

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Group 3

Program 1.6

Question No. 64

Senator Wright asked the following question at the hearing on 24 May 2012:

Senator WRIGHT: ... I have a final group of questions in relation to the declassification of documents relating to East Timor. ... Associate Professor Clinton Fernandes requested the declassification of cables written by Australian diplomats in Indonesia for the period from 1974 onwards. DFAT requested the Attorney-General, Ms Roxon, to block the release, which was done. Under the Archives Act, government documents including diplomatic cables are available to be declassified after 30 years when someone such as a researcher or a journalist asks for copies, but of course a department can claim an exemption on grounds that the material might threaten security, defence or international relations, and it appears that that is what has occurred. So my first question is: what percentage of declassified documents requested under the Archives Act would be made available in the normal course of events?

Mr Wilkins: I do not think we know the answer to that. I think that is something you would have to ask the Archives, quite frankly.

Senator WRIGHT: Then I ask: would you say that the issue of a certificate by the Attorney-General, such as in the circumstances that I have outlined, is unusual?

Mr Wilkins: It does not happen that often; it is true.

Senator WRIGHT: When you say 'it does not happen that often', can you indicate what you mean by that?

Mr Wilkins: I am advised that it would have been a couple of years, at least, since another certificate had been issued.

Senator WRIGHT: Perhaps I can ask you to take on notice a question so that I get some sense of the scale and how unprecedented or precedented this decision was. Perhaps you could indicate how many times this has occurred over the last 20 years, please.

Mr Wilkins: We can take that on notice, but you will appreciate that it is not so much how often it happens. It could happen two or three times in the next month. It depends on what documents we are talking about.

Senator WRIGHT: Yes, I understand that, but I would still like to get some sense of relativity there.

Mr Wilkins: Sure. We could give you that.

Senator WRIGHT: Thank you for that. Is it common for applicants to mount a legal challenge to a decision to deny declassification after the statutory period has expired under the Archives Act?

Mr Wilkins: I think we will have to take that on notice too. I do not know how common it is.

Senator WRIGHT: Again, when I say 'common', I suppose I would find it useful to give you a time frame, because 'common' is probably in the eye of the beholder—perhaps, again, how many times that may have happened over the last 20 years. Has any applicant successfully litigated to overturn a decision not to declassify?

Mr Wilkins: We had better take that on notice too.

Senator WRIGHT: Thank you.

Mr Wilkins: I do not know off the top of my head.

Senator WRIGHT: I ask again: is it common—and I might need to frame that in terms of a time perspective—for the Department of Foreign Affairs and Trade to apply for these certificates?

...

Mr Wilkins: We will take that on notice too.

Senator WRIGHT: Can you give me a sense of how many times it may have happened in the last year? Would you be aware of that?

Mr Wilkins: In the last year?

Senator WRIGHT: Yes.

Mr McDonald: There have been a couple of certificates in relation to this particular case, but, in relation to other cases, I do not think we have had another one in the last year.

Senator WRIGHT: Perhaps I will give that 20-year time frame again for that, thank you. When you say 'in relation to this particular case', you are talking about the request by Associate Professor Fernandes in relation to the diplomatic cables?

Mr McDonald: Yes.

Senator WRIGHT: Thank you. Can you tell me also how many times DFAT has applied for certificates and been denied them by the Attorney-General? Are you aware of any times that that has occurred?

Mr McDonald: I am not aware of an occasion when that has occurred, but we will take that on notice.

Senator WRIGHT: And if you could also—this might duplicate the previous question I asked, but if not—tell me how many times have they applied and been successful, again over that 20-year period. I would also like to know how many times the Attorney-General has intervened in this way overall, specifically in relation to Indonesia.

Mr Wilkins: Sorry, what do you mean by 'intervene overall'?

Senator WRIGHT: Has signed a certificate suppressing the release of documents that have been requested.

Mr Wilkins: You have asked that already.

Senator WRIGHT: I think I have asked that already! Yes. I would like to have an identification then as to how many times in the overall total that you have given me relate specifically to Indonesia.

Mr Wilkins: So, how many of these relate to Indonesia?

Senator WRIGHT: Yes, thank you. Then a subcategory of that is Indonesia's dealings in East Timor. The other aspect of that question on the overall number is a breakdown by country and region of the decisions to suppress the release of documents.

Mr Wilkins: What do you mean by 'region' for this purpose?

Senator WRIGHT: Perhaps 'state' might be the easiest way to identify what 'region' would mean there.

Mr Wilkins: All right.

Senator WRIGHT: Does the Minister for Foreign Affairs have the power to intervene directly to declassify or release documents in this way?

Mr McDonald: This power is with the Attorney, not the Minister for Foreign Affairs.

Senator WRIGHT: Are you aware of any other power that the Minister for Foreign Affairs would have to intervene in a process where consideration is being given to declassify documents under the Archives Act?

Mr McDonald: I will have to take that on notice. I am not aware of any power to.

Senator WRIGHT: By that I mean a formal legal power as opposed, obviously, to making a representation to a colleague, or something like that.

Mr Wilkins: We are not aware of anything but you will have to ask the Department of Foreign Affairs.

Senator WRIGHT: If I get an opportunity to. If you could possibly take that on notice I would appreciate that as well.

The answer to the honourable senator's question is as follows:

1. How many times has the Attorney-General issued a certificate in circumstances such as the Fernandes matter over the last 20 years?

The Attorney-General has issued a certificate 3 times in the last 20 years under section 36 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) in relation to a matter where a decision by the National Archives of Australia has been challenged.

2. How many times in the last 20 years have applicants mounted a legal challenge to a decision to deny declassification after the statutory period has expired under the Archives Act?

The National Archives of Australia has advised that since the assent of the *Archives Act 1983*, there have been 14 appeals on exemptions under the *Archives Act 1983* where a decision by the AAT has been reported. These 14 appeals may include appeals that have been joined. It is possible that other matters were listed but did not proceed because the applicant withdrew their appeal.

3. Has any applicant successfully litigated to overturn a decision not to declassify?

The National Archives of Australia has advised that of the 14 appeals on exemptions, in 8 matters the decision was varied and additional material was released that had previously been exempted by the Archives.

4. How many times in the last 20 years has DFAT applied for these certificates?

In the last 20 years the Department of Foreign Affairs and Trade (DFAT) has never applied for a certificate under section 36 of the AAT Act in relation to a matter where a decision by the National Archives of Australia has been challenged.

Applications for certificates under section 36 of the AAT Act have only been made by the National Archives of Australia. The Archives has made 3 applications in the last 20 years.

5. How many times has DFAT applied for certificates and been successful or been denied by the Attorney-General?

See response to Question 4.

The National Archives of Australia has applied for 3 certificates over the past 20 years. All 3 of these applications have been granted; none have been denied by the Attorney-General.

6. Of the certificates the Attorney-General has issued in circumstances such as the Fernandes matter, which country do they relate to and how many have been issued in relation to each country?

Of the 3 certificates issued by the Attorney-General under s 36 of the AAT Act, all 3 have related to Indonesia and East Timor.

7. Is there any legislative power that the Minister for Foreign Affairs has to intervene in a process where consideration is being given to declassify documents under the Archives Act?

There is no specific legislative provision under the Archives Act that enables the Minister for Foreign Affairs to intervene.