so must necessarily outweigh the regard it is required to have to the Guidelines issued under s 93A.[[7]](#footnote-8)

With respect, I do not see any inconsistency between these two conclusions. Nonetheless, I prefer Jarvis DP’s approach—the Tribunal should apply the FOI Guidelines unless there are cogent reasons to the contrary—because it encourages consistency in decision making. Encouraging consistency in decision making was the reason why Brennan J concluded, in *Drake*, that the Tribunal should apply lawful ministerial policy unless there are cogent reasons to the contrary.[[8]](#footnote-9) The FOI Guidelines are made under legislation by an independent statutory office-holder. They should be given appropriate weight.[[9]](#footnote-10)

## The documents

1. At the hearing, the Department voluntarily provided electronic copies of the documents to the Tribunal.[[10]](#footnote-11) I have examined those copies.
2. The only witness in this review was Mr Robert Griew, the Associate Secretary, Higher Education, Research and International in the Department. Mr Griew provided a statement, and gave evidence at the hearing. Mr Griew described the documents as falling into five categories:

* question time briefs (2 documents);
* hypothetical scenarios (6);
* assessment of impact of deregulation on regional higher education (1);
* 2019 graduate modelling (2); and
* spreadsheets (34).

I think that that is an accurate categorisation of the documents.

1. In his statement, Mr Griew referred to the documents as containing “modelling and projections across a range of scenarios”. At the hearing, he explained that he meant that the documents contained modelling in the ordinary sense, not in the technical, econometric sense:

So the best way to describe the difference would be if you make a set of assumptions, albeit informed assumptions, about, for example, what fees universities might charge in a deregulated market, and then you do a whole lot of calculations about the implications of those for students, for revenue for universities, then in a sense that’s modelling. It’s a set of calculations based on an assumption. The alternative meaning of modelling is the more technical meaning where you engage the discipline of econometric modelling and you try and estimate what those fees will be on a kind of technical discipline-informed basis. What we’ve done consistently is the former. We’ve made assumptions based on our best estimates. We haven’t attempted to engage in econometric modelling of the fees. So the documents in contention where they include fee estimates are our estimates. They’re not the result of modelling. They’re the beginning point of a set of calculations.

I accept this evidence, noting that it assists arguments about different aspects of the public interest made by both the Department and Mr Rovere.

1. The material to which Mr Rovere has been given access is highlighted in the copies of the documents that the Department has provided to the Tribunal. The Department says that the remaining material is exempt. In considering whether or not the documents are exempt, I have considered only those parts of the documents to which Mr Rovere has not been given access—except to the extent that other parts of the documents provide context.
2. In these reasons, I will adopt the shorthand of referring to a document that is wholly comprised of exempt matter[[11]](#footnote-12) as **wholly exempt**; and to a document that contains, but is not wholly comprised of, exempt matter as **partly exempt**. Strictly speaking, under s 31B of the FOI Act, the whole document is exempt if one of the exemptions in Division 2 of Part IV applies; or if one of the conditional exemptions in Division 3 of Part IV applies and access to the document would, on balance, be contrary to the public interest.[[12]](#footnote-13) However, s 22 provides for an FOI applicant to be given access to an edited copy of a partly exempt document, modified by the deletion of the exempt matter.
3. The Department says that all of the spreadsheets are wholly exempt,[[13]](#footnote-14) that five of the other documents are wholly exempt, and that the remaining six documents are partly exempt.

## Are the documents conditionally exempt under the deliberative processes exemption (s 47C)?

1. Section 47C of the FOI Act provides:

47C  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; or

(c) the Government of the Commonwealth; or

(d) the Government of Norfolk Island.

Exceptions

(2) Deliberative matter does not include either of the following:

(a) operational information (see section 8A);

(b) purely factual material.

