FEDERAL COURT OF AUSTRALIA

Attorney-General (Cth) v Patrick [2024] FCAFC 126

Appeal from:	Patrick v Attorney-General (Cth) [2024] FCA 268
File number:	SAD 52 of 2024
Judgment of:	**RANGIAH, MOSHINSKY AND ABRAHAM JJ**
Date of judgment:	25 September 2024
Catchwords:	**FREEDOM OF INFORMATION** – request for access to an official document of a Minister (the Attorney-General) – where one document (the Document) was within the scope of the request but the request was refused on the basis of two exemptions – where a new person was appointed as Attorney-General – where the new Attorney-General did not have possession of the Document – where the Information Commissioner decided that the Document was not an "official document of a Minister" because it was not in the possession of the Minister at the time of the Information Commissioner's decision – where the primary judge held that the Information Commissioner erred in her construction of the Act – where the primary judge held that the time for determining whether a document is an "official document of a Minister" is the time the request for access is made (and only that time) – whether primary judge's construction was correct – held: appeal dismissed
Legislation:	*The Constitution*, ss 64, 65 *Acts Interpretation Act 1901* (Cth), ss 19, 19A, 19B, 19D-19E, 20 *Archives Act 1983* (Cth), ss 2A, 3, 3C, 24 *Freedom of Information Act 1982* (Cth), ss 3, 4, 11, 11A, 15, 15A, 15AB, 15AC, 16, 21, 24, 24A, 24AA, 24AB, 26A, 27, 27A, 34, 42, 54L, 54S, 55R, 55U, 56, 67 *Judiciary Act 1903* (Cth), s 78B
Cases cited:	*Beesley v Australian Federal Police* [2001] FCA 836; 111 FCR 1 *Commissioner of Stamp Duties (NSW) v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 *Dallikavak v Minister for Immigration and Ethnic Affairs* (1985) 9 FCR 98 *EMJ18 v Secretary, Department of Home Affairs* [2024] FCAFC 87

	Graham v Minister for Immigration and Border Protection [2018] FCA 1012; 265 FCR 634 *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19; 271 CLR 1 *Maritime Union of Australia v Fair Work Commission* [2015] FCAFC 56; 230 FCR 15 *Maroondah City Council v Fletcher* [2009] VSCA 250; 29 VR 160 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* [2021] HCA 19; 273 CLR 21 *Minogue v Victoria* [2018] HCA 27; 264 CLR 252 *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 36 *Taylor v The Owners – Strata Plan No 11564* [2014] HCA 9; 253 CLR 531
Division:	General Division
Registry:	South Australia
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	99
Date of hearing:	16 August 2024
Counsel for the Appellant:	Mr G Hill SC with Mr N Swan
Solicitor for the Appellant:	Australian Government Solicitor
Counsel for the Respondent:	Mr BK Lim with Ms A Sapienza
Solicitor for the Respondent:	Maurice Blackburn Lawyers

ORDERS

SAD 52 of 2024

BETWEEN:	**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA** Appellant
AND:	**REX LYALL PATRICK** Respondent

ORDER MADE BY:	**RANGIAH, MOSHINSKY AND ABRAHAM JJ**
DATE OF ORDER:	**25 SEPTEMBER 2024**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal, as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 The principal issue raised by this appeal may be stated as follows: where a person requests access to an official document of a Minister under the *Freedom of Information Act 1982* (Cth) (the **FOI Act**), at what point (or points) in time is it to be determined whether the document is an "official document of a Minister"? The primary judge concluded that the answer is: at the time that the request for access is made (and only at that time): *Patrick v Attorney-General (Cth)* [2024] FCA 268 (the **Reasons**). The appellant, the Attorney-General of the Commonwealth of Australia (the **Attorney-General**), contends that the primary judge erred, and that the answer is: *both* at the time the request for access is made *and* at the time that a decision is made whether to grant access to the document. The consequence of the answer given by the Attorney-General would be that, if a document was an "official document of a Minister" at the time the request was made, but ceased to be so when the request was decided, there would be no entitlement to access the document under the FOI Act. For the reasons that follow, we consider that the primary judge was correct to conclude that the answer is at the time the request for access is made (and only at that time). It follows that the appeal is to be dismissed.

Background facts

2 The following statement of the background facts is based on the Reasons and the chronologies prepared by the parties (and the documents referred to in the chronologies).

3 The respondent, Mr Rex Patrick, is a former Senator. On 3 February 2020, Mr Patrick made a freedom of information (**FOI**) request to the Attorney-General's Department (**AGD**) for access to a document under the FOI Act. A revised request was lodged by Mr Patrick on 11 March 2020.

4 On 3 April 2020, AGD transferred part of Mr Patrick's request to the Attorney-General's Office (**AGO**) for processing. At this time, the Attorney-General of the Commonwealth was the Hon Christian Porter MP.

5 As revised and transferred, Mr Patrick's FOI request sought access to documents described as follows:

> Any correspondence, briefing materials and advice sent by the Attorney-General's Department to the Department of Prime Minister and Cabinet that contain advice in relation to the administration of the Community Sport Infrastructure Grant Program by the Former Minister for Sport the Hon Bridget McKenzie.

6 On 14 April 2020, a decision was made by the AGO to refuse Mr Patrick's FOI request. The AGO stated that there was one document within the scope of the request (the **Document**), but it was exempt pursuant to s 34 (cabinet documents) and s 42 (documents subject to legal professional privilege) of the FOI Act.

7 On 4 June 2020, Mr Patrick applied to the Office of the Australian Information Commissioner (**Information Commissioner**) pursuant to s 54L of the FOI Act for review of the AGO's decision.

8 Between 12 August 2020 and 19 March 2021, the Information Commissioner corresponded with the AGO and Mr Patrick and they made submissions (both open and confidential) in relation to the review.

9 On 30 March 2021, Senator the Hon Michaelia Cash was appointed as the Attorney-General.

10 Between 18 August 2021 and 24 December 2021, the Information Commissioner made enquiries as to whether Attorney-General Cash, the AGD or the National Archives of Australia (**NAA**) were in possession of the Document. Each advised that they were not in possession of the Document.

11 On 13 December 2021, the Department of Prime Minister and Cabinet refused a request made by Mr Patrick for the Document on the basis that the Document could not be found or did not exist.

12 On 21 May 2022, a federal election took place. This resulted in a change of government.

13 On 1 June 2022, the Hon Mark Dreyfus KC MP was appointed as the Attorney-General.

14 On 20 July 2022, the Information Commissioner made enquiries with the AGD to check whether Attorney-General Dreyfus had access to, or possession of, the Document and/or whether the document had been transferred to the AGD or the NAA.

15 On 3 August 2022, the AGD responded on behalf of the current Attorney-General to the Information Commissioner's enquiries, stating that:

(a) an officer from the AGO had advised that he asked staff in the AGO to conduct all reasonable searches to locate any relevant documents and no relevant document had been identified; and

(b) the AGD had not located any record of receiving a transfer of documents from the office of former Attorney-General Cash following the May 2022 election, nor any record that documents from the former Attorney-General's office were transferred to the NAA.

16 On 28 February 2023, the Information Commissioner made a decision on the application for review: *Rex Patrick and Attorney-General (Freedom of information)* [2023] AICmr 9. The Information Commissioner decided to vary the decision under review, by finding that the Document was not an "official document of the Minister" to which the mandatory access rule in s 11A(3) of the FOI Act (set out below) applied. The essential basis of the Information Commissioner's decision was set out in [2] of her reasons for decision:

> Following changes to the person occupying the role of 'Attorney-General' I am satisfied that the current Attorney-General does not have possession of any document at issue. **This means that, for the purposes of the Information Commissioner (IC) review, any relevant document is no longer an 'official document of the Minister'** to which the mandatory access rule in s 11A(3) of the FOI Act applies.
>
> (Emphasis added.)

