

Applicant: CR
By email: foi+request-10612-c1e3688c@righttoknow.org.au

FOI Request: Freedom of Information Request No. LEX 4640

Your FOI Request

On 25 August 2023 you wrote to the Australian Electoral Commission (**AEC**) seeking access under the *Freedom of Information Act 1982* (the FOI Act) to:

- 1. All documents pertaining to the design of the 2023 referendum ballot paper. This includes, but is not limited to, internal and external communications, drafts, memos, guidelines, and any other pertinent materials. I am particularly interested in any communication between the AEC and external bodies concerning the design, layout, or content of the ballot paper.*
- 2. All documents, reports, evaluations, or assessments carried out by the AEC or external parties concerning the "YES/NO" voting method for the 2023 referendum ballot paper. This specifically includes materials exploring the use of "YES/NO" as opposed to traditional methods such as marking, ticking, or crossing boxes.*
- 3. All documents pertaining to the application of savings provisions concerning 'ticks' and 'crosses' on the ballot papers. This extends to legal advice, guidance, memos, and any other relevant material.*

On 31 August 2023, you consented to an extension for your request until 25 October 2023.

On 25 September 2023, we provided you with a decision letter in response to item 3 of your FOI request.

This letter contains the decision on the remainder of your request, and is your final decision letter for this request.

Identification of Documents

I identified 35 documents that fell within the scope of item 1 and 2 of your FOI Request (the 'Relevant Documents').

I did this by contacting the relevant areas of the AEC and having them complete relevant searches.

The schedule of documents in Attachment A provides a description of each of the Relevant Documents and the access decision for each of the Relevant Documents.

Decision

With regard to the Relevant Documents identified in **Attachment A**, I have decided:

- Access in full: Documents 17, 19a, 19b
- Edited Copies: Documents 1, 1a, 3, 5, 6, 7, 18, 19, 20
- Refuse access: Documents, 1b, 1c, 2, 3a, 4a, 5a, 6a, 6b, 6c, 6d, 7a, 7b, 8, 9, 10, 11, 12, 13, 14, 15, 16,

The relevant documents are provided as a separate attachment to this decision.

More information, including my reasons for my decision, is set out in **Attachment B**.

Review Rights

You are entitled to seek review of this decision. Attachment C sets out your rights to apply for review if you are dissatisfied with my decision.

Yours sincerely

Andrew Johnson

Chief Legal Officer

Australian Electoral Commission

Document No.	Document Description	Decision on access/Redactions applied	Page no.
1	FW_Updated Referendum ballot paper	Release in part Section 47F – personal privacy	1
1a	RE_ Updated Referendum ballot paper [SEC=OFFICIAL]	Release in part Section 47F – personal privacy	2
1b	22-1724 Sample Referendum ballot paper_Long Question_06	Exempt Section 47E(d) – certain operations of the agency	
1c	22-1724 Sample Referendum ballot paper_06	Exempt Section 47E(d) – certain operations of the agency	
2	Referendum Ballot Paper Style Guide_05	Exempt Section 47E(d) – certain operations of agency	
3	Referendum Ballot Paper Style Guide for urgent review	Release in part Section 42 – LPP Section 47F – Personal privacy Section 22 – out of scope	3
3a	Referendum Ballot Paper Style Guide_01	Exempt Section 47E(d) – certain operations of agency	
4	Sample Referendum BP_incl_attachments.pdf	Release in part Section 47F- Personal privacy Section 22 – Out of scope	17
4a	22-1724 Sample Referendum ballot paper_QLD_05.pdf	Exempt Section 47E(d) – certain operations of the agency	
4b	22-1724 Sample Referendum ballot paper_05.pdf	Exempt Section 47E(d) – certain operations of the agency	
5	Sample Referendum BP_incl_attachments.pdf	Release in part Section 47F- Personal privacy	25
5a	22-1724 Sample Referendum ballot paper_SAMPLE.pdf	Exempt Section 47E(d) – certain operations of the agency	
6	Sample Referendum BP_incl_attachments.pdf	Release in part Section 47F- Personal privacy Section 22 – out of scope	34
6a	22-1724 Sample Referendum ballot paper_reworde.pdf	Exempt Section 47E(d) – certain operations of the agency	
6b	22-1724 Sample Referendum ballot paper_QLD_WM.pdf	Exempt Section 47E(d) – certain operations of the agency	
6c	22-1724 Sample Referendum ballot paper_WM.pdf	Exempt Section 47E(d) – certain operations of the agency	
6d	22-1724 Sample Referendum ballot paper_reworde.pdf	Exempt Section 47E(d) – certain operations of the agency	