(3) This section does not apply to any of the following:

(a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;

(b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;

(c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

1. Section 4(1) defines “agency” to include “a Department”, which it defines as “a Department of the Australian Public Service that corresponds to a Department of State of the Commonwealth”. The Department is an agency for the purposes of s 47C(1)(a).
2. Section 8A defines “operational information”, which is information that s 8(2)(j) requires agencies to publish. Mr Rovere does not contend that the documents include operational information (s 47C(2)(a)). Having examined the documents, I find that they do not include operational information.
3. Mr Rovere contends that some of the material in the documents is purely factual material (s 47C(2)(b)). I discuss this below.
4. Mr Rovere expressly does not contend that the documents include reports of scientific or technical experts (s 47C(3)(a)). Having examined the documents, I find that no paragraph of s 47C(3) applies.
5. So, in this review, whether the documents are conditionally exempt under s 47C depends on the meaning of “deliberative matter”, “deliberative processes” and “purely factual material”.

### Deliberative matter and deliberative processes

1. The FOI Guidelines point out that:

Not every document generated or held by a policy area of an agency is “deliberative” in the sense used in [s 47C], even if it appears to deal with the development or implementation of a policy. A decision maker should ensure that the content of a document strictly conforms with the criteria for identifying “deliberative matter” before claiming this conditional exemption …

…

The presence or absence of particular words or phrases is not a reliable indication of whether a document includes deliberative matter. The agency should assess the substance and content of the document before concluding it includes deliberative matter. Similarly, the format or class of the document, such as a ministerial brief or submission, does not automatically designate the content as deliberative matter.[[14]](#footnote-15)

In *Parnell and Attorney-General’s Department*, the Information Commissioner said:

“Deliberative matter” is a shorthand term for “opinion, advice and recommendation” and “consultation and deliberation” that is recorded or reflected in a document. Those are broad terms that bear their ordinary meaning …[[15]](#footnote-16)

I agree with that approach. Neither Mr Rovere nor the Department have argued otherwise.

1. On the meaning of “deliberative processes” the FOI Guidelines quote from the Tribunal in *Waterford and Department of Treasury (No 2)*:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, 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 a course of action. Deliberations on policy matters undoubtedly come within this broad description.[[16]](#footnote-17)

1. Mr Griew says that all of the documents were prepared as part of the development of Government policy on the higher education sector. Some of the documents were considered by the Minister; the remainder were considered within Government as part of the development of that policy. He says that the spreadsheets perform calculations, based on various assumptions, and that the Department used the results of those calculations—that modelling[[17]](#footnote-18)—in preparing its advice to the Minister and Government, including advice contained in some of the other documents. I accept this evidence. The content of the documents is consistent with them having been prepared, and used, as Mr Griew says they were.
2. I find that the documents contain deliberative matter for the purposes of s 47C(1). They contain material that relates to opinions, advice and recommendations about higher education policy. They contain material that relates to deliberations and (to a lesser extent) consultations[[18]](#footnote-19) about that policy.
3. I also find that those opinions, advice and recommendations were prepared or recorded—and those consultations and deliberations took place—in the course of, or for the purposes of, the deliberative processes involved in the functions of the Department. Those deliberative processes were the weighing-up or evaluation of competing arguments or considerations about higher education policy. They were the Department’s “thinking processes”.

### Purely factual material

1. Section 47C(2)(b) provides that deliberative matter does not include purely factual material. The Department concedes that the documents include some factual material, but says that that material is intrinsically linked to the deliberative matter.
2. There is a good deal of factual material in the documents, especially in the spreadsheets. Much of it is hypothetical, and can be characterised in the same way that the Tribunal characterised some of the material in issue in *McKinnon and Secretary, Department of the Treasury*: “[t]o the extent to which the documents could be said to address factual material they are really predictions as to the future and could not be treated as fact.”[[19]](#footnote-20)
3. Some of the facts in the documents are assumptions upon which predictions are made. It would be possible to give Mr Rovere access to edited copies of some of the documents, with the predictions deleted leaving the factual assumptions, but this would be difficult to do. Section 22 requires an edited copy to be prepared only if it is reasonably practicable to do so, having regard to the nature and extent of the modification and the resources available.[[20]](#footnote-21) The FOI Guidelines say that:

… an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.

