Solicitor-General of the Commonwealth of Australia

Mr Richard Ackland
c/o Law Press of Australia
Suite 10 Milton House
2-14 Bayswater Road
KINGS CROSS NSW 2011

Dear Mr Ackland

RE: FREEDOM OF INFORMATION REQUEST

1. I am writing to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

A. Background

2. In a letter dated 28 June 2016 you requested access to the following documents (**Request**):

    (1) Each note for file or other record of any consultation between the Attorney-General and the Solicitor-General concerning the form or content of the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* [**Direction**].

    (2) Any communications between the Solicitor-General and the Attorney-General or any member of the Attorney-General's personal staff that occurred at any time on or after 1 November 2015 and concerning the form or content of the [Direction] or of *Guidance Note 11 – Briefing the Solicitor-General* [**Revised Guidance Note 11**].

    (3) All communications created on or after 1 November 2015 and concerning or referring to the appropriate form and content of

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[Revised Guidance Note 11] or the [Direction] between:

(a) the Solicitor-General or his office on the one hand and the Secretary or any Deputy Secretary of the Attorney-General's Department on the other;

(b) the Solicitor-General or his office on the one hand and the Office of Legal Services Coordination on the other; or

(c) the Solicitor-General or his office on the one hand and the Australian Government Solicitor or her officers on the other.

3. I informed you by letter dated 1 July 2016 that I understood that, in the light of s 47F of the FOI Act, it is the usual practice of agencies not to disclose the names and contact details of junior officers of departments and other government agencies, where that information is contained in documents within the scope of a request. The names and contact details of senior officers, however, will generally be disclosed. You have agreed with this course. If any documents are to be produced, they will be redacted on this basis.

4. I subsequently confirmed with you in an email dated 7 July 2016 that I would not produce duplicate documents.

5. By email dated 25 July 2016, you agreed to an extension of time to answer your Request until 27 August 2016.

6. I have interpreted your Request, consistently with the FOI Act, as calling for documents in my possession up to the date of your letter (28 June 2016) (see *Re Radar Investments Pty Ltd and Health Insurance Commission* (2004) 80 ALD 733 at [39]; *Re Lobo and Department of Immigration and Citizenship* (2010) 116 ALD 639 at [61]).

7. To identify relevant documents, I arranged for a comprehensive search of my office's electronic document management system and made enquiries of my staff.

8. As a result of that process, I identified a number of documents that potentially fell within your Request. I attach to this letter a Schedule which numbers and

identifies the documents in question. The numbering runs from 1 to 32. As will be seen below, certain numbers (1A-1C, 4, 6, 9, 11-13, 20, 22-25 and 30) relate to documents that I have ultimately ruled as not calling for production, being duplicates or out of scope documents. (Where documents are out of scope, I consider that I should not rule in the alternative on other grounds on which access might be refused).

9. As the answer to your Request raises a number of questions of law, I have taken independent legal advice on it. I do not record the content of that advice in this letter or waive privilege in it.

B. Discretionary consultation

10. Although not required by law, I have chosen to consult with the Attorney-General, officers of the Attorney-General's Department (**AGD**), the Australian Government Solicitor (**AGS**) and the Office of Parliamentary Counsel within the Commonwealth.

11. Those persons and bodies have raised with me a series of possible grounds on which I should conclude *either* that documents I have provisionally identified as relevant fall outside your Request (on its proper construction), *or* access should be refused on the grounds that the documents are exempt under the FOI Act. I have taken those matters into account. I do not waive privilege in certain legal advices that those persons or bodies have shared with me.

C. Obligation to give reasons

12. Under s 26 of the FOI Act, if there are any documents that fall within your Request where I consider that I am bound by law to refuse to grant access, or bound to defer granting access, I am required to give you notice in writing of my decision, including my findings on any material questions of fact, the material on which those findings are based, and the reasons for my decision. Where I decide to refuse access to a conditionally exempt document, I must include the public interest factors taken into account in reaching that decision. My reasons are not required to include any matter which is of such a nature that its inclusion in this document would cause this document itself to be an exempt

document. Given the range of submissions I have received and the objects of the FOI Act, I have also recorded relevant reasons why certain submissions have not been accepted.

D. Material taken into account

13. I have taken the following material into account in making my decision.

14. *First*, the content of the documents that fall within the scope of your Request.

15. *Secondly,* the FOI Act (specifically, but without limitation, ss 4, 7, 11, 11A(5), 11B, 22, 42, 47C, 47E and 47F).

16. *Thirdly,* the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (**Guidelines**).

17. *Fourthly*, the views of the third parties mentioned above that I have chosen to consult.

18. *Fifthly*, the views of individuals as referred to below.

E. Decision - generally

19. The Schedule of documents attached to this letter records the access decision for each document which falls within your Request and my specific findings and reasons in respect to any redactions/refusals to produce.

20. Those specific findings and rulings should be read together with the following more general findings and rulings.

F. Decision - Paragraph 1 of your Request

21. I have identified no documents that come within paragraph 1 of your Request. In saying this I note that shortly before finalising my reasons it was brought to my attention that two file notes of the meeting of 30 November 2015, should potentially be produced under paragraph 1. I have numbered these file notes **Documents 1B** and **1C**. The file notes were prepared by two persons, Joshua Faulks (Deputy Chief of Staff to the Attorney-General) and James Lambie (Senior Advisor to the Attorney-General) at the meeting of 30 November 2015.

Copies of those notes were first provided to me in the week of 15 August 2016 and were not in my possession at the time I received the Request. Accordingly, they are outside the scope of the Request (see paragraph [6] above).

G. Decision - Paragraph 2 of your Request

22. Shortly before finalising my reasons, it was brought to my attention that a fifth document, which I have numbered **Document 1A**, might also fall within paragraph 2 of your Request. As I had already drafted these reasons when that matter was brought to my attention, I deal with **Document 1A** later in these reasons at paragraphs [161]-[162] below.

23. I identified, provisionally, four documents falling within paragraph 2 of your Request which I caused to be numbered, provisionally, **Documents 1-4** in the Schedule.

24. Two of those documents, numbered **Documents 1** and **2** in the Schedule also fall within paragraph 3 of your Request.

25. I have consulted the Attorney-General, AGD and AGS on some or all of these four documents.

26. Whether you have a legally enforceable right to access these four documents must start with s 11 of the FOI Act. The Office of Solicitor-General is an "agency" within the definition in s 4. That is because it is a "prescribed authority" within the definition of that term. (See specifically paragraph (c) of the definition of "prescribed authority", namely a person holding an office established by an enactment. The relevant enactment here is the *Law Officers Act 1964* (Cth) (**Law Officers Act**). For completeness I note that no exclusion applies under s 4(3).)

27. Each of **Documents 1-4** is a document of my agency under paragraph (a) of the definition in s 4 of "document of an agency". That is because it is a document in the possession of my agency, having been received by my office or created by my office at some stage before 28 June 2016. Accordingly you have a right under s 11 to access each document unless it is out of scope or is an "exempt

document" (see ss 4 and 31B of the FOI Act).

28. I start first with a general submission of law that, if correct, would mean that I am bound to find each of **Documents 1-3** to be an "exempt document". I deal with **Document 4** separately at paragraphs [165]-[166] below.

Paragraph (b) of the definition of exempt document – the AGS exemption

29. The overarching submission for consideration is that each of **Documents 1-3** attracts paragraph (b) of the definition of "exempt document" in s 4 because it is a document in respect of which, by virtue of s 7, AGD is exempt from the FOI Act.

30. Section 7(2), read with Div 1 of Pt II of Sch 2 to the FOI Act, renders AGD exempt from the operation of the FOI Act in relation to "documents in respect of activities undertaken by [AGS]" (**AGS exemption**).

31. Read with the definition of "document of an agency" in s 4, the above provisions, on their face, go at least as far as to render AGD exempt from the operation of the FOI Act in relation to documents in the possession of AGD, whether created in AGD or received in AGD, which bear the character of being "in respect of activities undertaken by [AGS]".

32. The question, however, is whether the AGS exemption goes further than this and requires that **Documents 1-3** are exempt in the hands of another agency, namely the Solicitor-General.

33. The resolution of this issue depends upon the proper construction of the FOI Act. I will first set out the general scheme of the FOI Act (at paragraphs [34]-[46] below), and then consider in more detail the competing possible constructions of the AGS exemption (at paragraphs [47]-[76] below).

34. As to the general scheme of the FOI Act, *first*, a person who wishes to exercise his or her right to obtain a document of an agency (other than an exempt document) is to make a request to the agency (s 15).

35. *Secondly*, subject to s 11A, the agency is to give the person access to the

document. That obligation can only come into play if the document sought is a document of the agency, which largely turns on whether the agency is in possession of the document.

36. *Thirdly*, under s 11A(4), that general obligation to give the person access to the document does not apply "at a particular time if, at that time, the document is an exempt document".

37. In this scheme, the question of whether a document is an exempt document arises not in a vacuum, but in the context of determining whether a particular agency is obliged to provide access to a particular document. In addition, the context in which the operation of the definition of "exempt document" must be determined includes s 7 and Pt II of Sch 2 to the FOI Act.

38. In relation to s 7, I note the following.

39. *First*, under s 7(2), the "persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of [the FOI] Act in relation to the documents referred to in that Schedule in relation to them".

40. *Secondly*, s 7(2A) exempts agencies from the operation of the FOI Act in relation to a class of documents that fall within the definition of "intelligence agency document", and in relation to any document that "contains a summary of, or an extract or information from, an intelligence agency document, to the extent that it contains such a summary, extract or information".

41. *Thirdly*, s 7(2B) is relevantly identical to s 7(2A), except that it exempts Ministers, rather than agencies, from the operation of the FOI Act.

42. *Fourthly*, s 7(2C) operates in the same way as s 7(2A), except that the documents in question are "defence intelligence document[s]".

43. *Fifthly*, s 7(2D) is relevantly identical to s 7(2C), except that it exempts Ministers, rather than agencies, from the operation of the FOI Act.

44. *Sixthly*, s 7(2E) exempts Ministers and agencies from the operation of the FOI Act in relation to certain documents that have originated with, or have been

received from, the Child Sexual Abuse Royal Commission, or which contain a summary of, or an extract or information from, a private session of that Commission.

