



16 June 2023

Our reference: LEX 73053

Concerned Citizen

Only by email: foi+request-10166-48914a1b@righttoknow.org.au

Dear Concerned Citizen,

Decision on your Freedom of Information Request

I refer to your request received by Services Australia (the Agency) on 17 April 2023 for access under the *Freedom of Information Act 1982* (the FOI Act) to the following documents:

All documents, emails, briefs, text and/or instant messages (including but not limited to Whatsapp and signal) between the CEO or the CEO's office of Services Australia and Minister Bill Shorten and/or his office regarding Stuart Robert and/or Synergy 360 between 24-25 November 2022 inclusive and 30 November-2 December 2022 inclusive. Exclude any media clips.

My decision

The Agency holds 4 documents (totalling 4 pages) that relate to your request.

I have decided to:

- grant you **part access** to 3 documents (Documents 2 – 4) with some of the content removed, and
- **refuse access** to 1 document (Document 1).

I have decided that documents that you have requested are, in part or in whole, exempt under the FOI Act, because they contain:

- information the disclosure of which could reasonably be expected to prejudice the conduct of an investigation of a breach, or possible breach, of the law or prejudice the enforcement or proper administration of the law in a particular instance (section 37(1)(a) exemption)
- material that would disclose deliberative matter, the disclosure of which would be contrary to the public interest (section 47C conditional exemption)
- material, the disclosure of which would have a substantial adverse effect on the proper and efficient conduct of the operations of the Agency and would be contrary to the public interest (section 47E(d) conditional exemption), and

- material that would disclose personal information about other people, the disclosure of which would be unreasonable and contrary to the public interest (section 47F(1) conditional exemption).

Please see the schedule at **Attachment A** to this letter for a detailed list of the documents and the reasons for my decision, including the relevant sections of the FOI Act.

How we will send your documents to you

The documents are attached.

You can ask for a review of our decision

If you disagree with any part of the decision you can ask for a review. There are two ways you can do this. You can ask for an internal review from within the Agency, or an external review by the Office of the Australian Information Commissioner. You do not have to pay for a review of the decision. See **Attachment B** for more information about how to request a review.

Further assistance

If you have any questions please email FOI.LEGAL.TEAM@servicesaustralia.gov.au.

Yours sincerely

TY
Authorised FOI Decision Maker
Freedom of Information Team
FOI and Ombudsman Branch | Legal Services Division
Services Australia



SCHEDULE OF DOCUMENTS FOR RELEASE

Concerned Citizen (Right to Know) – LEX 73053

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
1.	1	1 Dec 2022	Email from Rebecca Skinner to Minister's Office	Exempt in full	s37(1)(a) s47E(d) s47F(1)	Investigative material deleted under s37(1)(a) Operational material deleted under s47E(d) Third party information deleted under s47F(1)
2.	2	24 Nov 2022	Email from Minister's Office to Rebecca Skinner	Release in part	s47C s47F(1)	Deliberative matter deleted under s47C Third party information deleted under s47F(1)
3.	3	1 Dec 2022	Email from Rebecca Skinner to the Minister	Release in part	s47C s47E(d) s47F(1)	Deliberative matter deleted under s47C Operational material deleted under s47E(d) Third party information deleted under s47F(1)
4.	4	1 Dec 2022	Email from Minister's Office to Rebecca Skinner	Release in part	s47F(1)	Third party information deleted under s47F(1)



REASONS FOR DECISION

What you requested

All documents, emails, briefs, text and/or instant messages (including but not limited to Whatsapp and signal) between the CEO or the CEO's office of Services Australia and Minister Bill Shorten and/or his office regarding Stuart Robert and/or Synergy 360 between 24-25 November 2022 inclusive and 30 November-2 December 2022 inclusive. Exclude any media clips.

What I took into account

In reaching my decision I took into account:

- your original request dated 17 April 2023
- the documents that fall within the scope of your request
- whether the release of material is in the public interest
- consultations with Agency officers about:
 - the nature of the documents
 - the Agency's operating environment and functions
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines), and
- the FOI Act.

Reasons for my decisions

I am authorised to make decisions under section 23(1) of the FOI Act.

I have decided that documents that you have requested are, in part or in whole, exempt under the FOI Act. My findings of fact and reasons for deciding that the exemptions apply to those documents are discussed below.

Section 37(1)(a) of the FOI Act - documents affecting enforcement of law

I have applied the exemption in section 37(1)(a) to Document 1.

Section 37(1)(a) of the FOI Act provides that:

A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to

- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance.

I have found that certain documents, as referred to in the Schedule, are exempt under section 37(1)(a) of the FOI Act. The material to which I have refused access contains details

relating to investigations being undertaken by the Joint Committee of Public Accounts and Audit (JCPAA) in relation to procurement matters contained in or related to the 'Independent Review of Services Australia and NDIA Procurement and Contracting' (the Watt review).