It would not be reasonably practicable to separate the purely factual material from the deliberative matter in the documents. And the resulting edited copies of the documents would be of little value to Mr Rovere.

### Conclusion

1. Disclosure of the documents would disclose deliberative matter. That deliberative matter relates to opinions, advice, recommendations, consultations and deliberations about higher education policy. Those opinions, advice and recommendations were prepared or recorded—and those consultations and deliberations took place—in the course of, or for the purposes of, the deliberative processes involved in the Department’s functions. Accordingly, the documents are conditionally exempt under s 47C of the FOI Act.

## Would access to the documents be contrary to the public interest (s 11A(5))?

1. Section 11A(5) of the FOI Act 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 FOI Guidelines point out, “[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”.[[21]](#footnote-22)

### Factors favouring access

1. Section 11B(3) of the FOI Act provides:

11B  Public interest exemptions—factors

…

Factors favouring access

(3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);

(b) inform debate on a matter of public importance;

(c) promote effective oversight of public expenditure;

(d) allow a person to access his or her own personal information.

1. The Department concedes that access to the documents would promote the objects of the Act (s 11B(3)(a)), specifically the promotion of “Australia’s representative democracy by contributing towards … increasing public participation in Government processes”—in this case, the process for determining appropriate higher education policy—“with a view to promoting better informed decision making”.[[22]](#footnote-23) The Department also concedes that higher education reform is a matter of public importance, and that disclosure of the documents would inform debate on that issue (s 11B(3)(b)). No issues arise in this review regarding the oversight of public expenditure (s 11B(3)(c)),[[23]](#footnote-24) or Mr Rovere’s personal information (s 11B(3)(d)).
2. The FOI Guidelines include a non-exhaustive list of further factors favouring access.[[24]](#footnote-25) Only two of those factors are relevant to the documents: access would reveal the reason for a government decision and any background or contextual information that informed the decision; and access would enhance the scrutiny of government decision making.
3. Mr Rovere says that the public interest in access to the documents is “simply overwhelming”, on both “an individual and societal level”. Without access to the documents, he says, “prospective students will be unable to accurately assess the financial impact and benefit of this major life decision [whether to embark upon higher education], and the public will not be able to assess this against what is deemed the appropriate balance between the individual and public benefit of tertiary education as a whole”.
4. I do not agree with Mr Rovere about the value of the documents to prospective students. As noted above, the documents include modelling, though not econometric modelling, of possible student fees for a given course at a given university, given certain assumptions. The modelling is speculative at the system level; its accuracy at an individual level must be very low. The documents are clearly of interest to prospective students. But the modelling in the documents is not the sort of information upon which someone could sensibly make a “major life decision”.
5. There is clearly a general public interest in the documents. Their disclosure would reveal some of the background or contextual information that has informed the Government’s decision-making in this area. The disclosure of the documents would inform debate on the issue of higher education reform, which is a matter of public importance.

### Factors against access

1. The FOI Act does not specify any factors against giving access to documents. The FOI Guidelines include a non-exhaustive list of such factors,[[25]](#footnote-26) but none of those factors is relevant to this review.
2. The Department argues that there are four factors against giving access, which are relevant to this review. It says that disclosing the documents would:

* damage the operation of a deregulated market;
* interfere with the free flow of advice to the Minister (frankness and candour);
* disclose confidential Treasury projections; and
* (in relation to two of the documents) affect the confidentiality of question time briefs.