7	Sample Referendum BP_incl_attachments.pdf	Release in part Section 47F- Personal privacy	39
7a	22-1724 Sample Referendum ballot paper_QLD_02.pdf	Exempt Section 47E(d) – certain operations of the agency	
7b	22-1724 Sample Referendum ballot paper_02.pdf	Exempt Section 47E(d) – certain operations of the agency	
8	FW: Legal Services ObjectiveIM Ballot Paper Approval Workflow [SEC = OFFICIAL]	Exempt Section 42 - LPP	
9	FW: Legal Services ObjectiveIM Ballot Paper Approval Workflow [SEC=OFFICIAL] (A3034558)	Exempt Section 42 - LPP	
10	Legal Services ObjectiveIM Ballot Paper Approval Workflow [SEC=OFFICIAL] (A3034559)	Exempt Section 42 - LPP	
11	Legal Services ObjectiveIM Ballot Paper Approval Workflow [SEC=OFFICIAL] (A3037653)	Exempt Section 42 - LPP	
12	Legal Services ObjectiveIM Ballot Paper Approval Workflow [SEC=OFFICIAL] (A3037880)	Exempt Section 42 - LPP	
13	Legal Services ObjectiveIM Ballot Paper Approval Workflow [SEC=OFFICIAL] (A3038818)	Exempt Section 42 - LPP	
14	Legal Services ObjectiveIM Ballot Paper Approval Workflow [SEC=OFFICIAL] (A3038819)	Exempt Section 42 - LPP	
15	Legal Services ObjectiveIM Ballot Paper Approval Workflow [SEC=OFFICIAL] (A3044823)	Exempt Section 42 - LPP	
16	Request_ Legal Services ObjectiveIM Ballot Paper Approval Workflow _SEC_OFFICIAL_ (A3032705)	Exempt Section 42 - LPP	
17	ObjectiveIM Ballot Paper Approval Workflow - Referendum	Release in full	42
18	FW_ Updated Referendum ballot paper _SEC_OFFICIAL_ (A3104128)	Release in part Section 47F	43
19	RE_ For Clearance Task - Clearance - TAS - Minute - Ballot Paper Endorsement - Ref 2023 - Delivery and Support Branch _SEC_OFFIC (A3104132)	Release in part Section 47F	44
19a	Attachment to email	Release in full	47
19b	Attachment to email	Release in full	48
20	Electoral Commissioner - Ballot Paper Approval - Ref 2023.pdf	Release in part Section 47F – personal privacy Section 42 - LPP	49

Attachment B – Reasons – Freedom of Information Request No. LEX4640

Authority

As the Chief Legal Officer, Legal Services Branch, I am an authorised decision-maker under section 23 of the FOI Act.

Retrieval process

To identify documents for your request, I arranged for relevant staff likely to be able identify documents to undertake a comprehensive search of the relevant electronic holdings used by the AEC.

Relevant Documents

With regard to the Relevant Documents identified in Attachment A, I have decided:

Access in full

- a) to grant access in full to Documents 17, 19a, 19b

Edited copies

- b) to grant access to an edited copy of documents 1, 1a, 3, 5, 6, 7, 18, 19, 20 from which exempt matter and irrelevant information has been deleted under section 22 of the FOI Act.

Refuse access

- c) To refuse access to Documents, 1b, 1c, 2, 3a, 4a, 5a, 6a, 6b, 6c, 6d, 7a, 7b, 8, 9, 10, 11, 12, 13, 14, 15, 16, as providing access would be contrary to the public interest or they are exempt documents.