45. Part II of Sch 2 of the FOI Act lists certain agencies in relation to certain classes of document. For example, AGD is listed as follows:

> Attorney-General's Department, in relation to:
>
> (a) documents in respect of commercial activities it undertakes; and
>
> (b) documents in respect of activities undertaken by the Australian Government Solicitor; and
>
> (c) exempt content-service documents concerning the performance of a function, or the exercise of a power, under Schedule 7 to the *Broadcasting Services Act 1992*; and
>
> (d) exempt internet-content documents concerning the performance of a function, or the exercise of a power, under Schedule 5 to that Act.

46. On a number of occasions, more than one agency is listed in relation to the same class of documents. So, for example, there is a listing for the Australian Communications and Media Authority in Pt II of Sch 2 that refers to the same classes of document as in paragraphs (c) and (d) of the listing for AGD above:

> Australian Communications and Media Authority, in relation to:
>
> (a) exempt content-service documents concerning the performance of a function, or the exercise of a power, under Schedule 7 to the *Broadcasting Services Act 1992*; and
>
> (b) exempt internet-content documents concerning the performance of a function, or the exercise of a power, under Schedule 5 to that Act.

47. There are three possible constructions of the AGS exemption. The *first* construction of paragraph (b) of the definition of "exempt document" in s 4(1) is that, where a document is within any of the classes of documents referred to in Pt II of Sch 2, then that document is an exempt document, regardless of which

agency processes the s 15 request, and whether or not the agency specified in Pt II of Sch 2 holds a copy of the document (**Construction 1**).

48. The *second* possible construction (**Construction 2**) is that, if a document falls within one of the specified classes of documents, and the person, body or Department in relation to which that class is specified in Pt II of Sch 2 holds a copy of the document, then all copies of the document are exempt documents, regardless of which agency those copies are documents of and regardless of which agency processes the s 15 request.

49. Th*e third* possible construction (**Construction 3**), is that if a document falls within one of the specified classes of documents, and a request to provide access to that document is made to a person, body or Department that is listed in Pt II of Sch 2 in relation to that class of documents, then, for the purposes of dealing with that request, the document is an exempt document. However, if the agency that processes the request is not listed in Pt II of Sch 2 in relation to a specified class of documents, then a document that falls within one of the specified classes will not, by virtue of that specification alone, be an exempt document for the purposes of dealing with that request.

50. I will consider the legal merits of each of the three possible constructions in turn.

Construction 1

51. Under Construction 1, the effect of a class of documents being specified in relation to a person, body or Department in Pt II of Sch 2 to the FOI Act would be to make documents within that class exempt documents, regardless of the identity of the recipient of the s 15 request. The effect of a class of documents being specified at any point in Pt II of Sch 2 would be the same, in respect of that class, as the specification of classes of documents in ss 7(2A)-7(2E). I do not consider that the FOI Act can be read as having this effect for the following reasons.

52. *First*, insofar as ss 7(2A)-7(2E) are concerned, the FOI Act is explicit: an agency or a Minister is exempt from the operation of the FOI Act in relation to

certain specified classes of documents. It does not matter, under those subsections, which agency is requested to grant access to the document in question. If a document of the agency in question falls into one of the specified classes, it is an exempt document.

53. If the legislature had intended the same outcome in respect of the classes of documents referred to in Pt II of Sch 2, then one would expect that the legislature would have used generally the same drafting as it has used in ss 7(2A)-7(2E). The adoption of significantly different drafting in s 7(2) and Pt II of Sch 2 is a strong indicator that a different outcome should prevail.

54. The definitional provision in s 4(1) is not to be given a "narrow, literal meaning" that negates "the evident policy or purpose of a substantive enactment" (see, for example *Kelly v The Queen* (2004) 218 CLR 216 at [84] and [103]). I consider it plain enough from the differences between s 7(2A)-(2E) on the one hand, and s 7(2) and Pt II of Sch 2 on the other, that there was a purpose in using these different schemes to define when a document is an exempt document. A construction of s 4(1) that elides these two schemes is to be avoided.

55. *Secondly*, Construction 1 would make considerable portions of Pt II of Sch 2 to the FOI Act redundant. As noted at paragraph [46] above, there is often more than one agency listed in relation to the same class of documents. So, for example, the following agencies are listed as exempt agencies in relation to "exempt content-service documents concerning the performance of a function, or the exercise of a power, under Schedule 7 to the *Broadcasting Services Act 1992*":

(a) the AGD;

(b) the Australian Communications and Media Authority;

(c) the Children's e-Safety Commissioner;

(d) the Classification Board; and

(e) the Classification Review Board.

56. If Construction 1 were correct, it would be unnecessary to list all of these agencies as exempt in relation to that same class of documents. The listing of one agency as exempt in relation to that class of documents would suffice to make the document an exempt document. The listing of additional agencies as exempt in relation to that class of documents would be mere surplusage. The FOI Act should be construed so as to avoid such an outcome (see, for example, *Taheri v Vitek* (2014) 87 NSWLR 403 at [121]).

57. *Thirdly*, any concerns that the rejection of Construction 1 might undermine the exemptions created by s 7(2) and Pt II of Sch 2 are ameliorated, at least in part, by ss 16(3)-16(6). Subsection 16(3) states (underlining added):

> Where a request is made to an agency for access to a document that:
>
> (a) originated in, or has been received from, another agency, being an agency specified in Part II of Schedule 2… and
>
> (b) is more closely connected with the functions of the other agency in relation to documents in respect of which the other agency is exempt from the operation of this Act than with the functions of the agency to which the request is made;
>
> the agency to which the request is made shall transfer the request to the other agency.

58. Under s 16(3A), where a s 15 request is made for access to more than one document, and one or more of the documents is a document to which, relevantly, s 16(3) applies, then s 16 applies as if a separate request for access had been made in respect of each of those documents. Thus the obligation to transfer a request under s 16(3) applies when any document that is sought satisfies the criteria in ss 16(3)(a) and 16(3)(b).

59. Under s 16(4), the agency that transfers a request to another agency must, if it is necessary to do so in order to enable the transferee agency to deal with the request, send the document in question to the transferee agency.

60. Under s 16(5)(a), where a request is transferred under s 16, the request is taken to have been made to the agency to which the request is transferred. That

agency would then be able to rely on the exemptions under s 7(2) and Pt II of Sch 2 as appropriate. Under s 16(6), “agency” in s 16 includes “a Minster”.

61. Section 16 provides considerable scope for the exemptions created by s 7(2) and Pt II of Sch 2 to have, in practice, an expanded effect beyond cases in which a s 15 request is made directly to the agency listed in Pt II of Sch 2. It is true that it may nevertheless be possible that a second agency will grant access to a document that would be exempt if it were in the hands of, and if a relevant request was made to, an agency listed in Pt II of Sch 2. But that ultimately reflects the legislative choice not to use, in relation to the classes of documents referred to in Pt II of Sch 2, the method of exempting documents used in ss 7(2A)-7(2E).

62. In light of these matters, I do not consider that Construction 1 is an available reading of the FOI Act.

Construction 2

63. Construction 2 avoids the problems, created by Construction 1, of surplusage and eliding the different schemes that appear within s 7. However, it instead produces an operation of the FOI Act that does not have a rational basis.

64. Take, for example, a case in which an agency (not being AGD) receives a s 15 request in relation to a document (a **requested document**), in possession of that agency, that is a document in respect of activities undertaken by AGS. If AGD holds a copy (or the original) of the document (a **parallel document**), then under Construction 2, the document is an exempt document, and the agency to which the s 15 request is directed need not provide access to it. If, however, AGD does not hold a parallel document, then the requested document would not be an exempt document.

65. Such an operation of the FOI Act lacks any sensible justification. Whether a requested document was exempt would depend in part upon whether AGD had, for example, lost or destroyed the parallel document. Further, the scheme would apply where, for example, AGD possessed a parallel document in respect of a requested document (assuming the requested document had the necessary

character), but would not apply where the requested document merely summarised the document that was in possession of AGD. That, to me, would be a capricious operation of the FOI Act. Moreover, this operation of the FOI Act would also mean that the agency that received the request would be dependent upon AGD to tell the agency whether AGD had a copy of the document in question. Yet the FOI Act does not oblige AGD to do so.

66. In the light of these matters, and because I do not regard the literal language of the FOI Act as supporting such a construction, in my view Construction 2 is not the preferable construction of the FOI Act. This is especially so given my views in relation to Construction 3.

Construction 3

67. In my view, Construction 3 is the preferable construction of the FOI Act. This is so for three reasons.

68. *First*, as outlined above, under the scheme created by the FOI Act to give effect to a person's right to a document of an agency that is not an exempt document, the question of whether a document is exempt arises only if the document is a document of the agency processing the request. Construction 3 recognises, consistently with the FOI Act, that a requested document in the hands of one agency is a different document to a parallel document in the hands of a second agency. As much is made clear by the definition of "document of an agency", which refers to a document "in the possession of the agency, whether created in the agency or received in the agency". Text and context thus point overwhelmingly to Construction 3 as the correct reading of the FOI Act.

69. *Secondly*, Construction 3 avoids the problems of surplusage, eliding the different schemes within s 7 and irrational outcomes that affect Constructions 1 and 2. Construction 3 simply requires the agency that receives the request to determine whether the document is exempt by asking itself whether the agency is listed in Pt II of Sch 2, and if so, whether the document falls into any of the classes of documents in relation to which the agency is listed.

70. *Thirdly*, concerns that such an approach undermines the exemptions created by

s 7(2) and Pt II of Sch 2 appear to have been foreseen by the legislature. As outlined above, the obligation to transfer a request under s 16(3) addresses this issue to some extent. To the extent that the issue remains unaddressed, that appears to be intentional given the way in which s 7(2) differs from the subsections that follow it.

71. The question of whether an agency that is not the agency processing the request is exempt from the operation of the FOI Act in respect of a requested document simply does not arise under the scheme created by the FOI Act. An agency is not *exempt* from granting access to a document that is not its document; rather no question of granting access arises. So, for example, in order for AGD to be exempt from the operation of the FOI Act in respect of a document, the document would need to be a document of AGD, and AGD would need to be the processing agency. A document that is in the hands of the Solicitor-General is not such a document. There is no occasion to conclude that AGD is exempt from the operation of the FOI Act in respect of a document that is not a "document of" AGD, such as a document in the possession of the Solicitor-General. (The position would be otherwise if the document were sent to AGD under s 16(4) if a s 16(3) transfer occurred).