#### Damage to the operation of a deregulated market

1. The Department says that disclosure of the documents would influence the pricing of course fees in a deregulated higher education market. It says that only two universities have disclosed the fees that they will impose, and that disclosure of the documents would significantly influence the remaining universities when they set their fees. This, the Department argues, would be contrary to the principles of a deregulated market.
2. Mr Griew said that disclosing the Department’s modelling on fees would jeopardise the core objective of the reforms: “genuine price competition, with institutions competing with each other to offer the most attractive courses, and students being able to exercise genuine choice”. He said that there are international examples “where price signalling by government has led to an unhealthy convergence of price points”. I accept this evidence.
3. The Department says that the disclosure of “modelling and calculations done for the purpose of informing the Minister could be taken to indicate the government’s views about what might be acceptable or expected behaviour by participants in the market”, and that universities will use that information to “engage in a reflective process” in setting their fees, which would limit the effective operation of the reform proposal and damage the operation of a deregulated higher education market. For this reason, the Department says, access would not be in the public interest.
4. This argument would be stronger if the modelling in the documents were more robust. As I noted above,[[26]](#footnote-27) the speculative nature of the modelling—the fact that it is not modelling in the technical, econometric sense—means that it is of limited value to prospective students. Similarly, it must be of limited value to universities, at least to the extent that it predicts the fees that those universities would set in a deregulated market. Nonetheless, I agree that the disclosure of the documents would affect a deregulated higher education market. The possible damage to the operation of a deregulated market is a factor against access.
5. This will not always be the case. Once universities have set their fees in a deregulated market, disclosure of the documents would have little, if any, effect on that market. Once fees have been set, knowledge of the Government’s views about what those fees might have been will cause little or no damage.

#### Frankness and candour

1. The Department says that there is a public interest in avoiding interference with the free flow of advice to Ministers. As counsel for the Department noted, “this is a claim in the genus of frankness and candour”. The Department says that:

… disclosure would undermine the confidential relationship that exists between the Department and its Minister that is designed to allow the exploration and development of sensitive policy issues. This would be reasonably … likely to inhibit the Department’s frankness and candour in providing a full range of strategic options to the relevant Minister on policy issues, thereby undermining the overall quality of advice provided to the Minister and the effectiveness of the public service.

1. In *Howard and Treasurer*, the Tribunal listed five factors against giving access when applying the public interest test.[[27]](#footnote-28) Section 11B(4), inserted into the FOI Act 25 years after the decision in *Howard*,[[28]](#footnote-29) specifies factors that must not be taken into account in applying that test, including three of the factors identified in *Howard*.[[29]](#footnote-30) The remaining two *Howard* factors are:

* “disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest”; and
* “disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest”.[[30]](#footnote-31)

Although the FOI Act does not provide that the two remaining factors must not be taken into account, the FOI Guidelines say that those factors “are not, in those terms, consistent with the new objects clause of the FOI Act (s 3) and the list of public interest factors favouring access in s 11B(3)”.[[31]](#footnote-32)

1. The Department argues that that statement in the FOI Guidelines is “not entirely borne out by the legislative history of the provision” and that the case law on this issue is “equivocal—or perhaps ambivalent”. Counsel for the Department referred me to several cases in which the Tribunal has considered a “frankness and candour” argument in applying the public interest test.[[32]](#footnote-33) As the Information Commissioner noted in *Crowe and Department of the Treasury*, that argument has had a chequered history in Australian FOI practice.[[33]](#footnote-34) But all of the previous Tribunal cases to which I was referred were decided before the FOI Act was amended in 2010. Two of those 2010 amendments are significant to the question whether “frankness and candour” remains a factor against access. Those amendments are referred to in *Crowe*:

The first is that the objects clause (s 3) was recast to express more strongly a presumption in favour of public access and disclosure. Notably, the objects clause now declares that among the objects of the Act are to “promote Australia’s representative democracy [by] increasing scrutiny, discussion, comment and review of the Government’s activities” (s 3(2)(b)).

Secondly, the former “Internal working documents” exemption (s 36) was recast as “Public interest conditional exemptions—deliberative processes” (s 47C). At the heart of this exemption is the requirement, as before, that a document containing deliberative matter is exempt only if disclosure would “be contrary to the public interest” (s 11A(5)). However, the FOI Act now spells out public interest factors that favour public access, and factors that are irrelevant. Factors favouring access include promoting the objects of the Act and informing debate on a matter of public importance (s 11B(3)).[[34]](#footnote-35)