The definition of "official document of the Minister" is set out later in these reasons.

17 The Information Commissioner stated at [24] of her reasons that she was satisfied that the Document was not in the possession of the current Attorney-General, nor was it transferred to the AGD or the NAA. The Information Commissioner stated at [25]:

> As the current Attorney-General does not have possession of the document at issue and cannot give access to the requested documents under s 11A(3) of the FOI Act, **the document for the purposes of this IC review is no longer an official document of a Minister**.
>
> (Emphasis added.)

The key relevant provisions

18 Before providing an outline of the primary judge's decision, we set out the key relevant provisions of the FOI Act (noting that the Attorney-General also referred in his submissions to the *Archives Act 1983* (Cth)). The version of the FOI Act included in the parties' amended joint bundle of authorities is compilation No 107, compiled on 1 October 2022, this being the

version of the legislation in place on 23 February 2023, the date of the Information Commissioner's decision. The provisions reproduced below are from that version of the legislation.

19 Section 4(1) of the FOI Act includes the following definitions:

> ***agency*** means a Department, a prescribed authority or a Norfolk Island authority.
>
> ***applicant*** means a person who has made a request.
>
> ...
>
> ***document of an agency***: a document is ***a document of an agency*** if:
>
> (a) the document is in the possession of the agency, whether created in the agency or received in the agency; or
>
> (b) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document.
>
> …
>
> ***official document of a Minister*** or ***official document of the Minister*** means a document that is in the possession of a Minister, or that is in the possession of the Minister concerned, as the case requires, in his or her capacity as a Minister, being a document that relates to the affairs of an agency or of a Department of State and, for the purposes of this definition, a Minister shall be deemed to be in possession of a document that has passed from his or her possession if he or she is entitled to access to the document and the document is not a document of an agency.
>
> …
>
> ***request*** means an application made under subsection 15(1).

20 Part III of the FOI Act is entitled "Access to documents" and comprises ss 11 to 31. Sections 11 and 11A are important for present purposes. They provide:

> **11 Right of access**
>
> (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
>
> (a) a document of an agency, other than an exempt document; or
>
> (b) **an official document of a Minister**, other than an exempt document.
>
> (2) Subject to this Act, a person's right of access is not affected by:
>
> (a) any reasons the person gives for seeking access; or
>
> (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

11A Access to documents on request

Scope

(1) This section applies if:

(a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:

(i) a document of the agency; or

(ii) **an official document of the Minister**; and

(b) any charge that, under the regulations, is required to be paid before access is given has been paid.

(2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

(a) section 12 (documents otherwise available);

(b) section 13 (documents in national institutions);

(c) section 15A (personnel records);

(d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

(3) **The agency or Minister must give the person access to the document in accordance with this Act, subject to this section**.

Exemptions and conditional exemptions

(4) The agency or Minister is not required by this Act to give the person access to the document **at a particular time** if, **at that time**, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

(5) The agency or Minister must give the person access to the document if it is conditionally exempt **at a particular time** unless (in the circumstances) access to the document **at that time** would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

(6) Despite subsection (5), the agency or Minister is not required to give access to the document **at a particular time** if, **at that time**, the document is both:

(a) a conditionally exempt document; and

(b) an exempt document:

(i) under Division 2 of Part IV (exemptions); or

(ii) within the meaning of paragraph (b) or (c) of the definition of ***exempt document*** in subsection 4(1).

(Bold emphasis added.)

21 Section 15 of the FOI Act provides in part:

15 Requests for access

Persons may request access

(1) Subject to section 15A, **a person who wishes to obtain access to** a document of an agency or **an official document of a Minister** may request access to the document.

Requirements for request

(2) The request must:

(a) be in writing; and

(aa) state that the request is an application for the purposes of this Act; and

(b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and

(c) give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication).

(2A) The request must be sent to the agency or Minister. …

(Bold emphasis added.)

22 Section 24A provides in part:

24A Requests may be refused if documents cannot be found, do not exist or have not been received

Document lost or non-existent

(1) An agency or Minister may refuse a request for access to a document if:

(a) all reasonable steps have been taken to find the document; and

(b) the agency or Minister is satisfied that the document:

(i) is in the agency's or Minister's possession but cannot be found; or

(ii) does not exist.

The proceeding at first instance

23 Pursuant to s 56(1) of the FOI Act, Mr Patrick appealed to the Federal Court of Australia, on a question of law, from the decision of the Information Commissioner made on 28 February 2023.

24 By ground 1(a) of his amended notice of appeal, Mr Patrick contended that the relevant date for determining whether a document is an "official document of the Minister" is the date of the FOI request (or, in the alternative, some other date earlier than the date of the Information Commissioner's decision on the review) and not the date of the Information Commissioner's decision on the review, and that at the relevant time the Document was in the possession of then-Attorney-General Porter. The corresponding question of law set out in the amended notice of appeal was:

> 1. On the proper construction of the FOI Act, what is the relevant date by reference to which the question of whether a document is "an official document of a Minister" is to be assessed and, in the event of an Information Commissioner review ("**IC Review**"), is the assessment to be undertaken again by reference to a different date?

25 By ground 1(b) of his amended notice of appeal, Mr Patrick contended (in summary) that, further and in any event, the Document is an "official document of the Minister" on the basis that it was a document that had passed from the custody of the Minister and to which the current Minister is "entitled to access", because:

(a) the former Minister, Mr Porter, was subject to an implied obligation, arising from the FOI Act, to take such steps as were necessary to retain custody of the Document for the purpose of the Information Commissioner's review and not to deal with the Document in such a way as to frustrate provision of access to the Document; and

(b) the current Minister, Mr Dreyfus, is entitled to have the Document produced to him by the former Minister, Mr Porter, in accordance with the general law or in any event upon request.

26 Questions of law 2, 5 and 6 in the amended notice of appeal were said to relate to this ground. It is sufficient to set out questions of law 2 and 5:

> 2. Does the FOI Act impose an implied obligation upon a Minister (including an outgoing Minister) in relation to a document that the Minister has identified as an official document of the Minister:
>
> a. which falls within the terms of a request made under s 11 of the FOI Act that has not been finally determined; and/or

b. which is the subject of an IC Review under Part VII of the FOI Act,

to:

c. take such steps as are necessary to retain in the custody of the Minister (from time to time) for the purpose of the IC Review; and/or

d. not deal with the document in such a way as to frustrate provision of access to the document in accordance with the FOI Act or to frustrate the appeal?

…

5. Is the current Minister "entitled to access to" a document that has been transferred out of the custody of the Commonwealth by a former Minister in breach of any of the duties or obligations described in questions 2, 3 and 4 above?

27 Ground 2 in the amended notice of appeal was, in summary, that the Information Commissioner failed to exercise the powers under s 55R (and/or s 55U) of the FOI Act on the basis of a misunderstanding of the relevant law. This ground referred back to grounds 1(a) and (b). It also contained an additional aspect, but it is not necessary to refer to this for present purposes.