Paragraph 5.82 of the Guidelines provides that a document should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law, in order to be exempt under section 37(1)(a) of the FOI Act. This is not confined to court action or court processes, but extends to the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches. I also note that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

I have decided that material in Document 1 contains information that is relevant to an ongoing investigation relating to compliance with the Commonwealth Procurement Rules, and that disclosure could reasonably be expected to prejudice the conduct of this investigation. Disclosure of this document under the FOI Act would amount to disclosure to the world at large.

I am satisfied that the release of these documents would disclose information that is relevant to and could be reasonably expected to prejudice the JCPAA's ongoing investigation.

For the reasons set out above, I am satisfied that the material is exempt under section 37(1)(a) of the FOI Act and will not be released to you.

Deliberative Matters – 47C of the FOI Act

Section 47C of the FOI Act provides that:

A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency.

Paragraphs 6.55 to 6.57 of the Guidelines are relevant to this exception and provide:

6.55 The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter. If a document does not contain deliberative matter, it cannot be conditionally exempt under this provision, regardless of any harm that may result from disclosure.

6.56 While identifiable harm resulting from disclosure is not a specific factor in determining whether a document may be categorised as 'deliberative', it may be relevant subsequently when deciding where the balance of the public interest lies. If, in a particular case, a deliberative document may be released without appreciable harm resulting, this would tend to indicate that it would not be contrary to the public interest to disclose the document and therefore it must be released to the applicant.

6.57 This conditional exemption has a potentially broad reach. The Information Commissioner expects, however, that agencies will claim this conditional exemption only in clearly applicable circumstances. Not every document

generated or held by a policy area of an agency is 'deliberative' in the sense used in this provision, even if it appears to deal with the development or implementation of a policy. A decision maker should ensure that the content of a document strictly conforms with the criteria for identifying 'deliberative matter' prepared or recorded for the purposes of a 'deliberative process' before claiming this conditional exemption.

I have found that certain parts of Documents 2 and 3 as referred to in the Schedule are conditionally exempt under section 47C of the FOI Act as they contain deliberative material in relation to the Agency's response to issues raised in a media report.

The deliberative matter contained in this document reflects the internal decision-making processes of the Agency and discussions with the Minister's Office. I am also satisfied the material does not comprise operational information or purely factual information, and is otherwise not of a kind specifically excluded by the FOI Act. Accordingly, I find that parts of the document, as identified in the Schedule, are conditionally exempt under section 47C(1) of the FOI Act.

Public interest considerations

Section 11A(5) of the FOI Act provides:

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.

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would:

- promote the objects of the FOI Act, and
- inform debate on a matter of public importance.

I have also considered the relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure could reasonably be expected to undermine the Agency's deliberative processes and the frank exchange of opinions and recommendations by Agency and government officials to inform decision making and the exercise of the Agency's functions. If information of this nature were released, this could lead to less frank deliberations and premature or uninformed decision-making, as well as damage the relationships between the Agency and stakeholders.

Based on these factors, I have decided that in this instance, the public interest in disclosing the conditionally exempt information in the above-mentioned documents is outweighed by the public interest against disclosure.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.

Section 47E(d) of the FOI Act – adverse effect on the proper and efficient conduct of the operations of an agency

I have applied the conditional exemption in section 47E(d) to Documents 1 and 3.

Section 47E(d) of the FOI Act provides that:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Proper and efficient conduct of the operations of an agency

In *Re James and Australian National University* (1984) 6 ALD 687 (Re James) the phrase 'conduct of operations' was interpreted to extend 'to the way in which an agency discharges or performs any of its functions.'

Documents 1 and 3 contain information relating to the Agency's immediate response to issues raised in the media in relation to the Agency's procurement processes. I am satisfied that information contained in the documents relates to the way in which the Agency would, and did, perform its functions, both in this particular context and more generally, and therefore is relevant to the proper and efficient conduct of the Agency's operations.

Reasonable expectation of a substantial adverse effect

Paragraph 5.20 of the Guidelines provides:

The term 'substantial adverse effect' broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'. The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.

In *Re James* it was held that the term 'substantial adverse effect' meant that the effect had to be 'serious' or 'significant'. Further, paragraph 6.101 of the Guidelines provides:

... There must be more than merely an assumption or allegation that damage may occur if the document were to be released.

Documents 1 and 3 contain information about the Agency's immediate response to allegations made by media. It is reasonably expected that if information of this nature were to be made public, the effectiveness of Agency responses in the future is likely to be compromised as would processes to investigate and address allegations made in relation to procurement processes.