1. Counsel for the Department also referred me to discussion on frankness and candour, in the explanatory memorandum to the Freedom of Information Bill 1978, about the provision which became s 36 of the FOI Act.[[35]](#footnote-36) But that merely demonstrates that the exemption in s 36 was intended to encourage—or, at least, not to discourage—frankness and candour in government documents. Even if there was a similar intention behind s 47C,[[36]](#footnote-37) it does not follow that frankness and candour are a factor against access when applying the public interest test after deciding that a document is conditionally exempt.
2. In my view, a “frankness and candour” claim—in the words of *Howard*, a claim that disclosure will inhibit frankness and candour in future pre-decisional communications—cannot be a factor against access. A frankness and candour claim, made in circumstances where there is no (other) factor against access, is effectively a claim that disclosure of a document to which the FOI Act gives a right of access will inhibit the agency in preparing future documents to which the FOI Act will also give a right of access. That may be true—the disclosure of *any* document prepared by an agency for briefing a Minister has the potential to inhibit frankness and candour—but it cannot be a factor against access when applying the public interest test. It cannot be in the public interest that a document not be disclosed for no other reason than that its disclosure would discourage the creation of other documents which may also have to be disclosed.
3. In this review, disclosure of the documents may inhibit the Department’s frankness and candour in providing future advice to Ministers, but that is not a factor against giving access to the documents.

#### Disclosure of confidential Treasury projections

1. The documents include projections of several economic indicators. The Department says that these projections were provided to it by the Treasury on the understanding that they would be treated confidentially. Mr Griew went as far as to say that disclosure of this information “is likely to impede important current and future working relationships between Australian Government agencies” and prejudice the future delivery of government policy. An example of the information in question is the Treasury’s projection of the value of Government bonds.
2. I accept that Treasury provided its projections to the Department on a confidential basis. But the Treasury must be taken to have understood, when it provided those projections, that the Department might have to disclose them in response to an FOI request. And, if the FOI Act obliges the Department to disclose the projections, the Act also obliges the Treasury to disclose those projections in response to an FOI request made to the Treasury. It cannot be argued that disclosure, in this review, will make Treasury reluctant to provide information to other agencies in the future: providing information to another agency does not make that information any more or less accessible under the FOI Act than it already was. The fact that Treasury provided projections to the Department on a confidential basis cannot be a factor against giving access to the documents.[[37]](#footnote-38)
3. However, I accept the Department’s argument (and Mr Griew’s evidence) that disclosure of Treasury’s projections could adversely affect markets and financial frameworks. That is a factor against giving access to the documents.[[38]](#footnote-39) Of course, this will not always be the case. With the passing of time, the effect of the disclosure of those projections will be less and, eventually, nil.

#### Question time briefs

1. The Department says that disclosure of two of the documents—the question time briefs—would be contrary to the public interest because it would adversely affect the confidentiality of briefings to Ministers for the purposes of answering questions in Parliament.
2. Section 46(c) of the FOI Act provides that a document is exempt if its public disclosure would infringe the privileges of the Parliament. The FOI Guidelines say that:

Disclosure of briefings to assist ministers in parliament—namely, question time briefs or possible parliamentary questions—would not ordinarily be expected to breach a privilege of Parliament. A document of this kind, while prepared for a minister to assist him or her in responding to potential questions raised in Parliament, is nevertheless an executive document. Unless some clear prejudice to parliamentary proceedings can be demonstrated, s 46(c) should not be claimed for briefings of this kind. Depending on the content of the briefings, other exemptions may apply.[[39]](#footnote-40)

The Department does not claim that the question time briefs in this review are exempt under s 46(c). It claims that they are exempt under s 47C, and I have already found that they are conditionally exempt under that provision.