28 In the course of the proceeding at first instance, an affidavit of Justin Hyland, a lawyer employed by the Australian Government Solicitor (**AGS**), dated 19 May 2023, was filed. The affidavit stated that a copy of the Document was held by AGS and explained the circumstances in which AGS came to hold a copy of the Document. It seems that this fact was not appreciated by the parties at the time of the Information Commissioner's decision and was not appreciated by the Information Commissioner at the time of her decision. Because the Information Commissioner was not informed that a copy of the Document was held by AGS, the Information Commissioner did not consider whether the current Attorney-General has possession (actual or deemed) of the Document by virtue of AGS holding a copy of the Document. Further, this was not raised as an issue by Mr Patrick in the proceeding before the primary judge.

The reasons of the primary judge

29 On 21 March 2024, the primary judge published the Reasons. The primary judge held, in summary, that on the true construction of the FOI Act, the time at which one determines whether a document is an "official document of a Minister" is the time of the request for access (and only that time): Reasons, [96], [99], [168]. There could be no question that the Document met the description of an "official document of a Minister" at that time: Reasons, [168]. Accordingly, the primary judge concluded that the Information Commissioner had proceeded

on an erroneous construction of the FOI Act: Reasons, [9]. The primary judge set aside the decision of the Information Commissioner and remitted Mr Patrick's application for review to the Information Commissioner for determination according to law.

30 The primary judge considered question of law 1 (set out above) at [60]-[101] of the Reasons. The primary judge's reasoning included:

> 96 As to temporal considerations, consistent with the reasoning and outcome in *Lobo* [*v Department of Immigration and Citizenship* (2010) 116 ALD 639] (which I consider to be correct) the FOI Act would be unworkable if there existed an ongoing obligation to consider the application of its provisions to all documents continually coming into the possession of an agency or Minister for the first time after an FOI request is made. **The more sensible construction is that the population of documents falling within the scope of the request is to be determined by reference to facts and circumstances existing at the time that the request is made such that the cohort of documents subject to that assessment is to remain static.** To my mind it would be a strange construction if the cohort of documents to be considered against the provisions of the FOI Act could be temporally static in the sense that it could not later expand, but fluid in the sense that it could later shrink. …
>
> (Emphasis added.)

31 The primary judge concluded her reasoning in relation to question 1 in the following passage:

> 98 The Attorney-General submitted that the FOI Act must be construed in the context of a broader legislative regime concerning the handling, care and access to public documents including the Archives Act which operates both to prohibit the destruction of public records other than in accordance with its terms and require the transfer of certain records to the National Archives where a different public access regime applies. There is no evidence in this case that the Document was transferred by Mr Porter or any other person to the National Archives, nor is there evidence that the Document has been destroyed in accordance with or contrary to the Archives Act or any other law. But it is necessary to consider the provisions of the Archives Act because of submissions concerning its interaction with the regime established under the FOI Act and the nature of the mischief said by Mr Patrick to arise if his submissions are rejected. That will be done in the context of answering the remaining questions of law.
>
> 99 Ultimately, I have concluded that the question of whether a document referred to in an FOI request meets the description of an "official document of a Minister" (if it arises in the particular case) **is a question that must be resolved by reference to facts and circumstances existing at the time that a request under s 15(2) is received in respect of it. The status of the document under the definition is not to be revisited and revised by reference to changed facts and circumstances following the date that the request is received.** However, as I have said, access to a document to which an FOI request relates may nonetheless be refused in the circumstances described in s 24A of the FOI Act, applied by reference to facts and circumstances arising after a request is received. It is in that context that loss or destruction of a document captured by the request falls to be considered. As explained earlier, access to a document that may be captured by a request may also be refused on

bases that do not depend on any finding about whether it is so captured, or whether or not it has been lost or destroyed.

100 I am urged by the Attorney-General to avoid that construction because it may create a situation in which Ministers may have legal obligations under s 11A(3) to provide access to documents that are no longer in their physical control or possession at the time of their own decisions or decisions on external review. In other words, it may result in there being an obligation that cannot be fulfilled for reasons that are not the fault of the Minister concerned. That argument can be rejected for reasons given in the course of answering the remaining questions of law. In short, there may be an answer in s 24A of the FOI Act to the conundrum in the case of accidental loss or destruction of a document falling within a request, depending on the facts. The asserted conundrum does not otherwise tell against the imposition of the duties referred to below. Rather, compliance with those duties will avoid the conundrum arising at all. Deliberate non-compliance may constitute a refusal to comply with a legal obligation or an interference with the rights of the requesting party. That is not a "conundrum" in a constructional sense. Rather, it is a factual conundrum arising because of a breach of duties owed under the statute, properly construed.

(Emphasis added.)

32 The primary judge considered questions of law 2 and 5 in the next section of the Reasons, at [102]-[128]. In the course of her reasoning on these questions, the primary judge stated:

108 The right to have a request determined in accordance with the FOI Act gives rise to concomitant obligations on the receiving agency and Minister by necessary intendment. At the very least, there is an obligation not to do any act that would interfere with the right to have the request determined according to law, including any act that would frustrate the exercise of a right of review or appeal by rendering its exercise ultimately futile (even if successful).

…

115 In a case where there is no change in the person holding the office of Minister, I conclude that on the proper construction of the FOI Act there is an obligation owed by the recipient of a request not to deal with a document described in the request in such a way as to frustrate the right of the requesting party to have the request finally determined including on review or appeal. That includes an obligation not to deal with the document in way that would make it impossible to grant access to the document in accordance with the FOI Act should it ultimately be found that the obligation under s 11A(3) exists. It follows that there exists an obligation not to deal with the document in a way that would render the exercise of review or appeal rights inutile. In my view, it must also follow that the Minister or agency responsible for dealing with the request and in whose possession (including deemed or constructive possession) it is in at the time of the request, must maintain that possession until the request is finally determined upon the exercise of review and appeal rights or the expiration of time limits relating to them. For those reasons, I would answer the question in [2(d)] "yes". In the case of a Minister the relevant person is the person holding the office of Minister from time to time.

116 The practical content of that duty must depend on the facts and circumstances of the particular case. To be clear, I do not accept that it is necessary for the

> document to be kept in the physical custody of the person in every case and so would answer the more specific question raised in [2(c)] "no". There will be cases in which the rights of the requesting party may be sufficiently protected if the document is kept within the Minister or agency's physical control (but not custody), or by the maintenance of an entitlement to access to the document from another (such as a former Minister) with a view to exercising that entitlement for all purposes necessary for the final resolution of the request, should they arise.
>
> 117 The duties I have identified may be understood as ordinary incidents of the function of the relevant Minister or agency to perform functions under the FOI Act, including the function under s 55DA to use best endeavours to assist with a Commissioner's review. They arise as a natural and logical consequence of the requesting party's procedural rights to have the request determined.

33 In the same section of the Reasons, the primary judge also stated:

> 123 In a case where there is a change in the person holding office of Minister after a request but before the Minister makes an initial decision on the request, the duty to determine the request is one owed by the new occupier of the office. The function of determining the request is to be carried out in the context of the rights and obligations identified above. The new occupant of the office of Minister has the same obligations as the former occupant, and may demand from the former occupant the transfer of the custody of the document to the extent necessary to fulfil those obligations. The machinery of that in the context of Cabinet documents is discussed separately below.
>
> …
>
> 128 Question 5 should therefore be answered "yes", although with one qualification. It will not always be the case that a former Minister having an official document in his or her custody will be in breach of a duty arising under the FOI Act. It is enough to observe that the former Minister has an obligation to deliver up the document into the possession of a person entitled to demand it. That includes the new incumbent in the office in connection with a document subject to an unresolved request for access under the FOI Act. If the document contains information that is said to be confidential *as against the new holder of the office*, then delivery up of the thing containing the information can occur subject to conditions maintaining that confidentiality. Cabinet documents may fall within that description, but in my view documents claimed to be subject to legal professional privilege are less likely to be so. That is because the privilege subsisting in documents held by a person in their official capacity as a Minister of the Commonwealth is not theirs to claim in any personal capacity. Rather, it may be claimed by the person holding the office from time to time.