72. Once that point is accepted, the reference in paragraph (b) of the definition of "exempt document" to "a document in respect of which, by virtue of s 7, an agency, person or body is exempt from the operation of this FOI Act" may be seen to refer only to a document in respect of which the *agency* that is processing the request is exempt. I see no reason to read the definitional provision in s 4(1) as requiring an agency that is processing a request to ask itself whether the requested document would be an exempt document if it were in the hands of some other agency. Rather, reading the definitional provision as I have suggested in the preceding paragraphs is consistent with the way in which a document is an exempt document under the FOI Act. That supports my reading of the definitional provision (again, see, for example, *Kelly v The Queen* (2004) 218 CLR 216 at [84] and [103]).

73. I am therefore of the view that Construction 3 is the correct construction. In the application of that construction, I note a submission received shortly before

finalising my decision, that as my staff are employed by AGD, my staff are exempt from the FOI Act in relation to documents in respect of activities undertaken by AGS. That is not how the FOI Act works. The Solicitor-General is an agency subject to the FOI Act. Staff working for and reporting to the Solicitor-General who come into possession of documents in that capacity hold such documents for the Solicitor-General. All documents dealt with in this Request are in the possession of the Solicitor-General, not AGD.

74. I should indicate the following considerations, for the sake of completeness.

75. *First*, I do not view the Explanatory Memorandum to the Bill that became the FOI Act as providing support for any of the three constructions discussed above over the others.

76. *Secondly*, I have not been referred to any authorities that have considered the issue of construction raised by the AGS exemption.

Exemption under s 42 for legally privileged communications

77. I have next considered a submission that the entirety of the communications between the Solicitor-General and Attorney-General found in **Documents 1-3** are legally privileged, and attract the operation of s 42 of the FOI Act.

78. I have indicated below (at paragraph [147]) that some parts of **Document 2** are legally privileged communications and must be redacted under s 22 to comply with s 42.

79. However, I have concluded that there are portions of **Documents 1-3,** which otherwise would be produced under the FOI Act, that are not legally privileged. These portions of the documents reveal some consultation between the Solicitor-General, the Attorney-General, AGS and AGD in relation to Guidance Note 11. However, there is nothing to show that those consultations were for the purpose (let alone the dominant purpose (see, for example, *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49)) of any of the lawyers present providing legal advice on Guidance Note 11 to any other person who was a client in the discussions. What is

revealed is the fact and nature of a process, not the *content* of legal advice or any *request* for such advice. I do not see how a privilege claim arises in these circumstances.

80. Shortly before finalising this statement of reasons it was submitted to me that all communications between the Attorney-General and the Solicitor-General about the exercise of, and restraints on, the Solicitor-General's functions and duties and how those functions and duties are to be performed in the context of Commonwealth matters attract legal professional privilege. The authority cited for that submission was comments by Brennan J in *Waterford v The Commonwealth* (1987) 163 CLR 54 at 74. A close reading of the comments, and the context in which were they were made, indicates that Brennan J was not suggesting that principles of legal privilege have some broader application in the context of communications regarding public powers, functions or duties. Accordingly, a communication regarding the performance or exercise of a public power, function or duty must be for the dominant purpose of providing legal advice if it is to attract legal professional privilege. For the reasons given above at paragraph [79], the communications in **Documents 1-3** do not attract legal professional privilege.

Section 47C – conditional exemption for deliberative material and the public interest balancing test to be applied under s 11A(5) of the FOI Act

81. As will become apparent below, **Documents 1-3** contain material that I have ruled to be deliberative material under s 47C, attracting a conditional exemption, and requiring a public interest balancing test under s 11A(5). I consider it appropriate to set out next how I understand the public interest balancing test is to be applied.

82. A document that is conditionally exempt is an exempt document if access to the document would, on balance, be contrary to the public interest for the purposes of s 11A(5) (see s 31B and paragraph (a) of the definition of exempt document). The following points should be noted regarding that public interest balancing test.

83. *First*, s 11B applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under s 11A(5) (s 11B(1)). However, s 11B does not limit s 11A(5) (see s 11B(2)).

84. Under s 11B(3), where granting access to a document would achieve an outcome listed in s 11B(3), that is a factor that favours the granting of access. Under s 11B(4), certain factors must be excluded from consideration under the public interest balancing test. Under s 11B(5), regard must be had to the Guidelines in working out whether access to a document would, on balance, be contrary to the public interest.

85. *Secondly*, the Guidelines note that the test in s 11A(5) is "weighted towards disclosure" (Guidelines at [6.12]). The mere fact that a document is conditionally exempt is not, of itself, a basis to determine that access should be withheld. Disclosure of such a document is required unless "in the particular circumstances, and at the time of the decision, there is on balance countervailing harm which offsets the inherent public interest of giving access" (Guidelines at [6.14]).

86. The Guidelines provide, respectively, a non-exhaustive list of public interest factors in favour of, and a non-exhaustive list of public interest factors against, disclosure of a conditionally exempt document (see Guidelines at [6.25] and [6.29]).

87. The Guidelines refer to the application of the s 11A(5) public interest balancing test in relation to a document that is conditionally exempt under s 47C (see Guidelines at [6.77]). The Guidelines note that there is considerable case law on the equivalent former provision, but that caution is required in applying that case law to s 47C. The Guidelines state that it "is important that agencies now have regard to the more extensive range of public interest factors that may favour or be against disclosure (see paragraphs 6.23-6.29 above)".

88. The Guidelines do not contain specific guidance on the application of the s 11A(5) public interest balancing test to a document that is conditionally exempt under s 47C. As such a decision maker must have regard to the factors

outlined at [6.25] and [6.29] of the Guidelines to the extent that they are relevant to the document in question,[1] as well as any other factor that arises in the circumstances of the case.

89. *Thirdly*, as was said in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42]:

> [w]hen used in a statute, the expression "public interest" <u>imports a discretionary value judgment</u> to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505, when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "<u>unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view</u>". (Underlining added)

90. Whilst ss 11B(3)-11B(5) set out matters to which regard must, or must not, be had in resolving the public interest balancing test under s 11A(5), those subsections are not exhaustive. The other factors that a decision-maker may take into account in considering the public interest balancing test under s 11A(5) are otherwise confined only in the manner outlined in the passage quoted in the preceding paragraph.

91. I now turn to each of **Documents 1-3** to give the rulings in the light of the above discussion.

<u>Document 1</u>

92. Document 1 is the file copy of a communication from the Office of the Solicitor-General to three persons: the Deputy Chief of Staff of the Attorney-General; the Executive Advisor to the Secretary of AGD and Mr Govey as the AGS.

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1 See also Moira Paterson, *Freedom of Information and Privacy in Australia: Information Access 2.0* (2nd ed, 2015) at [7.67].

93. The third substantive paragraph of Document 1 is irrelevant to the Request and would be redacted in the event of any access under s 22. Likewise paragraphs 3 and 4 of the attachment.

94. The balance of Document 1 is a request for comments on notes of a meeting held on 30 November 2015 between the Attorney-General, myself, Mr Chris Moraitis (the Secretary of AGD) and Mr Govey as the AGS and the attached notes of meeting.

95. **Document 1** contains "deliberative matter" within s 47C(1). That is because it discloses the opinions, advice, or recommendations of a number of persons within Government as to how and when the Solicitor-General should be briefed to advise, and notes possible amendments to Guidance Note 11 in light of those opinions, advice and recommendations. The document is thus conditionally exempt.

96. Under s 11A(5), I must give access to **Document 1** unless in the circumstances access to it at this time would on balance be contrary to the public interest.

97. The exercise of judgment under s 11A(5) requires a proper identification of the circumstances presently prevailing which may bear on the public interest; a proper appreciation of public interest factors that may point for or against disclosure; and a weighing of those factors ("on balance") in a manner that is rational and reasonable in all the circumstances.

98. Under s 15(5A) I must have regard to the Guidelines and I have done so.

Contextual matters

99. I find that there are a series of matters concerning the relationships between the Attorney-General, the Solicitor-General and other senior officer holders in Government that provide relevant *general* background to the assessment of the how the public interest bears on this part of the Request.

100. *First,* the Attorney-General, as the First Law Officer and Member of Parliament and Cabinet, has the primary responsibility for the rule of law in Australia at the federal level.

101. *Secondly,* the Solicitor-General, as Second Law Officer, holds a statutory office under the Law Officers Act, with various functions and duties under that statute and other laws which give him or her an important role in the rule of law in Australia at the federal level.

102. *Thirdly*, two of the other most senior legal figures and bodies in the Commonwealth Government are the Secretary of AGD and the AGS.

103. *Fourthly,* the work done by the above officials is ordinarily a mix of the public and private. The Attorney-General reports publicly to the Parliament and to the citizen body including through the media. The Solicitor-General's work is public to the extent it consists of appearances in courts and certain other responsibilities, but much of the work is done in private, including but not limited to communications within Government that are the subject of client legal privilege. The Government occasionally waives that legal privilege but generally does not. The Secretary and the AGS may be required from time to time to speak publicly about the workings of legal affairs within Government, including by giving evidence before the Senate.

104. *Fifthly*, communications between the above officials will often be confidential and protected under the general law of client legal privilege.

105. *Sixthly*, apart from legally privileged communications, ordinarily communications between the above officials will be confidential. Confidentiality is important to ensure that there can be a free exchange of views and the Government can ultimately make the best possible decisions that impact on the rule of law.

106. *Seventhly*, there are a range of circumstances in which such confidentiality will not be maintained, including where communications are disclosed to Parliament, or to the citizen body such as through the media.

107. *Eighthly,* the relationship between Attorney-General and Solicitor-General, as fellow Law Officers, assumes mutual trust and confidence.

108. I also find that there are a series of matters that provide the *more specific*

background to the assessment of this part of the Request.

109. *First,* Guidance Note 11 is a public document that has for a number of years set out, in non-binding form, the processes expected for briefing the Solicitor-General.

110. *Secondly,* Guidance Note 11 has been amended from time to time and published in its amended form.

111. *Thirdly,* on 4 May 2016, the Attorney-General published a revised version of Guidance Note 11, in a materially different form to the form of that document immediately prior to 4 May 2016.