1. The Department says that the question time briefs are “deliberative in a different sense” than are the other documents in this review, because they provide advice to the Minister about how he might answer a particular question in the Parliament. In other words, disclosure of the question time briefs in this review would be contrary to the public interest—not because of what they contain, but because of what they are.
2. If two documents contain the same information, it is possible that one of them could be exempt and the other not exempt under the FOI Act: for example, one could be a Cabinet document,[[40]](#footnote-41) and the other a media release. But I do not see how disclosing information in one document can be more or less contrary to the public interest than disclosing the same information in another document. For example, a document prepared to advise a Minister how to answer a question in Parliament might be substantially identical to a document prepared to advise the same Minister how to answer the same question in a media interview. If disclosure of the first document would infringe the privileges of the Parliament, it would be exempt under s 46(c). Otherwise, its disclosure would be no more or less contrary to the public interest than the disclosure of the second document.[[41]](#footnote-42)
3. The fact that two of the documents are question time briefs is not a factor against access in relation to those documents.

### Balancing the factors favouring and against access

1. There is a general public interest in the disclosure of the documents. Disclosure would inform debate on the issue of higher education reform, which is a matter of public importance. Disclosure would increase public participation in Government processes. It would also reveal the reason for a government decision and some of the background or contextual information that informed the decision, enhancing the scrutiny of government decision making.
2. But, disclosure would frustrate the Government’s policy objective by damaging the operation of a deregulated higher education market. And the disclosure of Treasury’s projections, included in the documents, could adversely affect markets and financial frameworks.
3. In balancing these factors—for and against access—I give the greatest weight in this review to the factors against access. I find that access to the documents at this time would, on balance, be contrary to the public interest.

## The economy exemption (s 47J)

1. Section 47J of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could be reasonably expected to, have a substantial adverse effect on Australia’s economy, including a particular sector of the economy. The Department has not argued, in this review, that s 47J applies to any of the documents.
2. As I have found that the documents are conditionally exempt under s 47C, I do not need to consider the operation of s 47J. However, I note that, for similar reasons to those that led me to find that access to the documents would be contrary to the public interest—damage to the operation of a deregulated higher education market, and a possible adverse effect on markets and financial frameworks—I would have found that the documents are also conditionally exempt under s 47J.

## Timing

1. Applying s 11A(5) of the FOI Act involves considering the public interest “at that time”. As the FOI Guidelines point out:

The timing is important: it is possible that certain factors may be relevant when the decision is made, but would not be relevant if the request were to [be] reconsidered some time later. In such circumstances a new and different decision could be made.[[42]](#footnote-43)

1. As I have noted above,[[43]](#footnote-44) with the passing of time, the factors that mean that access to the documents now would be contrary to the public interest will have little or no effect. For example, if the higher education market is deregulated, and an FOI request is made for the documents in this review after the universities have set their fees, it is likely that access to the documents at that time would not be contrary to the public interest.
2. When disclosure of the documents will no longer damage the operation of a deregulated higher education market or adversely affect markets and financial frameworks, the Department should consider publishing the documents, for the reasons identified above as factors favouring access.[[44]](#footnote-45)

## Conclusion

1. The documents are conditionally exempt under s 47C of the FOI Act. It would not be reasonably practicable to prepare edited copies of the documents, separating the purely factual material from that deliberative matter. In any event, the resulting edited copies of the documents would be of little value to Mr Rovere.
2. Access to the documents at this time would, on balance, be contrary to the public interest. Accordingly, the documents are exempt (s 31B of the FOI Act): that is, all of the spreadsheets and five of the other documents are wholly exempt, and the remaining six documents are partly exempt.
3. The Department is not required to give Mr Rovere access to the exempt documents or the exempt matter in the partly exempt documents (s 11A(4)). The Department has already given Mr Rovere access to edited copies of the partly exempt documents, modified by the deletion of the exempt matter. So, I must affirm the decision under review.

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| I certify that the preceding 72 (seventy-two) paragraphs are a true copy of the reasons for the decision herein of Senior Member Popple |

...............................[sgd].........................................