34 The primary judge considered the Attorney-General's submissions in relation to the *Archives Act* at [129]-[146] of the Reasons. Those submissions referred to and relied on *General Records Authority No. 38 – Ministers of State* (**GRA38**), published by the NAA pursuant to ss 3C and 24(2)(b) of the *Archives Act*. In summary, the primary judge held that the Attorney-General's submissions about the operation of the *Archives Act* did not support any different conclusion on the proper construction of the FOI Act: Reasons, [129].

35 At [147]-[166], the primary judge considered submissions made by the Attorney-General about the policies and procedures applicable to Cabinet documents, in particular those set out in the *Cabinet Handbook*, 15th edition, 2022 (the **Cabinet Handbook**), published by the Department of Prime Minister and Cabinet. In summary, the primary judge held that the Attorney-General's submissions about Cabinet documents did not support any different conclusion on the proper construction of the FOI Act: Reasons, [165]-[166].

36 At [167]-[178] of the Reasons, the primary judge applied the earlier reasoning to the grounds of appeal. In summary, the primary judge held that ground 1(a) was made out; that it was not necessary to decide ground 1(b); and that ground 2 was made out (as a consequence of the reasoning in relation to ground 1(a)).

The appeal

37 The Attorney-General appeals from the judgment of the primary judge. The Attorney-General's amended notice of appeal contains three grounds:

> 1. The primary Judge erred in finding that the time for determining whether a document is an "official document of a Minister" is only at the time that a request for that document is received, pursuant to s 15(2) of the *Freedom of Information Act 1982* (Cth) (**FOI Act**), and by reference to the facts and circumstances existing at that time (J [99]).
>
> **Particulars**
>
> a. Contrary to her Honour's conclusion, it is also necessary to determine whether a document is an "official document of a Minister" at the time of the decision on the FOI request, including a decision on review, and on the basis of the state of affairs existing at that time, because the FOI Act does not intend or require a Minister, such as the Appellant, to provide access to documents that are not in his or her possession at that time (cf J [100]).
>
> b. Contrary to her Honour's approach, the FOI Act operates in the context of a broader legislative regime concerning the manner in which documents of former Ministers are to be dealt with and handled, including the *Archives Act 1983* (Cth) (**Archives Act**), and the FOI Act must be construed in that context (cf J [98]).
>
> c. Contrary to her Honour's conclusion, no temporal limitation arises by implication from ss 11, 11A(3) and 15(1) of the FOI Act, either individually or together (cf J [84]), and no implication arises from s 24A(1)(b)(ii) of the FOI Act, which has a different field of operation (cf. J [90]; J [176]).
>
> d. In the alternative, a document "does not exist" within s 24A(1)(b)(ii) of the FOI Act if it is not in the possession of the relevant Minister or agency, taking account of any change of circumstances between the time of the FOI request up to the time of the decision on the FOI

request.

2. The primary Judge erred in finding that there existed implied duties under the FOI Act upon Ministers, including former Ministers, to preserve the subject matter of an FOI request (cf J [115]-[117]).

Particulars

a. There is no basis in the text or context of the FOI Act to imply the numerous duties of uncertain content found by Her Honour to be imposed on current and former Ministers in relation to preserving the subject matter of an FOI request (cf J [108], [115], [116], [123], [128]). Contrary to the approach of Her Honour, these duties are not reasonably necessary to give effect to the scheme of the FOI Act.

b. Instead, the FOI Act is part of a broader legislative regime, including the Archives Act, concerning the manner in which documents of Ministers and former Ministers are to be dealt with and handled, and the content of the right of access to documents provided by the FOI Act should be interpreted in light of, and together with, that other legislation and the conventions of responsible government. Her Honour's findings as to the operation of the Archives Act (J [129]-[146]) and the Cabinet Handbook (J [147]-[166]) were therefore in error.

c. Nothing in the Appellant's arguments would permit the wilful destruction of documents in response to an FOI request, which is prohibited by other legislation (cf J [114]). That is not to render the FOI Act "subservient" to other legislation (cf J [132]), but rather to read the FOI Act in its context.

d. Her Honour erroneously construed an office of a Minister as a perpetual, ongoing entity occupied by different individuals over time (J [121], [123]-[124], [128]). To the contrary, the office of a Minister is connected to the specific person appointed as a Minister (pursuant to s 64 of the *Constitution*) and ends upon the cessation of his or her appointment as a Minister. The FOI Act does not contemplate or make provision for the continuation of an FOI request directed to a particular Minister after that Minister ceases to hold office, unlike the legislative mechanism in place to continue an FOI request where an agency is abolished: s 4(6)-(7) of the FOI Act.

3. The primary Judge erred in finding that the Australian Information Commissioner (**AIC**) erred in the exercise of her discretionary power pursuant to s 55R of the FOI Act, and thereby erred in upholding Ground 2 (cf J [173]).

Particulars

a. The primary Judge held that the AIC's exercise of power under s 55R of the FOI Act was affected by the AIC's erroneous view that the document was not an "official document of a Minister" (J [173]).

b. The Appellant repeats the particulars to Ground One, above, in respect of the primary Judge's errors in her construction of the term "official document of a Minister".

38 Ground 2(d) of the amended notice of appeal raises a constitutional issue. The Attorney-General served notices under s 78B of the *Judiciary Act 1903* (Cth). No State or Territory Attorney-General sought to intervene in the appeal. As discussed below, we do not consider it necessary to resolve the constitutional issue.

39 In Mr Patrick's outline of submissions, he contended that the Attorney-General needed to succeed on *both* grounds 1 and 2 in order to succeed on ground 3. At the hearing of the appeal, senior counsel for the Attorney-General said that "in practice, unless I can persuade your Honours on both grounds 1 and 2, then ground 3 will not be successful" (T43).

Consideration

Ground 1

40 Although the Attorney-General's oral and written submissions addressed ground 2 before ground 1, we consider it preferable to address the grounds in the order in which they appear in the amended notice of appeal.

41 Ground 1 raises the issue of statutory construction outlined in [1] of these reasons, namely: where a person requests access to an official document of a Minister under the FOI Act, at what point (or points) in time is it to be determined whether the document is an "official document of a Minister"?

42 There is no issue as to the applicable principles of statutory construction. In *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362, Kiefel CJ, Nettle and Gordon JJ stated at [14]:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
>
> (Footnotes omitted.)

43 The above passage was cited with approval by Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* [2021] HCA 19; 273 CLR 21 at [15].

44 The Attorney-General contends that the time for assessing whether a document is an "official document of a Minister" (to which access must be provided) is not just the time of the FOI request, but also the time of the decision on the FOI request (including a decision on review). In other words, the Attorney-General contends that the question whether a document is an "official document of a Minister" is to be determined *both* at the time the request for access is made *and* at the time that a decision is made whether to grant access to the document. The Attorney-General submits that, as a practical matter, access can only be granted to documents actually in the possession of the Minister at the time of the decision. Further, he submits that successive Ministers hold different offices, meaning there is no expectation that a document that was in the possession of a former Minister will be in the possession of a subsequent Minister (especially a Minister of a different government).