For reasons detailed above, I am satisfied that parts of Document 1 and 3 are conditionally exempt under section 47E(d) of the FOI Act.

Public interest considerations

As outlined above, section 11A(5) of the FOI Act provides:

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.

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would:

- promote the objects of the FOI Act, and
- inform debate on a matter of public importance.

I have also considered the relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure could reasonably be expected to:

- prejudice the Agency's ability to effectively investigate and address allegations made in relation to procurement practices
- prejudice the administration of justice generally, including procedural fairness, and
- prejudice the Agency's ability to obtain further information to conduct investigations in the future.

Based on these factors, I have decided that in this instance, the public interest in disclosing the conditionally exempt operational information in the above-mentioned documents is outweighed by the public interest against disclosure.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.

Section 47F of the FOI Act - unreasonable disclosure of personal information

I have applied the conditional exemption in section 47F(1) to Documents 1 – 4.

Section 47F of the FOI Act relevantly provides:

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.

Personal Information

The term 'personal information' is defined as follows:

...information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in a material form or not.

Paragraph 6.130 of the Guidelines provides:

Personal information can include a person's name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.'

I find that Documents 1 – 4 contain personal information of other people, who are either identified or reasonably identifiable. This includes their name, job title, phone number, email, address and other information or opinions about them.

Whether disclosure is 'unreasonable'

In addition to the factors specified in section 47F(2) of the FOI Act, paragraph 6.138 of the Guidelines provides:

The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.

I am satisfied that the disclosure of the third party personal information would be unreasonable for the following reasons:

- it relates to aspects of individuals' personal affairs
- you do not have the consent from these individuals for the release of their personal information
- the information is private and not available in full or in part from publicly-accessible sources, and
- the identity of the individuals concerned is readily apparent or could be easily ascertained.

On this basis, I have decided that the personal information included in the documents referred to in the Schedule is conditionally exempt under section 47F(1) of the FOI Act.

Public interest considerations

As outlined above, section 11A(5) of the FOI Act provides:

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.

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would:

- promote the objects of the FOI Act, and
- inform debate on a matter of public importance.

I have also considered the relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure could reasonably be expected to:

- prejudice individuals' right to privacy, and
- harm the interests of an individual or group of individuals.

Based on these factors, I have decided that in this instance, the public interest in disclosing the conditionally exempt personal information in the above-mentioned documents is outweighed by the public interest against disclosure.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.

Summary of my decision

In conclusion, I have decided to:

- grant you part access to 3 documents, and
- refuse access to 1 document.

I have decided that:

- Document 1 is exempt, in full, under sections 37(1)(a), 47E(d) and 47F(1) of the FOI Act and disclosure would be contrary to the public interest
- Document 2 is exempt in part under sections 47C and 47F(1) of the FOI Act and disclosure would be contrary to the public interest
- Document 3 is exempt in part under sections 47C, 47E(d) and 47F(1) of the FOI Act and disclosure would be contrary to the public interest, and
- Document 4 is exempt in part under section 47F(1) of the FOI Act and disclosure would be contrary to the public interest.



Attachment B

INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Asking for a full explanation of a freedom of information (FOI) decision

Before you ask for a formal review of a FOI decision, you can contact us to discuss your request. We will explain the decision to you. This gives you a chance to correct misunderstandings.

Asking for a formal review of an FOI decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by:

1. an Internal Review Officer in Services Australia (the Agency), and/or
2. the Australian Information Commissioner.

Note 1: There are no fees for these reviews.

Applying for an internal review by an Internal Review Officer

If you apply for internal review, a different decision maker to the Agency delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be:

- made in writing
- made within 30 days of receiving this letter, and
- sent to the address at the top of the first page of this letter.

Note 2: You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

If you do not receive a decision from an Internal Review Officer in the Agency within 30 days of applying, you can ask the Australian Information Commissioner for a review of the original FOI decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can **lodge your application**:

Online: www.oaic.gov.au
Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001
Email: enquiries@oaic.gov.au

Note 3: The Office of the Australian Information Commissioner generally prefers FOI applicants to seek internal review before applying for external review by the Australian Information Commissioner.

Important:

- If you are applying online, the application form the 'Merits Review Form' is available at www.oaic.gov.au.
- If you have one, you should include with your application a copy of the Services Australia decision on your FOI request
- Include your contact details
- Set out your reasons for objecting to the Agency's decision.

Complaints to the Australian Information Commissioner and Commonwealth Ombudsman

Australian Information Commissioner

You may complain to the Australian Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Australian Information Commissioner must be made in writing. The Australian Information Commissioner's contact details are:

Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may also complain to the Commonwealth Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Commonwealth Ombudsman may be made in person, by telephone or in writing. The Commonwealth Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.