112. *Fourthly,* on 4 May 2016, the Attorney-General also issued the Direction. The Direction is the first time that the process for briefing the Solicitor-General has been placed on a legislative basis. The Direction binds the Solicitor-General as well as others. The Direction is in a materially different form to the procedures in Guidance Note 11 as it was prior to 4 May 2016.

113. *Fifthly,* the Direction, as tabled in Parliament, was accompanied by an Explanatory Statement as required by the *Legislation Act 2003* (Cth) in which the Attorney-General stated:

> **Consultation before making**
>
> Before this instrument was made, the Attorney-General considered the general obligation to consult imposed by s 17 of the *Legislative Instruments Act 2003.*
>
> Section 55ZF of the *Judiciary Act 1903* empowers the Attorney-General to issue Directions, which are to apply generally to Commonwealth legal work, or that are to apply to Commonwealth legal work being performed, or to be performed, in relation to a particular matter. As the Direction relates to the process for referring a question of law to the Solicitor-General, the Attorney-General has consulted the Solicitor-General.

114. *Sixthly,* on 17 June 2016, the Australian Financial Review published an article about the Direction and recorded:

> A spokesperson [for the Attorney-General] said: ‘The Attorney-General consulted the Solicitor-General about the procedure for briefing and taking advice from the Solicitor-General in person at a meeting on 30 November 2015 and also asked him to provide feedback in writing. That feedback was provided and considered’.

115. *Seventhly*, on 24 July the Attorney-General answered questions on the ABC Insiders Program and his office issued a transcript:

> INSIDERS PROGRAM - 24 JULY 2016
>
> FRAN KELLY: Just a couple of other questions in your area. During the election it was revealed the Solicitor-General, your top law adviser, had disputed your assurance to the Parliament that you consulted him before changing the rules so that all approaches to the Solicitor-General have to get your permission first. Was the Solicitor-General aware you were going to make this instruction?
>
> ATTORNEY-GENERAL: Let me just correct a false premise in your question. There were no changes to the rules. There was a change to an administrative direction but the rules are contained in a provision of the Law Officers Act, Section 12B, which says quite explicitly that approaches for advice to the Solicitor-General are to be made by the Attorney-General.
>
> FRAN KELLY: That’s not been the practice though. People have been able to go directly to the Solicitor-General. Why [inaudible]
>
> ATTORNEY-GENERAL: In fact the genesis of this issue was that some government agencies and departments were unaware of the requirements of Section 12B of the Law Officers Act.....
>
> FRAN KELLY: Why did you decide to implement them though, to enforce them like that?
>
> ATTORNEY-GENERAL: Because I wanted to regularise the practice across government to ensure it was in conformity with Section 12B of the Law Officers Act.
>
> FRAN KELLY: And the Solicitor General was aware you were going to do this?

> ATTORNEY-GENERAL: I had a long meeting with the Solicitor-General on 30 November in which we discussed this issue at length.
>
> FRAN KELLY: And you announced this in May?
>
> ATTORNEY-GENERAL: It was announced in about May.

116. *Eighthly*, by reason of the fifth, sixth, and seventh matters above, the public have been told by the Government that there was consultation between the Attorney-General and Solicitor-General over the Direction before it was issued; that the consultation occurred at a meeting of 30 November 2015; that at such meeting an issue was discussed at length that some Government agencies and Departments were not aware that s 12(b) of the Law Officers Act required that approaches for advice to the Solicitor-General be made through the Attorney-General; that at such meeting the Attorney-General asked the Solicitor-General to provide feedback in writing about the procedure for briefing and taking advice from the Solicitor-General; and such feedback was later provided and considered.

117. *Ninthly*, during the election campaign there was some public controversy raised about the Direction, including the possibility that the next Parliament might consider disallowing it.

118. *Tenthly*, the Request evidences an interest in the public learning more about what communications and consultation occurred between the identified persons about the appropriate form and content of the Direction and Revised Guidance Note 11.

119. *Eleventhly*, the Direction will remain open for possible disallowance by the Parliament for a period. There has been media discussion that disallowance may be considered by the Parliament.

Factors in favour of disclosure

120. I identify and take into account the following public interest factors which would tend to operate in favour of disclosure of **Document 1**, in the light of s 11B(3) and the discussion above.

121. *First,* it would promote the objects of the FOI Act including increasing scrutiny, discussion, comment and review of the Government's activities (s 3(2)(b)). The activities in question include the process followed in the lead up to the giving of the Direction and the amending of Guidance Note 11 (s 11B(3)(a)).

122. *Secondly,* it would inform debate on a matter of public importance (s 11B(3)(b)), which again, may be identified as that same process.

123. *Thirdly,* it would reveal the reason for a government decision and background or contextual information that informed the decision (see Guidelines at [6.25(a)(iv)]). The government decisions are the making of the Direction and the amending of Guidance Note 11.

124. *Fourthly*, it would enhance the scrutiny of government decision making, in particular scrutiny of the decisions referred to in the preceding paragraph (see Guidelines at [6.25(a)(v)]).

Factors against disclosure

125. I identify and take into account the following factors that might count against disclosure of **Document 1** and provide some comments on each.

126. *First,* disclosure could reasonably be expected to increase the Government's vulnerability to legal risks. However, I do not consider that disclosure of the relevant parts of **Document 1** gives rise to a significant risk in this respect.

127. *Secondly,* disclosure could be reasonably expected to impede the administration of justice generally, as it may impede the ability of members of Government to deliberate upon the appropriate approach to Commonwealth legal work, including briefing the Solicitor-General, without fear that those deliberations will be released under a request under the FOI Act. However, I doubt that the concept of "imped[ing] the administration of justice generally" (Guidelines at [6.29(d)]) is so broad as to include impeding the ability of members of Government in the manner described. That said, I consider that impeding the ability of members of Government in the manner described would be a factor against disclosure, regardless of how that factor is classified.

128. *Thirdly*, disclosure could be reasonably expected to prejudice an agency's ability to obtain similar information in the future. In particular, the Attorney-General's ability to seek and obtain full information on the proper performance of Commonwealth legal work may be impeded if the Attorney-General cannot have confidence that the information will remain confidential, and the Solicitor-General's ability to provide candid advice to the Attorney-General about the briefing of the Solicitor-General may be impeded if such advice may be disclosed under the FOI Act. The importance of this leads me to consider it in the public interest to preserve the Attorney-General's ability to obtain information from outside his Department, including from the Solicitor-General, about the performance of Commonwealth legal work or the briefing of the Solicitor-General. In circumstances where information is obtained in the course of private consultation, if disclosure may make such consultations more difficult or less frank in the future, this "chilling effect" would weigh against that disclosure.

Balancing the above factors

129. As appears from the above, there are factors in favour of disclosure of **Document 1**, and factors against. In determining whether access to **Document 1** would, on balance, be contrary to the public interest, these factors must all be considered. However, there is not necessarily a "correct" answer to the question of whether disclosure would be contrary to the public interest. The determination ultimately involves a degree of discretion.

130. In the present case, the public interest factors pull heavily in both directions and in a sense are the inverse of each other. Disclosure of **Document 1**, through its very promotion of the ability of the public to more closely scrutinise and comment on what has occurred in respect to the Direction and Revised Guidance Note 11, particularly in the Parliamentary context, may lead to some of the above identified harms to the public interest.

131. How is that balance then to be resolved? It seems to me that there are three matters that help resolve the tension.

132. The *first* is to recognise that it is a legitimate choice for Government generally,

and for the Attorney-General and those who work with him in particular, in designing a process of “consultation” over a proposed legislative or administrative measure, to determine whether it should be public or private. There are competing benefits of each process. Public consultation, by its very nature, offers the broadest opportunities for receipt and exchange of views. On the other hand, private consultation seeks a narrower range of views, but may aid a more open exchange of views and a richer dialogue between the smaller circle.

133. Where private consultation has been chosen as a model, ordinarily, there is a strong public interest in the maintenance of the confidentiality in the substantive exchanges that occur, both to match the expectations of those who engaged in the private consultation at the time, and to avoid discouraging openness in like communications in the future.

134. The *second* is to recognise that the public interest claim is strongest in respect of the substantive content of the exchanges in the private consultation, but weakened in respect to disclosures which go no further than to shed light on the nature of the process involved. Disclosures of the latter kind cannot have any significant “chilling effect” and, conversely, significantly aid the public in understanding, and commenting on, the way government is chosen to be done. They are unlikely to undermine to a great extent the administration of justice or impair to a great extent the effective working of the relationship between the Law Officers or other senior lawyers within Government.

135. The *third* is to recognise that, even with private consultation, there can never be more than relative certainty that the confidence in the substantive discussions will be maintained. There are a range of circumstances in which it may be lost: extending from voluntary disclosure to the public, compelled disclosure such as through Parliamentary process or indeed the operation of the FOI Act itself. After all, the FOI Act has given only a conditional immunity to disclosures of the kind in question here. The fact that they must undergo a public interest assessment only underlines that sometimes private deliberative discussions of the type in question are required by law to be made public.

Conclusions regarding Document 1

136. Had the present matter remained fully at the stage of a *private* consultation, the balance would likely have favoured not granting access to the substantive content of exchanges in this document, at least at this time.

137. The above facts demonstrate that events, however, have somewhat moved on from a purely private process of consultation. As noted above at paragraph [113], the Explanatory Statement has informed the Parliament and the public that consultation did occur between the Attorney-General and the Solicitor-General over the Direction. Further, the Attorney-General has twice spoken publicly confirming the existence of the 30 November meeting and provided a description, albeit brief, of what had transpired. Specifically there has been an identification of a particular issue discussed at the 30 November 2015 meeting and that a process of feedback from the Solicitor-General to the Attorney-General had occurred between then and May 2016.

138. These facts speak to a process of private consultation, and certain substantive aspects of it, that have been made public. The reasons they have been made public are not critical. It is the fact of publicity that must be noted. While a Minister is entitled to choose to speak publically to correct the public record, that does not mean the Government can insist, over the purposes of the FOI Act, that documents recording what occurred must remain secret.

139. In the light of these matters, I conclude that the confidence in the 30 November meeting, and the process of feedback to be followed, has been partly eroded by voluntary action of Government. In the same way that legal privilege can be lost if the underlying confidentiality of the communications is given away (see *Mann v Carnell* (1999) 201 CLR 1), so when the Government reports to Parliament, or otherwise speaks publicly, on what are otherwise confidential internal governmental communications, the public interest in maintaining secrecy is much reduced.