45 The Attorney-General submits that: a document is only an "official document of a Minister" if (relevantly) it is in the "possession" of that Minister; "possession" is essentially a practical concept – a person can only produce what they actually have possession of; thus, constructive possession requires that a person have an immediate right of access to the document (citing *Beesley v Australian Federal Police* [2001] FCA 836; 111 FCR 1 at [72], [75] per Beaumont J); this point illustrates the need to determine whether the Minister has possession at the time of the decision on the FOI request (not just at the time of the request), because the effect of an FOI decision is to require a person to actually produce and hand over documents; there would be little point in making a decision to grant access to a document, on the basis that it was in a former Minister's possession at the time of the FOI request, without assessing whether the new Minister still has possession of the document at the time of the decision and is actually able to produce it.

46 The Attorney-General submits that the primary judge sought to solve this "conundrum" by implying duties on former Ministers to preserve the subject-matter of an FOI request (Reasons, [100]). However, the Attorney-General submits that there is no proper basis for those implications (referring to his submissions in relation to ground 2).

47 The Attorney-General submits that his approach to the temporal question is consistent with the following provisions in the FOI Act, which recognise that access to a document can and is affected by circumstances occurring between the FOI request and the decision on access (including a decision on merits review). The Attorney-General makes the following submissions:

(a) Exemptions are determined by reference to the circumstances at the time of decision (including a decision on merits review): each of s 11A(4)-(6) provides that access is not required to be given if the document is exempt or conditionally exempt "at that time". This recognises that the factual basis for several exemptions is capable of changing over time.

(b) Section 24(1) provides a basis for refusing access if the work involved would substantially and unreasonably interfere with the performance of the Minister's functions (s 24AA(1)(a)(ii)). That is determined at the time of the decision, not the time of request.

(c) Section 24A(1) permits access to be refused if reasonable steps have been taken to find a document, and the agency or Minister is satisfied that the document is in the agency's or Minister's possession but cannot be found, or the document does not exist. These questions are determined at the time of the decision. It would be absurd if a document otherwise coming within the scope of a request was only found after an initial decision to refuse access but before a decision on review, yet access had to be refused.

(d) Section 24A(2) deals with refusing access where an agency has not received documents under contractual measures, despite taking all reasonable steps. This also would be determined at the time of decision. If a document was received after an initial refusal decision but before a decision on merits review, it would be absurd to deny access because the document had not been received under the circumstances existing at the time of request.

48 In our view, the correct construction of the relevant provisions is that the time for assessing whether a document is an "official document of a Minister" is the time the request for access is made (and only that time). We consider that construction to be supported by the text of the relevant provisions, considered in the context of the Act as a whole, and its purpose.

49 Section 11 of the FOI Act (see [20] above) deals with the right of access to documents. Section 11(1) provides that, subject to the Act, every person has a legally enforceable right to obtain access in accordance with the Act to (relevantly) an official document of a Minister, other than an exempt document.

50 Section 11A of the FOI Act (see [20] above) is significant for present purposes. The section is headed "Access to documents on request". Section 11A(1) relevantly provides that the section applies if a request is made in accordance with s 15(2) to a Minister for access to an "official

document of the Minister". Section 11A(2) provides that the section applies subject to the Act. Section 11A(3) relevantly provides that the "Minister must give the person access to the document in accordance with this Act, subject to this section".

51 The text of these sub-sections indicates that the question whether a document is an "official document of the Minister" is to be determined as at the time of the request for access. The requirement in s 11A(3) to give access to a document is enlivened when the conditions in s 11A(1) are fulfilled, i.e. an applicant has made a request in accordance with s 15(2) for (relevantly) "an official document of the Minister", and paid any applicable charge. That is clear from the terms of s 11A(1), which provides that s 11A (including sub-section (3)) "applies" when those conditions are met. There is no doubt that "the document" to which access must be given pursuant to s 11A(3) is the "official document of the Minister" for which a request has been made. Section 11A(1)(a) refers to a request for access to *an official document of the Minister* rather than, for example, a request for access to *a document*. This suggests that the question whether a document is an official document of the Minister, and therefore whether s 11A(3) applies to the document, is capable of determination – and is to be determined – at the point in time when the request is made.

52 The definition of "official document of the Minister" is consistent with this construction. The definition refers to a document that is, relevantly, "in the possession of the Minister concerned". For the purposes of s 11A(1), the "Minister concerned" must be the Minister to whom the request has been made in accordance with s 15(2), namely, in this case, Attorney-General Porter.

53 It is notable that in the scheme of the FOI Act, s 11A(3) is the only express source of a requirement to grant access to a document following a request for access. The requirement to grant access is not enlivened by a decision of the agency or Minister, but by the operation of s 11A(3) (which comes into operation immediately when the conditions in s 11A(1) are fulfilled, not at some later time when a decision is made on the request). Section 11A(3) applies "subject to this Act" (s 11A(2)), so access to a document need not be granted if, for example, an exemption applies; but if no exemption applies and the agency or Minister does not otherwise have the power to refuse access, s 11A(3) remains the source of the requirement to grant access.

54 These points are reinforced by a comparison with the text of sub-sections (4), (5) and (6) of s 1 1A, which refer to particular points in time. Sub-section (4) relevantly provides that the Minister is not required to give the person access to the document *at a particular time* if, *at that*

time, the document is an exempt document. Thus, the question whether the document is an exempt document is to be determined at a later point in time (after the request for access). Sub-sections (5) and (6) include similar references to a document meeting a certain description "at a particular time". These sub-sections presuppose that a request for access to an official document of a Minister has been made (s 11A(1)) and they presuppose that an official document of a Minister has been identified so that the Minister can decide whether *that document* is exempt or conditionally exempt. Further, sub-sections (4) to (6) show that the drafter was conscious of issues of timing; when a fact or matter is to be determined at a later point in time (after the request for access), this is made clear. There is no indication in the balance of s 11A that the question whether a document is an official document of a Minister is to be revisited at a later point in time (after the request for access). There is therefore no textual or contextual basis on which an official document of a Minister to which s 11A(3) applies (at the time of the request) could cease to be such a document at a later point in time.

55 Section 15(1) provides that, subject to s 15A, a person who wishes to obtain access to (relevantly) an "official document of a Minister" may request access to the document. This links the making of a request with the document being an official document of a Minister and is consistent with the analysis set out above in relation to s 11A(1) to (3).

56 The scheme of these provisions appears to be that the question whether a document is an "official document of a Minister" is to be determined as at the time when the request for access is made, and then certain other matters (such as whether an exemption applies) are to be determined as at a later point in time. Those other matters include: whether a "practical refusal reason" exists in relation to the request (ss 24, 24AA); and whether the request for access should be refused because all reasonable steps have been taken to find the document and the document cannot be found or does not exist (s 24A).

57 The Attorney-General accepts that the time when the request for access is made is *one relevant point in time* for the purposes of determining whether a document is an "official document of a Minister". His contention is that the determination of this question should be carried out *both* at the time when the request for access is made *and* at the time when a decision is made on the request. The main reason he puts forward for so construing the provisions is practical: the Minister cannot provide access to a document that is not in his or her possession. However, as noted above, there is nothing in the text of s 11, 11A or 15 or other provisions to suggest that the question whether a document is an official document of a Minister is to be revisited. The

scheme appears to have been drafted on the assumption that a document that is in the Minister's possession at the time of the request for access will remain in his or her possession (actual or constructive) at the time of a decision on the request. The possibility that a document might be in the Minister's possession at the time of the request for access but cease to be in the Minister's (actual or constructive) possession at the time of decision should not drive the construction of the provisions, in circumstances where their meaning is reasonably clear. One would expect that, in most cases, the Minister would at least have constructive possession of the document at the time of the decision on the request.