Associate

Dated 30 June 2015

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| --- | --- |
| Date of hearing | **11 May 2015** |
| Applicant | **In person** |
| Counsel for the Respondent | **Mr Justin Davidson** |
| Solicitors for the Respondent | **Australian Government Solicitor** |

1. Department of Education and Training, *Strengthening the higher education system* (13 May 2015) <http://education.gov.au/strengthening-higher-education-system>. [↑](#footnote-ref-2)
2. The Department was the Department of Education at the time that Mr Rovere made his FOI request. Its name changed on 23 December 2014. [↑](#footnote-ref-3)
3. Based on the numbers in the Department’s reasons for decision, this would mean that access was refused to 7954 pages. In the statement that it filed on 21 October 2014, under s 37 of the AAT Act, the Department said that it had refused access to 8008 pages. In its statement of facts and contentions (30 January 2015), the Department said that that number was incorrect, and that it had refused access to 8020 pages—which must also be incorrect, as that is the total number of pages that were identified as falling within the scope of the request. Nothing turns on this discrepancy (see [9] below). [↑](#footnote-ref-4)
4. (2012) 59 AAR 35 at [18]. [↑](#footnote-ref-5)
5. (1979) 2 ALD 634 at 645 per Brennan J. [↑](#footnote-ref-6)
6. [2015] AATA 361 at [118]–[119]. [↑](#footnote-ref-7)
7. [2015] AATA 361 at [127]. [↑](#footnote-ref-8)
8. (1979) 2 ALD 634 at 644–645; see also at 639. [↑](#footnote-ref-9)
9. In Forgie DP’s view, the Tribunal should not give weight to the FOI Guidelines “as a fundamental element in its review” because applying the Information Commissioner’s Guidelines in the review of a decision of the Information Commissioner would be “something almost akin to a doctrine of deference” to that decision ([2015] AATA 361 at [126]–[127]). That issue does not arise in this review. It is the Department’s decision that is under review because the Information Commissioner decided, under s 54W(b) of the FOI Act, not to review the Department’s decision. [↑](#footnote-ref-10)
10. This was done under s 64(1A) of the FOI Act. [↑](#footnote-ref-11)
11. Section 4(1) provides that “**exempt matter** means matter the inclusion of which in a document causes the document to be an exempt document”. [↑](#footnote-ref-12)
12. See also the definitions of “conditionally exempt” and “exempt document” in s 4(1). [↑](#footnote-ref-13)
13. The Department says that the personal privacy exemption (s 47F) applies to some of two of the spreadsheets, and the deliberative processes exemption (s 47C) applies to the remainder of those spreadsheets (and to the remaining 32 spreadsheets). Mr Rovere does not seek access to those parts of those spreadsheets to which the Department says s 47F applies. [↑](#footnote-ref-14)
14. Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (October 2014) at [6.61], [6.67]. [↑](#footnote-ref-15)
15. [2014] AICmr 71 at [38]. [↑](#footnote-ref-16)
16. (1984) 5 ALD 588 at [58] per Hall DP, Prowse M and Hughes M. See FOI Guidelines at [6.62]. The quotation in the FOI Guidelines does not include the last sentence quoted above. [↑](#footnote-ref-17)
17. See [15] above. [↑](#footnote-ref-18)
18. In the sense that “consultation” requires discussion between an agency, minister or the government and another person (see FOI Guidelines at [6.70]–[6.71]). [↑](#footnote-ref-19)
19. (2004) 86 ALD 138 at [75] per Downes J. I note that some of the documents in dispute in *McKinnon* were spreadsheets that contained modelling—at least in the ordinary sense, and probably in the technical sense (see [15] above). In that case, the Tribunal decided that those spreadsheets were exempt under s 36(1)(a) of the FOI Act (see at [88] and the schedule at 174–176). Section 36 has since been repealed, but was in similar terms to s 47C. [↑](#footnote-ref-20)
20. Section 22(1)(c). [↑](#footnote-ref-21)
21. FOI Guidelines at [6.12]. The objects of the FOI Act are set out in ss 3 and 3A. [↑](#footnote-ref-22)
22. Section 3(2)(a). [↑](#footnote-ref-23)
23. The documents relate to decisions that would affect public expenditure, but their disclosure would not promote effective oversight of that expenditure. [↑](#footnote-ref-24)
24. FOI Guidelines at [6.25]. [↑](#footnote-ref-25)
25. FOI Guidelines at [6.29]. [↑](#footnote-ref-26)
26. See [39] above. [↑](#footnote-ref-27)
27. (1985) 7 ALD 626 at 634–635 per Davies J. The Tribunal was applying the public interest test in s 36(1)(b) of the FOI Act (see at 632). Section 36 has since been repealed, but was in similar terms to s 47C. [↑](#footnote-ref-28)
28. Section 11B was inserted by the *Freedom of Information Amendment (Reform) Act 2010* on 1 November