140. The ultimate balance I draw, so far as relevant to **Document 1** (and to later documents that I will be considering in this case) can be summarised in three propositions. The propositions are a shorthand for the weighing and balancing

of a range of factors. They should not be divorced from all of my detailed discussion that has gone before.

141. **Proposition 1:** to the extent that documents shed light on the nature of the process of consultation that occurred, the public interest favours their disclosure.

142. **Proposition 2:** to the extent that documents go further than this and disclose the substance of particular communications during the process, the public interest ordinarily favours retention of confidentiality (subject to paragraph [143] below).

143. **Proposition 3:** to the extent that there has been a public statement bearing on the content of the particular communication, however, the balance reverts to disclosure.

144. I find with **Document 1** that Proposition 3 is applicable. To the extent that the document reveals the substantive contents of a private consultation process, there has been a sufficient public disclosure already of its contents to tilt the balance in favour of the public being able to know, understand and comment on what actually transpired at the 30 November meeting. Releasing the document would better inform the public about a matter of importance for our system of representative government and, to a lesser extent, facilitate the effective oversight of public expenditure. Any harm to the public interest in the administration of justice or the workings of the First Law Officer is much diminished by the matter being already placed in the public domain.

145. Accordingly I find that the public interest, on balance, at this time, in all the circumstances, is for disclosure of **Document 1**. The document will be produced subject to the redactions for relevance under s 22 referred to at paragraph [93] above.

<u>Document 2</u>

146. This document is the Solicitor-General's file copy of a communication on 21 March 2016 from AGD (OLSC) to the four persons who attended the 30 November 2016 meeting (plus some others). It contains the then current

Guidance Note 11 plus a proposed revised form of Guidance Note 11 (both in clean and mark-up) for discussion at a future meeting (23 March 2016) of these four officials. The attached agenda indicates that the "lead" for discussion on this item was to be the Solicitor-General.

147. There is material in **Document 2** which records legally privileged communications, and material which is irrelevant to the Request, and this must on any account be redacted under ss 22 and 42.

148. The then current form of Guidance Note 11, which is attached to the email, should be released. It does not contain deliberative matter within s 47C and is otherwise publicly available. I find that the balance of **Document 2** contains deliberative matter within s 47C.

149. As to the public interest balancing test, I find that the attached version of Guidance Note 11 proposing changes to the Note contains the "feedback" from the Solicitor-General to the Attorney-General that the latter said publicly was sought, received and considered (see paragraphs [114]-[116] above).

150. The present position is that the public have been informed of the fact of such feedback, but the Attorney-General and Government have made no public statement as to its content other than to say that it was "received and considered".

151. The public has the pre 4 May 2016 version of Guidance Note 11, and the version as published on 4 May 2016. The Government has not taken any step to lessen confidentiality in the precise changes which the Solicitor-General was proposing to Guidance Note 11 for the Attorney-General's consideration, nor the relationship between those proposed changes and the final form of the documents issued on 4 May 2016.

152. If the version of the Guidance Note proposed by the Solicitor-General on 21 March were released, the public would be better informed as to the competing views on what form the Guidance Note should take and as to the detailed workings of the process of consultation between Solicitor-General and Attorney-General. That might assist in greater scrutiny of the Direction, in

Parliament or otherwise. These factors favour disclosure.

153. However I must take into account the potential harms to the public interest identified at paragraphs [126]-[128] above. Absent any public statement as to the *substantive content* of the feedback, those harms remain of undiluted force. Access would reveal the detail of confidential government workings of high importance, workings which currently remain confidential. I find this outweighs the public interest considerations in favour of disclosure. Proposition 2 is applicable. Thus the attached proposed amended Guidance Note must not be disclosed.

154. The same holds good for the second column of the last summary item on the attached monthly report.

155. However, the covering email of **Document 2**, the attached agenda (save for items 1-3 and 5), and in the attached monthly report the material under the heading "Guidance Note 11 (save for the middle column), would assist the public to learn more about the nature of the process of seeking and obtaining "feedback" without disclosing its confidential workings. Proposition 1 is therefore applicable.

156. In summary what will be produced of **Document 2** is only the covering email of **Document 2**, the attached version of the then current Guidance Note 11, the attached agenda in relevant part, and the item on the attached monthly report in relevant part.

Document 3

157. **Document 3** is the formal communication by the Attorney-General to the Solicitor-General on 4 May 2016 that he had issued the Direction and a revised version of Guidance Note 11. It consists of a covering letter of one page, the Direction, the Explanatory Statement for the Direction and Revised Guidance Note 11.

158. I do not consider that there is any issue in disclosing the Direction, the Explanatory Statement, and the Guidance Note since these documents are

already publicly available. The questions that concern **Document 3** relate to the covering letter.

159. Once the global s 42 submission is put to one side, for reasons stated at paragraphs [79]-[80] above, it is necessary to consider whether disclosure of **Document 3** would disclose deliberative matter, as defined in s 47C(1). I conclude that the first two sentences of the letter in **Document 3** contain deliberative matter.

160. I then turn to the s 11A(5) test. In my view, the same considerations apply in relation to these parts of **Document 3** as apply in relation to the covering email of **Document 2**, the attached agenda (in relevant part), and the last summary item on the attached monthly report (in relevant part). Proposition 1 is applicable. This leads me to conclude that **Document 3** is not an exempt document.

<u>Document 1A</u>

161. Shortly before finalising this statement of reasons and the attached schedule, I received a submission that another document might be within the scope of paragraph 2 of the Request. That document is a letter that I sent to the Attorney-General on 12 November 2015, which was copied to the Secretary of AGD. That letter discusses the process for seeking and acting on the advice of the Solicitor-General in significant matters and refers to Guidance Note 11. It also seeks a meeting with the Attorney-General to discuss the concerns raised in the letter. That meeting was held on 30 November 2015 at which the form and content of Guidance Note 11 were discussed. That meeting is referred to in **Document 1**.

162. On close examination of the terms of paragraph 2 of the Request and **Document 1A**, the Request does not capture **Document 1A** as it is not a communication "*concerning* the form or content" of the Direction or Revised Guidance Note 11. That is because, while **Document 1A** provided an occasion which culminated in the meeting of 30 November 2015, at which the form and content of Guidance Note 11 were discussed, it does not itself concern the form

or content of Guidance Note 11.

163. Further, paragraph 2 of the Request can be contrasted to paragraph 3 of the Request which seeks communications "concerning or *referring* to the appropriate form or content" of the Direction or Guidance Note 11. There is thus a distinction drawn, in paragraphs 2 and 3, between communications *concerning* the form or content of Guidance Note 11, and communications *referring* to the appropriate form and content of Guidance Note 11. In my view, **Document 1A** refers to the contents of Guidance Note 11, but does not, when "concerning" is contrasted with "referring", concern the contents of Guidance Note 11.

164. For completeness, I also note that **Document 1A**, which was copied to the Secretary of AGD, does not come within paragraph 3(a) of the Request. That is because, although **Document 1A** refers to the contents of Guidance Note 11, it summarises those contents but does not itself refer or concern the "*appropriate* form or content" of Guidance Note 11. Paragraph 3, which requests communications "concerning or referring to the appropriate form and content" of Guidance Note 11 and the Direction can be contrasted to paragraph 2 which requests communications "concerning the form or content" of Guidance Note 11 and the Direction. There is thus a distinction drawn, in paragraphs 2 and 3, between communications concerning the form or content of the Direction and Guidance Note 11, and communications concerning or referring to the *appropriate* form and content of Guidance Note 11.

<u>Document 4</u>

165. I provisionally listed **Document 4** in the Schedule on the basis that it might be caught by paragraph 2 of the Request.

166. I have accepted a submission that, on closer examination of the terms of paragraph 2 of the Request, it does not catch **Document 4** as it does not concern the form or content of the Direction or Revised Guidance Note 11.

H. Paragraph 3 of your Request

Documents 1 and 2

167. **Documents 1**, **1A** and **2** have been dealt with above.

Documents 5-22

168. I need to provide a broad description of these documents in order to give my reasons in respect to them, without revealing their contents in a way that would cause this document to be an exempt document (s 26(2)).

169. These documents, viewed broadly, are communications (or records of communications) between 16 November 2015 and 29 April 2016 between the persons listed in paragraph 3 of your Request in which various amendments are suggested to the form or content of Guidance Note 11 as it existed then. They shed light on the nature and process of consultation and communications between the persons about this subject matter and the views expressed by different persons at different points in this process. Some are emails. Some are file notes. None of them went to the Attorney-General. They culminate in **Document 2** which, as discussed above, forwarded the then Guidance Note 11 and a proposed revised Guidance Note 11 (in clean and mark-up) to the Attorney-General and the other persons attending the meeting on 23 March to consider such documents. They also culminate in **Document 21** which records as a matter of fact what occurred between the meeting on 23 March and 29 April in seeking a response from the Attorney-General to the proposed revision to the Guidance Note attached to **Document 2**.

170. **Document 7** includes all the emails in **Document 6** as well as an additional email. As **Document 7** is to be disclosed, **Document 6** is not disclosed. **Document 11** is out of scope as a duplicate and otherwise irrelevant to the Request. **Document 20** is out of scope by reason of identity of the sender. **Document 22** is out of scope as a duplicate. None of these four documents will be produced.

171. As to balance of these documents, I have consulted with AGD and AGS about

these documents and received four pertinent submissions against disclosure.

172. *First*, the documents which are internal file notes (that is, **Documents 9** and **12-13**) fall outside your Request, as a matter of construction.

173. *Secondly*, under s 16 I am bound to, or should as a matter of discretion, transfer all or part of your Request to another agency, namely AGD, with which the Request is more closely connected.

174. *Thirdly*, the documents which contain legally privileged communications (being parts of **Documents 8, 12, 14** and **19**) are exempt under s 42.

175. *Fourthly*, some documents (**Documents 5-10, 12, 14-19** and **21**) are conditionally exempt under s 47C as they contain deliberative material and the public interest is, on balance, against their disclosure.

176. I deal with these submissions in turn, so far as necessary to dispose of the Request.

Are file notes outside your Request?