58 To the extent that the Attorney-General relies on other provisions of the FOI Act to support his construction, we do not consider that those provisions help his argument; if anything, they support the construction that we prefer. The Attorney-General relies on sub-sections (4) to (6) of s 11A and submits that these sub-sections recognise that the factual basis on which a decision on access is to be made is capable of changing over time. However, for the reasons set out above, we consider these sub-sections to support the construction we prefer. In summary, when a fact or matter is to be determined at a later point in time (after the request for access), this is made clear; there is no similar treatment in respect of the question whether a document is an "official document of a Minister". The Attorney-General relies on s 24(1) (which provides a basis for refusing access if the work involved would substantially and unreasonably interfere with the performance of the Minister's functions – s 24AA(1)(a)(ii)) and submits that this is determined at the time of the decision, not at the time of the request. This may be accepted, but it does not assist the Attorney-General's argument. The text of s 24(1), which refers to "when dealing with a request for a document", makes clear that it relates to a later point in time; there is no equivalent textual indicator in relation to the question whether a document is an "official document of a Minister".

59 The Attorney-General relies on s 24A(1) (see [22] above), which permits access to be refused if reasonable steps have been taken to find a document, and the Minister is satisfied that the document is in the Minister's possession but cannot be found, or the document does not exist. The Attorney-General submits that these questions are to be determined at the time of decision. That may be accepted. However, again, we do not consider this to support the Attorney-General's construction. It is clear from the text and substance of s 24A(1) that it relates to a later period of time (after the request for access was made) because it contemplates that a search has occurred in response to a request for access. There is no equivalent indication in relation to the question whether a document is an "official document of a Minister".

60 To the extent that the Attorney-General submits (as an alternative argument) that the words "does not exist" in s 24A(1)(b)(ii) are capable of covering a situation where a document is no longer in the possession of the Minister, we consider this to be a strained construction of those words. The ordinary meaning of the words, read in context, is that the document *does not exist at all*. There is no reason to depart from this ordinary meaning.

61 The Attorney-General relies on s 24A(2), which deals with refusing access where an agency has not received documents under contractual measures, despite taking all reasonable steps. The Attorney-General submits that this also would be determined at the time of decision. For the same reasons as for s 24A(1), we do not consider this provision to help the Attorney-General's contention.

62 One of the difficulties with the Attorney-General's construction is that the character of a document (as an "official document of a Minister") can change in one direction but not the other; that is, the pool of documents can reduce but not expand. In the course of oral submissions, senior counsel for the Attorney-General submitted that the Attorney-General's construction "actually works both ways" (T41). However, the example he gave was where a document that is within the scope of the request is *found* between the time of the request and the time of the decision. This example appears to contemplate that the document was in the possession of the Minister at the time of the request for access but not located in an initial search; it is then found during a subsequent search. The example does not cover a case where a document comes into the possession of the Minister after the request for access was made. Accordingly, we consider that it is the case that, on the Attorney-General's construction, the pool of documents can reduce but not expand. While not determinative, we agree with the primary judge that this would be a strange result.

63 If and to the extent that the Attorney-General relies on the broader legislative context (namely, the *Archives Act*) in support of his construction, we do not consider this to assist in resolving the constructional issue raised by ground 1. It is difficult to see how any provisions of the *Archives Act* could have a bearing on the constructional issue. If and to the extent that the Attorney-General relies on GRA38 and the Cabinet Handbook in relation to ground 1, we do not consider these to assist. The Attorney-General's submissions based on these documents were mainly, if not entirely, directed to ground 2.

64 In our view, it is not necessary to decide the issues raised by ground 2 (whether the primary judge erred in implying certain duties) in order to resolve the issue of construction raised by

ground 1. In our view, whether or not the primary judge was correct to imply those duties (a matter that we deal with below), the construction we prefer is the correct construction, for the reasons set out above.

65 For these reasons, in our view, the correct construction of the relevant provisions is that the time for assessing whether a document is an "official document of a Minister" is the time the request for access is made (and only that time). The primary judge was correct to construe the provisions in this way. It follows that ground 1 is not made out.

Ground 2

66 By this ground, the Attorney-General contends that the primary judge erred in finding that there exist implied duties in the FOI Act upon Ministers, including former Ministers, to preserve the subject matter of an FOI request, and in finding that the FOI Act confers an implied right on an incoming Minister to obtain such documents from former Ministers.

67 It is important to understand the way in which the Attorney-General relies on ground 2 in the context of the appeal as a whole. The Attorney-General started his written and oral submissions with ground 2 rather than ground 1. The reason he did so, as explained in oral submissions, is that the findings about implied duties formed part of the primary judge's reasoning in support of her construction of the FOI Act (in relation to the time at which one determines whether a document is an "official document of a Minister") (see the Reasons at [100]); if the Attorney-General were able to persuade the Court that the primary judge erred in relation to the implied duties, this would be a "powerful reason" for agreeing with the Attorney-General's submissions on ground 1 (T4).

68 It appears to us that the dispositive issue in the appeal is the construction issue that is the subject of ground 1. The issues raised by ground 2 only go to aspects of the primary judge's *reasoning* in relation to the construction issue. It follows that, even if the primary judge erred as contended by ground 2, given our conclusion in relation to ground 1, the appeal must be dismissed. It is nevertheless appropriate in the circumstances to consider ground 2.

69 Ground 2 focuses on the following implied duties, which the Attorney-General contends were found by the primary judge:

(a) that the Minister responsible for dealing with an FOI request, and in whose possession the document is at the time of the request, "must maintain that possession until the request is finally determined" (by keeping physical custody, physical control, or

maintaining an entitlement to access the document from another) (Reasons, [115]-[116]);

(b) that if, after an FOI request is made, there is a change in Minister, the new Minister "may demand from the former occupant the transfer of the custody of the document" (Reasons, [123]); and

(c) that the former Minister has an obligation to deliver up the documents, including to the "new incumbent in the office in connection with a document subject to an unresolved request for access under the FOI Act" (Reasons, [128]).

70 The Attorney-General submits that: there was no proper basis for the primary judge to imply those duties, which are of uncertain content; those duties have no textual foothold in the FOI Act and are not supported by the broader legislative context; they are not reasonably necessary to give effect to the scheme of the FOI Act.

71 The Attorney-General submits that the courts do not imply words into a statute, unless it is strictly necessary to do so: see, eg, *Minogue v Victoria* [2018] HCA 27; 264 CLR 252 at [43]; *Dallikavak v Minister for Immigration and Ethnic Affairs* (1985) 9 FCR 98 at 103; *Maritime Union of Australia v Fair Work Commission* [2015] FCAFC 56; 230 FCR 15 at [24]. It is submitted that it is not the Court's function to fill gaps in legislation or engage in statutory repair, nor is it appropriate to construe statutes in a way that makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature": *Taylor v The Owners – Strata Plan No 11564* [2014] HCA 9; 253 CLR 531 (***Taylor***) at [38], [65]; *EMJ18 v Secretary, Department of Home Affairs* [2024] FCAFC 87 (***EMJ18***) at [56], [136]. Accordingly, the Attorney-General submits, the reading of duties and obligations into legislation is not lightly to be undertaken: the court will ask whether the absence of the contended for obligation would render the regime "inoperative or unworkable", such that the principle of necessity can be invoked: *Graham v Minister for Immigration and Border Protection* [2018] FCA 1012; 265 FCR 634 at [93]; *EMJ18* at [61].