    2010. [↑](#footnote-ref-29)
29. “[A]ccess to the document could result in any person misinterpreting or misunderstanding the document” (s 11B(4)(b)); “the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made” (s 11B(4)(c)); and “access to the document could result in confusion or unnecessary debate” (s 11B(4)(d)). [↑](#footnote-ref-30)
30. (1985) 7 ALD 626 at 635 per Davies J. [↑](#footnote-ref-31)
31. FOI Guidelines at [6.77]. [↑](#footnote-ref-32)
32. *Cleary and Department of Treasury* (1993) 31 ALD 214; *McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138; *McKinnon and Secretary, Department of Prime Minister and Cabinet* (2007) 46 AAR 136. The second of these was upheld on appeal by the Full Court of the Federal Court (*McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70) and by the High Court (*McKinnon v Secretary, Department of the Treasury* (2006) 228 CLR 423). Two of the judges in the majority in the High Court made passing reference to “jeopardy to candour” (at [121] per Callinan and Heydon JJ) but the appeal was decided on different grounds. [↑](#footnote-ref-33)
33. [2013] AICmr 69 at [51]. [↑](#footnote-ref-34)
34. [2013] AICmr 69 at [54]–[55]. [↑](#footnote-ref-35)
35. Explanatory Memorandum, Freedom of Information Bill 1978 at [100]. Clause 26 of that Bill (“Internal working documents”) became clause 31 of the Freedom of Information Bill 1981, then s 36 of the FOI Act. Section 36 has since been repealed, but was in similar terms to s 47C. [↑](#footnote-ref-36)
36. There is no reference to frankness or candour in any of the explanatory memoranda to the Bill which became the *Freedom of Information Amendment (Reform) Act 2010* and inserted s 47C into the FOI Act: the explanatory memorandum and two supplementary explanatory memoranda to the Freedom of Information Amendment (Reform) Bill 2009, and the revised explanatory memorandum to Freedom of Information Amendment (Reform) Bill 2010. [↑](#footnote-ref-37)
37. Section 45(1) of the FOI Act provides that a document is exempt if its disclosure would found an action for breach of confidence, but not an action by an agency (like the Treasury). [↑](#footnote-ref-38)
38. And it would equally be a factor against giving access to the documents if the documents were held by Treasury, and Mr Rovere had made his FOI request to Treasury. [↑](#footnote-ref-39)
39. FOI Guidelines at [5.179]. [↑](#footnote-ref-40)
40. See s 34. [↑](#footnote-ref-41)
41. Counsel for the Department referred me to *McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138, and to a number of other cases cited there, in which the Tribunal considered claims relating to question time briefs (at [44] per Downes J). But those cases related to a different public interest test, regarding conclusive certificates. Counsel for the Department also referred me to the High Court’s decision in *McKinnon v Secretary, Department of the Treasury* (2006) 228 CLR 423. Two of the judges in the majority referred to as “reasonable” the argument that “such documents as are prepared for possible responses to questions in Parliament should remain confidential because their exposure would threaten the Westminster system of government” (at [125] per Callinan and Heydon JJ). However, that appeal was decided on different grounds (see note 32 above). And all of these cases were decided before the FOI Act was amended in 2010, and the public interest test was weighted towards disclosure (see [34] above). [↑](#footnote-ref-42)
42. FOI Guidelines at [6.32]. [↑](#footnote-ref-43)
43. See [47] and [56] above. [↑](#footnote-ref-44)
44. See [35]–[40] above. [↑](#footnote-ref-45)