177. Your Request seeks documents drawing a distinction between "each note for file or other record of…" in paragraph 1, and "any communications between…" or "all communications created…" in paragraphs 2 and 3. I conclude that you do not seek under paragraphs 2 and 3 any document which is an internal file note of my Office recording communications which have passed between the persons referred to in paragraphs 2 or 3 of your Request.

178. Accordingly I do not produce **Documents 9** and **12-13** on the ground that, as internal file notes, they are outside paragraph 3 of your Request. (As these documents are out of scope, I do not offer alternative rulings on access had they been within scope.)

Possible transfer of your Request

179. Next, it has been submitted (by AGS but not AGD) that I give consideration to transferring some part of your Request to another agency, namely AGD, under the discretionary provisions of s 16(1)(b) or the mandatory provisions of

s 16(3). I am satisfied the conditions for such a transfer are not made out. The subject matter of each of the documents is not “more closely connected” with the functions of AGD than those of the Solicitor-General. To the contrary, the documents bear centrally on whether, and if so in what terms, there should be a binding legal direction given to my Office, and whether my Office was consulted about there being a binding legal direction, and the issues the Direction and Guidance Note might pose for my Office. The headings of the Guidance Note (“Briefing the Solicitor-General”) and of the Direction (*Legal Services Amendment (Solicitor-General Opinions) Direction 2016*) prevent me being satisfied that the documents are “more closely connected” with AGD than with my Office.

Documents where there is an objection under s 42 on the ground of legal privilege

180. In respect of a small amount of the material sought, the Commonwealth, through AGD, has asserted before me a claim of legal professional privilege under s 42 of the FOI Act. I have upheld this claim, and found no loss of privilege in respect to a limited amount of the material in **Documents 8, 14** and **19**. To the extent those documents are otherwise to be produced, I have redacted those documents accordingly. My more detailed reasons appear in the Schedule.

Documents said to be conditionally exempt under s 47C

181. AGD has made a claim that every one of **Documents 5-8, 10, 14-19** and **21** contain deliberative matter and is conditionally exempt under s 47C and that in every case the public interest on balance under s 11A(5) is against disclosure.

182. AGS has made the same claim, but only in respect to the limited material in **Document 14** that I have already ruled will not be disclosed under s 42.

183. These documents contain deliberative matter, as they disclose the opinions, advice, or recommendations of a number of persons within government, as part of process of consultation and deliberation whether a non-binding instrument (that is, Guidance Note 11) should be revised and if so in what terms.

Specifically, the documents go beyond a mere factual description of the process being followed within this branch of Government and record *substantive content* of views being exchanged as to how Guidance Note 11 might be revised. I thus find that these documents must then be assessed against the public interest under s 11A(5).

184. Applying the public interest balancing test under s 11A(5), access to these documents would be in the public interest in the sense that the public would learn more about the processes by which the various persons within Government were involved in the settling of a proposed revised Guidance Note for briefing the Solicitor-General for the consideration of the Attorney-General, and the competing views they expressed.

185. Proposition 2 (see paragraph [142] above) is applicable to parts of these documents, and operates to exempt some documents wholly (**Documents 14** and **19**). However, Proposition 1 (see paragraph [141] above) applies to allow the balance of the documents to be disclosed.

186. In the light of this, I am satisfied the public interest on balance would not be harmed by the disclosure of these documents at this time (**Documents 5-8, 10, 15-18** and **21**), subject to appropriate redactions for privilege, relevance and to avoid Proposition 2 applying to such documents. (Although, as noted above at paragraph [170], **Document 6** will not be disclosed as it is a duplicate of **Document 7**.)

<u>Documents 23-32</u>

187. I need to provide a general description of this material so my reasons can be understood, but noting the obligation under s 26(2). This material falls into the following broad categories.

188. **Category 1 material:** In this category are documents created between 9 May 2016 and 22 June 2016 which are either internal, unconfirmed file notes of my Office, or emails, recording a series of communications between the persons identified in the Request. The communications concern how the Direction and/or Revised Guidance Note 11 would be implemented, and/or how they

should be interpreted, and/or what processes had been followed before they came into effect, and/or their form and content, and/or options that may be available in respect to them (**Documents 23-27** and **30**).

189. **Category 2 material:** This category comprises of four documents (**Documents 28, 29, 31** and **32**) created between 24 May 2016 and 23 June 2016. The documents record a series of formal exchanges between the Solicitor-General and the Secretary of AGD as to steps which should or might be taken to resolve issues arising from the Direction and Revised Guidance Note 11 as issued on 4 May 2016.

190. Specifically, I note that **Document 28** has a composite character. The cover letter and paragraphs 27-35 of Attachment A contain the Solicitor-General's formal response to the Secretary to the Direction and Revised Guidance Note as issued. Paragraphs 1-26 of Attachment A are a largely factual record of communications from 30 November 2015 to 19 May 2016. Attachment B is a factual comparison, by mark-up, of the differences between the proposed revised Guidance Note submitted to the Attorney-General ahead of the meeting on 23 March 2016 and the final Revised Guidance Note as issued.

191. I have consulted with AGD and AGS about these documents. For the reasons given at paragraphs [177]-[178] above, I accept that file notes are outside paragraph 3 of the Request. Accordingly, **Documents 23-25** and **30** will not be produced. (Again I will not address other grounds on which access to them might be refused or the submissions I receive from certain individuals in their private capacities about them.)

192. The transfer argument is rejected at paragraph [179] above.

193. That leaves four pertinent submissions to address.

194. *First*, all of these documents, brought into existence after 4 May 2016 are outside your Request as they concern the "appropriateness" of the Direction or Revised Guidance Note in contradistinction to its "appropriate" form or content.

195. *Secondly*, part of **Document 28** contains legally privileged communications and

is exempt under s 42.

196. *Thirdly*, part of **Document 28** is conditionally exempt under s 47F because it contains personal information and the public interest is, on balance, against its disclosure.

197. *Fourthly*, documents which are said by AGD to be conditionally exempt under s 47C as containing deliberative material (being all of **Documents 26-29** and **31-32**) and the public interest is on balance against their disclosure.

198. I deal with these submissions in turn.

"Appropriateness" v "appropriate"

199. An argument advanced (by each of AGS and AGD) is that you have used the word "appropriate" in paragraph 3 of your Request in deliberate contradistinction to the word "appropriateness". It is argued that, as a result, your Request captures only communications prior to 4 May 2016 about the prospective drafting or composition of the Guidance Note or Direction before they came into final form and that any communication after 4 May 2016 is excluded as going only to an after the event assessment of "appropriateness" of the documents as issued.

200. I do not accept this construction of the Request. It is not limited in time to the period ending on 4 May 2016. The full language used "concerning or referring to the appropriate form and content of…" is broad enough, as a matter of ordinary English, to capture communications which refer to the documents as actually issued on 4 May 2016 and which discuss whether their form and content is "appropriate".

201. I consider that if I did not produce **Documents 26-29** and **31-32** on the ground that they post-date 4 May 2016 and therefore are outside paragraph 3 of your Request I would make a legal error.

Legally privileged communications

202. I have upheld this claim, and found no loss of privilege in respect to a limited

amount of the material in attachment to **Document 28**. That material would be redacted in any event. My more detailed reasons appear in the Schedule.

Section 47F

203. AGD has asserted that a part of Attachment A to **Document 28** contains personal information about one senior AGD officer (Ms Petra Gartmann).

204. It was asserted that under s 27A(3) I was bound not to decide to give you access to this material unless the officer was given a reasonable opportunity to make submissions in support of exemption in her personal capacity. It was further asserted that even if I decided to give you access, under s 27A(5) I was not to give you access until the officer could exhaust all appeal rights.

205. On the provisional assumption that the material might be "personal information" I gave the officer the opportunity to put submissions to me in her personal capacity.

206. In the end I have found it unnecessary to base my decision on s 47F. I have independently decided that the material claimed to be personal information is conditionally exempt under another provision, s 47C, and that on balance it should not be disclosed in the public interest. My reasons for this conclusion are found below and in the Schedule.

Section 47C

207. I find that all the documents in categories one and two contain deliberative matter.

208. With the category one documents (that are not file notes) (namely, **Documents 26** and **27**) see paragraph [188] above), I find that the material contains deliberative matter as it discloses an exchange of views, and consultation about how a binding and non-binding instrument issued by Government (the Direction and Revised Guidance Note 11 as issued on 4 May 2016) would be interpreted, implemented and dealt with. I have considered whether any material can be separated out of these documents as purely factual matter under s 47C(2)(b). Ultimately I have accepted AGD's submission that it

is not possible to identify or separate such matter. Accordingly I find **Documents 26** and **27** contain deliberative matter that must then be assessed against the public interest under s 11A(5).

209. With the category two documents (see paragraph [189] above), I found that they record an attempt by the Solicitor-General to initiate a deliberative process over what might be a response to the Direction and Revised Guidance Note (see Guidelines at [6.71]).

210. While **Document 28** contains a chronology with a factual record in it, it is not possible to separate out any factual material from the larger deliberative character of the document.

211. Accordingly I find that s 47C requires me to assess all of the category one and category two documents against the public interest.

212. In each case I find the documents include deliberative matter relating to a private consultation where the deliberative processes are yet to run their course, and in relation to which there has been no public disclosure. Proposition 2 is therefore applicable. That is sufficient to find against disclosure. The material in paragraph 22 in Attachment A of **Document 28** has an additional claim against disclosure as it is a disputed conversation with an AGD officer where harm may flow from release in its current form.

213. Nor do I think that deferring the Request under s 21 is an appropriate response. I cannot identify whether, or when, circumstances might relevantly change to require revisiting this request.

214. For this reason, I find I am bound not to disclose any of **Documents 26-29** and **31-32**.

I. Overall conclusions

215. The result of my overall findings may be summarised as follows. I am obliged by law to release the following documents, and only the following documents.

216. *Release in full*: **Document 3**.

217. *Release in full* (excluding the names and details of junior officers): **Document 7**.

218. *Release in part*, subject to redactions for one or more of (1) relevance, (2) s 42 or (3) s 47C (and excluding the names and details of junior officers): **Documents 1-2, 5, 8, 10, 15-18** and **21**.

219. *No release*: all other documents.

J. Your review rights

220. If you are dissatisfied with my decision, you may apply for the Information Commissioner's review of the decision. Internal review is not available as the decision was made by me as the principal officer of the agency within s 54(1).