72 The Attorney-General submits that: the duties created by her Honour have no textual foundation in the FOI Act; reference to generally expressed provisions, such as ss 11A(3) and 15, do not assist, because the FOI Act only confers a right of access as defined by that Act; the statements at [108] and [117] of the Reasons as to necessity are no more than assertion; the implications drawn by the primary judge therefore go far beyond what was accepted in *Taylor*

as permissible, by creating substantial duties that fill what her Honour perceived as gaps in the express terms of the FOI Act.

73 The Attorney-General submits that: the primary judge appears to have treated a Minister's "office" as a perpetual, continual thing that is inhabited by different appointees over time (see the Reasons at [121], [123], [124], [128]), but that is not so; a person is appointed a Minister of State under s 64 of the *Constitution* (read with s 65), to administer such Departments of State as the Governor-General determines; the appointment is particular to a person and a portfolio; the number of Ministers and Departments may vary between (or even within) governments; the responsibilities of a Department, and the legislation administered by a Minister administering the Department, are set out in Administrative Arrangements Orders, which are made by the Governor-General and varied from time to time, sometimes within a single government. The Attorney-General submits that: s 11A confers a right to access documents of "the" Minister (i.e., the particular Minister to whom the FOI request was made); by convention, the names of some Ministries will be the same in successive governments (such as "Attorney-General"), but a "new" Attorney-General, appointed after the retirement of the prior Attorney-General, is not filling the one perpetual "office"; there is nothing unusual in the possibility that documents of a former Minister are not "official documents of" the new Minister.

74 The Attorney-General submits that: the position of Ministers can be contrasted with the express provision made in s 4(6)-(7) of the FOI Act for what is to occur when an *agency* is abolished; there is no similar regime for when a Minister leaves office; that reflects Parliament's choice that, if a Minister is no longer in office, the FOI Act does *not* continue to provide access to the official documents of *that* Minister. The Attorney-General submits that, in practice, an FOI request to a former Minister may be treated as a request to the new Minister; but, in law, there is no continuation in the Ministerial office; that is why provisions such as ss 19, 19B, 19D-19E, 20 of the *Acts Interpretation Act 1901* (Cth) are necessary; s 4(6)-(7) of the FOI Act (relating to agencies) is in addition to the provisions of the *Acts Interpretation Act* dealing with changes in Departments (such as s 19A and following).

75 It is convenient at this point to set out s 20 of the *Acts Interpretation Act*:

> **20 References to holders of appointments, offices and positions in Acts and Commonwealth agreements**
>
> In a provision of an Act, or of an agreement entered into by or on behalf of the Commonwealth, a reference **in general terms** to the holder or occupier of an office, appointment or position includes all persons who for the time being:

(a) hold or occupy the office, appointment or position; or

(b) perform the duties of the office, appointment or position.

(Emphasis added.)

76 In oral submissions, senior counsel for the Attorney-General clarified that the Attorney-General accepts that s 20 operates in the present situation, but said that s 20 "only goes so far" (T28). He accepted that it had the effect that Attorney-General Dreyfus was the party to the review before the Information Commissioner, even though a different Attorney-General (holding a different office) made the decision to refuse access.

77 The Attorney-General submits that: the FOI Act is not a self-contained scheme for accessing, storing and retaining government records; it operates within the setting of other Acts, and longstanding conventions of responsible and Cabinet government (such as the confidentiality of Cabinet documents of a previous government); the FOI Act and the *Archives Act* together provide a scheme for access to Commonwealth records, while the *Archives Act* has an additional focus on storing and retaining Commonwealth records (see s 2A); where two (or more) enactments deal with overlapping subject-matter, or comprise an overlapping legislative scheme, they should be construed in light of each other, and in a way that gives them a harmonious operation: see, eg, *Commissioner of Stamp Duties (NSW) v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 at 724; *Maroondah City Council v Fletcher* [2009] VSCA 250; 29 VR 160 at [85].

78 In oral submissions, senior counsel for the Attorney-General referred to provisions of the *Archives Act*, in particular ss 3(1), 3(2), 3C and 24. Section 3(1) relevantly defines a "Commonwealth record" as meaning (among other things) "a record that is the property of the Commonwealth or of a Commonwealth institution" but does not include a record that is exempt material. There appears to be a difference between the parties as to whether an official document of a Minister (within the meaning of the FOI Act) will be a "Commonwealth record" as so defined. The Attorney-General submitted that an official document of a Minister (within the meaning of the FOI Act) is the property of the Commonwealth and therefore will be within the definition of a "Commonwealth record" for the purposes of the *Archives Act* (T17). Mr Patrick submitted in his written submissions that an official document of a Minister will not necessarily be a "Commonwealth record", referring to *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19; 271 CLR 1 at [82]-[83].

79 Section 24(1) of the *Archives Act* provides, in part, that, subject to the Act, a person must not engage in conduct that results in the destruction or other disposal of a Commonwealth record. Section 24(2) of the *Archives Act* provides in part that sub-section (1) does not apply to anything done: with the permission of the Archives or in accordance with a practice or procedure approved by the Archives (s 24(2)(b)); or in accordance with a normal administrative practice, other than a practice of a Department or authority of the Commonwealth of which the Archives has notified the Department or authority that it disapproves (s 24(2)(c)).

80 Senior counsel for the Attorney-General took the Court to several parts of GRA38, which (as noted above) was made pursuant to ss 3C and 24(2)(b) of the *Archives Act*. GRA38 relates to Ministerial documents. As stated in the Introduction to GRA38, it "sets out those records that are part of the archival resources of the Commonwealth and need to be retained permanently as national archives". In paragraph 3 of GRA38, it is stated that GRA38 does not apply to Cabinet documents, which are dealt with in the Cabinet Handbook. Paragraph 12 of GRA38 states in part:

> Records of 'Retain as National Archives' (RNA) status in this records authority have been determined to be part of the archival resources of the Commonwealth under section 3C of the *Archives Act 1983* and **should be transferred to the National Archives by arrangement when they cease to be required for business purposes or when the Minister leaves office**.
>
> (Emphasis added.)

81 We note that, in the present case, as set out above, enquiries were made as to whether the NAA is in possession of the Document; the response was that it is not in the possession of the NAA.

82 The Attorney-General submitted that s 24(2) of the *Archives Act*, along with paragraph 12 of GRA38, impose an obligation on an outgoing Minister to transfer Commonwealth records to the NAA upon leaving office. In response, Mr Patrick submitted that paragraph 12 of GRA38 permits the retention of documents where they are required for "business purposes", and this includes dealing with an extant FOI request.

83 Senior counsel for the Attorney-General also took the Court to the Cabinet Handbook. That document includes the following statements in relation to the protection of Cabinet documents:

> 105. Cabinet documents are considered to be the property of the Government of the day. They are not departmental records. As such they must be held separately from other working documents of government administration.
>
> …
>
> 110. **Cabinet records (files) are held on behalf of the Government in the care**

> **and control of the Secretary of the Department of the Prime Minister and Cabinet (PM&C)** and are issued to ministers and departments on a need-to-know basis. Once a minister or department no longer has any immediate need for them, **and, in any event, when the minister vacates office** or a change of government occurs, **any copies of Cabinet documents must be returned to Cabinet Division or destroyed**.
>
> 111. The convention is that Cabinet documents are confidential to the Government which created them and not the property of the sponsoring minister or department. Access to them by succeeding governments is not granted without the approval of the current parliamentary leader of the appropriate political party.
>
> (Emphasis added.)

84 In the present case, as noted above, Mr Patrick applied to the Department of Prime Minister and Cabinet for access to the Document; this request was refused on the basis that the Document could not be found or did not exist.