221. Under s 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online:	https://forms.business.gov.au/aba/oaic/foi-review-/
email:	enquiries@oaic.gov.au
post:	GPO Box 5218, SYDNEY NSW 2001
in person:	Level 3, 175 Pitt Street, SYDNEY NSW 2000

Yours faithfully

Justin Gleeson

Justin Gleeson SC
Solicitor-General of the
Commonwealth of Australia

28 August 2016

FOI DOCUMENTS

CATEGORY 1 (consultation between the Attorney-General and Solicitor-General concerning the form or content of the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016*)

There are no documents in this category. However, I note the following, for completeness.

Doc	Date	Description	Decision on Access	Decision on Exemptions
1B	30 November 2015	File notes prepared by Joshua Faulks, Deputy Chief of Staff to the Attorney-General, from the meeting with the Attorney-General, the Solicitor-General, Chris Moraitis (the Secretary of the Attorney-General's Department (**AGD**)) and Ian Govey of the Australian Government Solicitor (**AGS**) on 30 November 2015.	No release.	The notes are outside the scope of the Request as they were not in my possession as at 28 June 2016.
1C	30 November 2015	File notes prepared by James Lambie, Senior Advisor to the Attorney-General, from the meeting with the Attorney-General, the Solicitor-General, the Secretary of AGD and Ian Govey of AGS on 30 November 2015.	No release.	**Findings and Ruling:** Same as **Document 1B**.

CATEGORY 2 (communications between the Solicitor-General and the Attorney-General or any member of the Attorney-General's personal staff that occurred at any time on or after 1 November 2015 and concerning the form or content of the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* or of *Guidance Note 11 – Briefing the Solicitor-General*)

Doc	**Date**	**Description**	**Decision on Access**	**Decision on Exemptions**
1A	12 November 2015	Letter from the Solicitor-General to the Attorney-General (and copied to the Secretary of AGD) concerning the process for seeking and acting on Solicitor-General advice in significant matters.	No release.	**Findings and Ruling:** **(1)** The letter is outside the scope of paragraph 2 of the Request as it does not concern the form or content of the Direction or the Guidance Note. **(2)** The letter is also outside the scope of paragraph 3 of the Request as it does not concern or refer to the appropriate form and content of the Direction or the Guidance Note.
1	8 December 2015	Email from the Solicitor-General's Chambers to Joshua Faulks, the Executive Advisor to the Secretary of AGD and Ian Govey of AGS attaching the Solicitor-General's meeting notes from the meeting with the Attorney-General, the Solicitor-General, the Secretary of AGD and Ian Govey of AGS on 30 November 2015.	Release in part subject to s 22 redactions (and excluding the names and details of junior officers).	**Findings and Ruling:** Exemption for s 22 relevance redactions. AGS exemption does not apply. **Note on Ruling:** I have considered whether the balance of **Document 1**, which falls within the Request, is conditionally exempt. I find, for the reasons set out in my letter: **(1)** The document contains deliberative matter, and thus is conditionally exempt under s 47C. **(2)** Under s 11A(5), access on balance would not be contrary to the public interest. **(3)** Accordingly, all of **Document 1**, save for the material redacted for relevance (and the names and details of junior officers), must be produced. The document is not an exempt document by virtue of legal privilege under s 42.

<table>
<tr>
<td>2</td>
<td>21 March 2016</td>
<td>Email from the Office of Legal Services Co-ordination (OLSC) to the Attorney-General, officers within the Attorney-General’s Office, the Solicitor-General, the Solicitor-General’s Chambers, the Secretary of AGD, officers within AGD and officers in AGS attaching the agenda for the Legal Issues Meeting on 23 March, the monthly report for discussion, current Guidance Note 11 and revised Guidance Note 11 (a clean copy and a marked up copy).</td>
<td>Release in part subject to ss 22, 42 and 47C redactions (and excluding the names and details of junior officers).</td>
<td>Findings and Ruling: Exemption for s 22 relevance, s 42 legal professional privilege (in part) and s 47C redactions. AGS exemption does not apply.

Note on Ruling:

(1) Some of the material (which is redacted) on page 2 is irrelevant to the request.
(2) The material redacted on pages 21-29 is both irrelevant to the request and includes communications on legally privileged matters between the Attorney-General, the Solicitor-General, Secretary of AGD and Ian Govey of AGS.
(3) The then current form of Guidance Note 11, which is attached to the email, should be released. It does not contain deliberative matter within s 47C and is otherwise publicly available.
(4) I have considered whether the balance of Document 2, which falls within the Request, is conditionally exempt and, if so, how the public interest test under s 11A(5) might apply. As to this, my findings are that the attached proposed revised Guidance Note 11 should not be released as it reveals the substantive content of deliberative disclosures that currently remain confidential (Proposition 2). The balance of the document (specifically, the covering email, the agenda (save for items 1-3 and 5) and the last item (save for the middle column) (page 29) on the attached monthly report) must be released as the public interest favours disclosure (Proposition 1).</td>
</tr>
</table>

3	4 May 2016	Letter from the Attorney-General to the Solicitor-General attaching the Direction and Guidance Note 11.	Release in full.	**Note on Ruling:** **(1)** AGS exemption does not apply. **(2)** Document is conditionally exempt under s 47C. **(3)** However, disclosure of document would not, on balance, be contrary to public interest (Proposition 1). The document is not an exempt document by virtue of legal privilege under s 42.
4	11 May 2016	Letter from the Solicitor-General to the Attorney-General.	No release.	The document is out of scope as it does not concern the form or content of the Direction or Guidance Note 11.

CATEGORY 3: (communications created on or after 1 November 2015 and concerning or referring to the appropriate form and content of *Guidance Note 11 – Briefing the Solicitor-General* or *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* between: (a) the Solicitor-General or his office on the one hand and the Secretary or any Deputy Secretary of the Attorney-General's Department on the other (b) the Solicitor-General or his office on the one hand and the Office of Legal Services Coordination on the other; or (c) the Solicitor-General or his office on the one hand and the Australian Government Solicitor or her officers on the other)

NOTE: DOCUMENTS 1 AND 2 ABOVE ALSO ANSWER CATEGORY 3

Doc	**Date**	**Description**	**Decision on Access**	**Decision on Exemptions**
5	8 December 2015 to 16 December 2015	Emails between the Solicitor-General's Chambers, Ian Govey of AGS and the Executive Advisor to the Secretary regarding the Solicitor-General's proposed changes to Guidance Note 11.	Release in part subject to redactions for ss 22 and 47C (and excluding the names and details of junior officers).	**Note on Ruling:** **(1)** Some of the material in the email on page 1 is irrelevant to the request and redacted. **(2)** I have considered whether the balance of **Document 5**, which falls within the Request, is conditionally exempt and, if so, how the public interest test under s 11A(5) applies. As to this, my finding is that the public interest favours disclosure for the reasons given in Proposition 1, subject to redaction of part of words in the email of Ian Govey at 4.35 pm on 16 December 2015 beginning at "It would be fair to say that..." until "administration costs" as this falls within Proposition 2. **(3)** The email sent on 8 December 2015 at 4:27pm included an attachment, in which I suggested amendments to Guidance Note 11. I have considered whether the document is conditionally exempt under s 47C and, if so, how the public interest test under s 11A(5) applies. As to this, my findings are that the public interest is against disclosure essentially in light of Proposition 2.
6	8 December 2015 to 18 December 2015	Emails between the Solicitor-General's Chambers, officers	No release.	**Note on ruling:**

		within the OLSC and the Executive Advisor to the Secretary regarding the Solicitor-General's proposed changes to Guidance Note 11.		**(1)** I have considered whether the document is conditionally exempt and, if so, how the public interest test under s 11A(5) applies. As to this, my findings are that the public interest is in favour of disclosure essentially in light of Proposition 1. **(2)** The document is a duplicate of **Document 7** (although **Document 7** includes an additional email so I have decided to release **Document 7** and not **Document 6**).
7	8 December 2015 to 18 December 2015	Emails between the Solicitor-General's Chambers, officers within OLSC and officers in the Office of Constitutional Law (**OCL**) regarding the Solicitor-General's proposed changes to Guidance Note 11 (including all the emails in **Document 6**).	Release in full (save for excluding the names and details of junior officers).	**Note on Ruling:** **(1)** Same as **Document 6** (except that the document should be released). **(2)** The attachment to the email sent on 8 December 2015 at 4:27pm is not included as it is provided as part of **Document 5**.
8	18 December 2015	Emails between the Solicitor-General's Chambers, officers within OLSC and officers in OCL regarding the Solicitor-General's proposed changes to Guidance Note 11.	Release in part subject to redactions for ss 42 and 47C (and excluding the names and details of junior officers).	**Note on Ruling:** **(1)** Part of the document, which I have concluded must be redacted in any event, contains communications from OCL to OLSC that were shared in confidence with the Solicitor-General's Chambers. **(2)** AGD asserts, and I accept, that OCL provides advice to AGD and the Commonwealth on constitutional issues that have general implications for the Commonwealth and federal arrangements and advice to AGD and the government on matters of constitutional policy development and litigation. **(3)** AGD asserts, and I accept, that OCL has the necessary degree of independence to qualify for a lawyer-client relationship giving rise to privilege. **(4)** AGD asserts, and I accept, that the material redacted provides legal advice within the lawyer

				client relationship between OCL and OLSC on behalf of the Commonwealth on possible construction arguments in relation to a draft instrument. The dominant purpose test for determining whether a document attracts legal professional privilege is therefore satisfied. **(5)** AGD asserts, and I accept, that the advice was further communicated to the Solicitor-General as a limited audience with a mutual interest not inconsistent with the continued maintenance of legal professional privilege. **(6)** For the balance of the document, I have considered whether the document is conditionally exempt because of s 47C and, if so, how the public interest test under s 11A(5) applies. As to this, my findings and reasons are that the public interest favours disclosure essentially because of Proposition 1 (save for the attached document in which OLSC suggest amendments to the Guidance Note where Proposition 2 applies).
9	23 December 2015	Notes of meeting between Ian Govey of AGS and the Solicitor-General's Chambers regarding the Solicitor-General's proposed changes to Guidance Note 11.	No release.	The document is out of scope as it is a file note recording communications between persons, which is not caught by paragraph 2 or 3 of the Request.
10	8 December 2015 to 5 January 2016	Emails between the Solicitor-General's Chambers, Ian Govey of AGS, officers within AGS and the Executive Advisor to the Secretary regarding the Solicitor-General's proposed changes to Guidance Note 11.	Release in part subject to redactions for ss 22 and 47C (and excluding the names and details of junior officers).	**Note on Ruling:** **(1)** The material redacted on page 1 is either irrelevant to the Request or redacted under ss 47C and 11A(5) as the public interest is against disclosure, essentially because of Proposition 2. **(2)** The attached email of 16 December 2015 (and the attachment) is not produced as it is a duplicate of **Document 5** (which is dealt with above). **(3)** For the balance of the document the public interest