85 The Attorney-General submitted that the *Archives Act*, GRA38 and the Cabinet Handbook "set out exactly how documents of ministers are to be dealt with when they leave office" and "conventions of responsible government deal particularly with how former cabinet documents are to be dealt with", which was important in the present case because it was asserted by Attorney-General Porter that the Document was a Cabinet document (T14).

86 In oral submissions in response, counsel for Mr Patrick submitted that it is necessary to identify precisely the duty that the primary judge found. Counsel submitted that this appears at [108] and [115] of the Reasons (see [32] above); the process of reasoning started with the right to have a request determined in accordance with the FOI Act; Mr Patrick did not understand this to be controversial; the primary judge then found that there is a correlative duty, described as "an obligation not to do any act that would interfere with the right to have the request determined according to law, including any act that would frustrate the exercise of a right of review or appeal by rendering its exercise ultimately futile (even if successful)"; similarly, in [115], the primary judge referred to "an obligation owed by the recipient of a request not to deal with a document described in the request in such a way as to frustrate the right of the requesting party to have the request finally determined including on review or appeal". Counsel submitted that, framed in that relatively narrow way, the duty found by the primary judge is "entirely uncontroversial" (T58).

87 Mr Patrick submits that: the scheme involves lengthy timeframes; a Minister has 30 days to notify a decision, or 60 days if the Minister decides that time should be extended (s 15(5)-(6)); the Information Commissioner can extend time further, both before and after the time for

decision elapses (ss 15AB, 15AC(4)); time can also be enlarged by the "request consultation process" if a practical refusal reason is raised (s 24AB(8)); review of refusal decisions also takes time; a person has 60 days, which can be extended, to seek review by the Information Commissioner (ss 54S(1), 54T); there is no express time within which the Information Commissioner must perform the statutory duty to determine a review.

88 Mr Patrick submits that: even if access is to be granted instead of refused, provision of access may be "deferred" on the grounds set out in s 21, or until the appeal or review opportunities by interested third parties have been exhausted (ss 26A(4), 27(7), 27A(6)); these provisions illustrate an additional point, namely that the FOI Act is concerned to maintain the status quo so that appeal or review opportunities are not frustrated (see also s 67); the duty not to deal with a document in a way that defeats the determination of a request is consistent with that statutory objective.

89 Mr Patrick submits that: when one has regard to the many express duties of a Minister, over what could lawfully be a period of many years, to co-operate in the FOI Act's scheme for determining whether access should be given to an official document, the duty identified by the primary judge, namely not to deal with the document in a way that would frustrate the process, is a compelling and even unavoidable implication; even if the requisite test is strict necessity, it is met. Moreover, Mr Patrick submits, because the permissible timeframes are lengthy, the Act clearly does not contemplate that a Minister leaving office has any decisive effect on the fate of a request for access to an official document of the Minister.

90 Mr Patrick submits that it is unnecessary to decide the constitutional issue (whether Ministers occupy a continuing "office" or whether there is a separate "office" upon each appointment) because the real issue is whether references to the Minister in the FOI Act are "references in general terms to the holder or occupier of an office, appointment or position" within the meaning of s 20 of the *Acts Interpretation Act*. Mr Patrick submits that: given the facultative purpose of s 20, it cannot be assumed that "office, appointment or position" has a meaning that would correspond to the asserted technical constitutional meaning of Ministerial office; a reference to a Minister "in general terms" attracts s 20, even if for constitutional purposes there might be no continuing office. Mr Patrick submits that: the Attorney-General's submissions understate the position; it is not that there is a mere "practice" facilitating some but not all aspects of the scheme; rather, an incoming Minister *legally* succeeds to the duties imposed by the FOI Act to give access to a document, even though the request was made to the outgoing

Minister; therefore, the outgoing Minister's duty not to frustrate the statutory right of access extends to maintaining possession of the document by the incoming Minister who will succeed to the duty to give access (unless a different course is taken of transferring the document and the request, under s 16, to an appropriate Department).

91 Mr Patrick submits that: the *Archives Act* does not speak against the obligation not to deal with an official document so as to frustrate an access request; even if an official document of a Minister is a "Commonwealth record", the most that can be said to follow is that GRA38, an instrument made under the *Archives Act*, disapplies the offence provision in s 24(1) where transfer to the NAA or destruction occurs in accordance with GRA 38; on its own terms, GRA38 does not purport to deal exhaustively with the topic; records with "Retain as National Archives" status "will be accepted for transfer", and "should be transferred", but only when they "cease to be required for business purposes or when the Minister leaves office"; that does not preclude business purposes continuing even though the Minister leaves office; the *Archives Act* does not purport to define "business purposes", which must include facilitating statutory FOI processes.

92 In relation to the Cabinet Handbook, Mr Patrick submits that: even if it be accepted that convention requires the information in cabinet documents not to be made available to an incoming government, the FOI Act expressly removes from the Minister's own unilateral determination whether a given document is a cabinet document; that question can be determined more authoritatively by the Information Commissioner, the Administrative Appeals Tribunal, and ultimately by a court.

93 In our view, to the extent that the primary judge considered that there was a duty not to frustrate the right of the requesting party to have the request determined including on review or appeal (at [108] and [115] of the Reasons), it may be accepted that the implication is necessary for the provisions of the FOI Act to be workable and to achieve the objects in s 3 of the FOI Act.

94 However, in our respectful opinion, the other duties or obligations referred to by the primary judge at [115]-[117], [123] and [128] of the Reasons (see [32]-[33] above) are too prescriptive and go beyond what is necessary for the provisions of the Act to operate. In particular, there does not appear to be a sufficient statutory foothold for the proposition that the Minister responsible for dealing with a request for access must maintain possession of the document until the request is finally determined (cf Reasons, [115]). There may be other ways of ensuring that an applicant's rights under the Act are preserved; for example, by transfer of the document

pursuant to s 16 of the FOI Act (noting that, in that section, "agency" includes a Minister – s 16(6)). Likewise, there does not appear to be a sufficient statutory foundation for the proposition that, pursuant to the FOI Act, a new Minister may demand from a former Minister that he or she transfer custody of a document that is the subject of an unresolved request for access (cf Reasons, [123]-[128]). Given the complications that may arise in relation to Cabinet documents where there is a change in government, it may be that there are other ways of dealing with such a situation that preserve the applicant's rights under the Act.

95 We do not consider it necessary for present purposes to resolve the difference of view as to whether an official document of a Minister (as defined in the FOI Act) will always be a "Commonwealth record" for the purposes of the *Archives Act*. Further, we do not consider it necessary to express a view on the interpretational issues raised in relation to GRA38 and the Cabinet Handbook. It would be preferable for these issues to wait until there is a fact situation that calls for their resolution.

96 Insofar as s 20 of the *Acts Interpretation Act* is concerned, as set out above, it is common ground that it applies in the present situation, whether or not the Attorney-General's constitutional point is correct. Accordingly, it is unnecessary to decide the constitutional issue (whether Ministers occupy a continuing "office" or whether there is a separate "office" upon each appointment) and it is preferable not to do so.

97 To the extent set out above, ground 2 is made out. However, as explained at [68] above, we do not consider this to affect the outcome of the appeal.

Ground 3

98 It follows from our conclusion on ground 1 that ground 3 is not made out.

Conclusion

99 For the reasons set out above, the appeal is to be dismissed. There is no apparent reason why costs should not follow the event. Accordingly, there will also be an order that the Attorney-General pay Mr Patrick's costs of the appeal.

I certify that the preceding ninety-nine (99) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Rangiah, Moshinsky and Abraham.

Associate:

Dated: 25 September 2024