				test under s 11A(5) favours disclosure essentially because of Proposition 1.
11	8 December 2015 to 7 January 2016	Various emails duplicating **Documents 5-7** and **10**.	No release.	The document is out of scope as it is a duplicate and is otherwise irrelevant to the Request.
12	11 January 2016 (typed on 29 June 2016)	Notes of meeting between the Solicitor-General's Chambers and Ian Govey, Louise Vardanega and Tom Howe QC of AGS.	No release.	The document is out of scope for the same reason given in relation to **Document 9**.
13	18 January 2016 (typed on 29 June 2016)	Notes of meeting between the Solicitor-General's Chambers and Tom Howe QC of AGS regarding Guidance Note 11.	No release.	The document is out of scope for the same reason given in relation to **Document 9**. (Note: the substance of **Document 13** is repeated in **Document 14**.)
14	18 January 2016 to 20 January 2016	Emails between the Solicitor-General's Chambers and Tom Howe QC of AGS regarding the Solicitor-General's proposed changes to Guidance Note 11.	No release.	**Note on ruling** **(1)** The material in the first bullet point after the words "national security matters" and in the second sentence of the second bullet point is exempt under s 42(1). I accept the statement of AGS that this material attracts legal professional privilege as it records matters disclosed to AGS by agencies in the course of legally privileged communications. **(2)** The whole of the document is also conditionally exempt under s 47C, and the public interest is against disclosure, essentially because Proposition 2 applies. **(3)** It is unnecessary to reach AGS's alternative submission regarding the application of s 47E(d).
15	4 March 2016	Email from the Solicitor-General's Chambers attaching the most recent version of the Solicitor-General's proposed changes to Guidance Note 11 (in	Release in part subject to redactions for s 47C (and excluding the	**Note on Ruling:** **(1)** I have considered whether the document is conditionally exempt under s 47C and, and if so, how the public interest test under s 11A(5) applies. **(2)** As to this I find that the proposed amended

		clean copy and in mark-up) (taking into account the suggestions AGD and AGS made on the draft the Solicitor-General's Chambers circulated in December 2015).	names and details of junior officers).	Guidance Note (in clean copy and in mark-up) is subject to Proposition 2 and the public interest is against disclosure. **(3)** As to the balance of the documents, essentially Proposition 1 applies and the public interest is in favour of disclosure.
16	11 March 2016 to 14 March 2016	Email from OLSC to the Solicitor-General's Chambers in response to the revised draft of Guidance Note 11 the Solicitor-General's Chambers circulated on 4 March 2016. (The email attaches some further proposed changes to Guidance Note 11 in mark-up).	Release in part subject to redactions for s 47C (and excluding the names and details of junior officers).	**Note on Ruling:** **(1)** Same as **Document 15**.
17	4 March 2016 to 18 March 2016	Email from Tom Howe QC to the Secretary of AGD, officers in OLSC, officers in OCL, officers in AGS and Solicitor-General's Chambers in response to the revised draft of Guidance Note 11 the Solicitor-General's Chambers circulated on 4 March 2016.	Release in part subject to redactions for s 47C (and excluding the names and details of junior officers).	**Note on Ruling:** **(1)** Same as **Document 15**.
18	18 March 2016	Email from OLSC to the Solicitor-General's Chambers incorporating all of the suggested changes by OLSC and AGS in response to the revised draft of Guidance Note 11 the Solicitor-General's Chambers circulated on 4 March 2016.	Release in part subject to redactions for s 47C (and excluding the names and details of junior officers).	**Note on Ruling:** **(1)** Same as **Document 15**.
19	4 March 2016 to 21 March 2016	Emails between the Solicitor-General's Chambers, officers of	No release.	**Note on Ruling:**

		OCL and officers of OLSC in which OCL provided suggestions on the revised draft of Guidance Note 11 the Solicitor-General's Chambers circulated on 4 March 2016.		**(1)** For the same reasons set out in relation to **Document 8**, part of the document contains legally privileged communications and would have been redacted in the event of any production. **(2)** Parts are mere duplicates which are redacted. **(3)** As to the balance, the document is conditionally exempt under s 47C and the public interest is against disclosure as Proposition 2 applies.
20	21 March 2016	Email from Jim Faulkner SC, General Counsel (Constitutional) of AGD, to the Solicitor-General's Chambers.	No release.	The document is out of scope of paragraphs 2 and 3 of the Request given the identity of the sender.
21	21 March 2016 to 29 April 2016	Email from Petra Gartmann of OLSC to the Attorney-General, officers within the Attorney-General's Office, the Solicitor-General, the Solicitor-General's Chambers, the Secretary of AGD, officers within AGD and officers in AGS confirming the action items of the meeting. Email from Solicitor-General's Chambers to OLSC querying when it will hear from the Attorney-General regarding Guidance Note 11 and emails in response from Petra Gartmann of OLSC. Email that is a duplicate of **Document 2**.	Release in part subject to s 22 redactions (and excluding the names and details of junior officers).	**Note on Ruling:** **(1)** The material redacted on pages 1 and 2 are irrelevant to the request. **(2)** The balance of the document is conditionally exempt under s 47C. The public interest favours disclosure essentially because of Proposition 1. **(3)** Otherwise, duplicate of **Document 2**.

22	21 March 2016 to 29 April 2016	Various emails duplicating **Document 21**.	No release.	Duplicate of **Document 21**.
23	9 May 2016	Meeting notes of the meeting between the Solicitor-General's Chambers and Petra Gartmann of OLSC about Guidance Note 11 and the Direction (as issued on 4 May 2016).	No release.	**Note on Ruling:** **(1)** Same as for **Document 9**.
24	9 May 2016 (typed on 30 June 2016)	File note by Counsel Assisting transcribing hand written notes from meeting with the Solicitor-General's Chambers and Petra Gartmann of OLSC about Guidance Note 11 and the Direction (as issued on 4 May 2016).	No release.	**Note on Ruling:** **(1)** Same as **Document 23**.
25	9 May 2016	Meeting notes of the meeting between Counsel Assisting the Solicitor-General and Matt Blunn and Leo Hardiman of AGS about Guidance Note 11 and the Direction (as issued on 4 May 2016).	No release.	**Note on ruling:** **(1)** Same as **Document 23**.
26	19 May 2016	Emails between the Solicitor-General's Chambers, officers in OLSC and Petra Gartmann of OLSC regarding the operation of paragraph [26] of Guidance Note 11.	No release.	**Note on Ruling:** **(1)** Contains deliberative matter under s 47C. **(2)** Public interest is against disclosure under Proposition 2. That is because it is a private consultation affecting deliberative processes that are yet to run their course and in relation to which there has been no public disclosure.

27	19 May 2016 to 24 May 2016	Further emails between the Solicitor-General's Chambers, officers in OLSC, Petra Gartmann of OLSC and Greg Manning of AGD regarding the operation of paragraph [26] of Guidance Note 11.	No release.	**Note on Ruling:** **(1)** Same as **Document 26**.
28	24 May 2016	Letter from the Solicitor-General to the Secretary of AGD that includes two attachments. Attachment A is a chronology of the consultations which did and did not occur in relation to the Direction and Guidance Note 11. Attachment B is a document comparing the proposed Guidance Note circulated on 21 March 2016 ahead of the meeting on 23 March 2016 and the Guidance Note as issued on 4 May 2016.	No release.	**Note on Ruling:** **Letter:** **(1)** The letter contains deliberative matter as described in my letter and thus must be assessed against the public interest test. **(2)** My assessment is that disclosure would be contrary to the public interest as the process of deliberation sought to be initiated by the letter has not concluded and remains confidential. **Attachment A** **(3)** The material in the third sentence of paragraph 22 and the material in paragraph 24 records communications from the Office of Parliamentary Counsel (**OPC**) to OLSC at the time of the drafting of the Direction about the form it should take. **(4)** AGD asserts, and I accept, that advice from OPC to a Commonwealth Department about the form of proposed legislation qualifies for legal privilege (see *State of NSW v Betfair Pty Ltd* (2009) 180 FCR 543). **(5)** That privileged communication was further shared with the Solicitor General as a limited audience with a mutual interest in it in a manner not inconsistent with the maintenance of the privilege. **(6)** Thus, on any view, this material is exempt.

				(7) The balance of the attachment, while in part factual, cannot be conveniently separated from the larger deliberative purpose of the letter and thus must not be disclosed. **Attachment B** **(8)** This attachment is deliberative material in the same category as the attachment to **Document 2**. Its disclosure would reveal the substantive content of the changes to Guidance Note 11 that the Solicitor-General was proposing as at 21 March 2016, and how those changes differed from the document issued on 4 May. Confidence in that substantive content has not been lost. The public interest at this time is against disclosure.
29	27 May 2016	Letter from Secretary of AGD to the Solicitor-General acknowledging receipt of the Solicitor-General's letter of 24 May 2016.	No release.	**Note on Ruling:** **(1)** Same as **Document 28 (Letter)**.
30	22 June 2016	Meeting notes of the meeting between the Secretary of AGD, Iain Anderson (a Deputy Secretary of AGD), the Solicitor-General and Counsel Assisting.	No release.	**Note on Ruling:** **(1)** Same as **Document 23**.
31	22 June 2016	Letter from the Secretary of AGD to the Solicitor-General noting that further consideration of the arrangements under the Legal Services Directions would be a matter for an incoming government.	No release.	**Note on Ruling:** **(1)** Same as **Document 28 (Letter)**.

32	23 June 2016	Letter from the Solicitor-General to the Secretary of AGD responding to letter of 22 June and confirming what was discussed at the meeting on 22 June 2016.	No release.	**Note on Ruling:** **(1)** Same as **Document 28 (Letter)**.