Material taken into account

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

- a) the content of the documents that fall within the scope of your FOI Request;
- b) the FOI Act, specifically section 22, 42, 47E(d) and 47F.
- c) the guidelines ('[FOI Guidelines](#)') issued by the Australian Information Commissioner under section 93A of the FOI Act;
- d) the [FOI Guidance Notes](#), July 2011 issued by the Department of Prime Minister and Cabinet; and
- e) the *Privacy Act 1988*.

Detailed Reasons

Attachment A indicates each Relevant Document to which access is refused or access is granted. My reasons for refusing or granting access are given below.

Exemptions

Section 42 – Legal Professional Privilege

Findings

I found that the documents, as identified in Attachment A, were documents of such a nature that they would be privileged from production in legal proceedings on the ground of legal professional privilege.

Consideration

Under subsection 42(1) of the FOI Act, a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

Section 42 of the FOI Act provides:

42 Documents subject to legal professional privilege

- (1) *A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.*
- (2) *A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.*
- (3) *A document is not an exempt document under subsection (1) by reason only that:*
 - (a) *the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and*
 - (b) *the information is operational information of an agency.*

*Note: For **operational information**, see section 8A.*

The documents identified are documents that:

1. Clearly demonstrate a legal adviser-client relationship.
2. Are communications for the purpose of giving or receiving legal advice.
3. Contain independent and confidential legal advice.

The decision maker acknowledges the waiver of privilege in regard to certain legal advice received by AGS, that has since been published by the AEC. This legal advice has not been considered exempt in the making of this decision.

Outcome

Accordingly, I am satisfied that the documents identified fall within the scope of the exemption for legal professional privilege and are therefore exempt from disclosure.

Section 47E – Public interest conditional exemptions - certain operations of agencies

Findings

I found that the documents, as identified in Attachment A contained information, such as unique ballot paper content, that could be used to reproduce ballot papers. This information would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.

Consideration

Section 47E of the FOI Act conditionally exempts a document if its disclosure under the FOI 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.

Paragraph 47E(d) of the FOI Act provides:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

.....

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

In making my decision I had regard to:

- a. the extent to which the information is well known; and
- b. the extent to which, and how, disclosure of the information would or could reasonably be expected to adversely effect the proper and efficient conduct of the operations of AEC.

The AEC is an independent statutory authority. It is funded to deliver one purpose and one outcome: *Maintain an impartial and independent electoral system for eligible voters through active electoral roll management, efficient delivery of polling services, and targeted education and public awareness programs.* It can therefore be said that the AEC's primary function is to deliver the voting franchise.

An important part of delivering the voting franchise is ensuring the integrity and security of the ballot paper. This includes electronic ballot paper files. If members of the public were able to reproduce ballot papers this would cause a substantial adverse effect on the AEC's operations.

Initial outcome

Accordingly, I am satisfied that the documents identified fall within the scope of the conditional exemption for certain operations of agencies provided by section 47E of the FOI Act.

Weighing of public interest factors

Under subsection 11A(5) of the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest. I have weighed public interest factors follows.

I find that the factors in favour of disclosure the documents identified are:

- a. promoting the objects of the Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities (section 3(2)(b) of the FOI Act);
- b. informing debate on a matter of public importance, namely how the AEC conducts referendums and applies the relevant legislation; and
- c. facilitating access to information to members of the public that allows them to be satisfied that proper processes have been followed by the agency.

I find that the factors against disclosure of the documents identified are that:

- a. disclosure could reasonably be expected to impact the security and integrity of the ballot paper;
- b. disclosure could reasonably be expected to prejudice the AEC's management function and ability to perform its functions;
- c. disclosure could reasonably be expected to prejudice the effective and efficient functioning of the AEC.

In accordance with subsection 11B(4) of the FOI Act, I excluded from my consideration the following matters:

- a. access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;

- b. access to the document could result in any person misinterpreting or misunderstanding the document;
- c. the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
- d. access to the document could result in confusion or unnecessary debate.

In my view, having regard to the above considerations and factors set out in sections 11B and 47E of the FOI Act, I have decided that the balancing of considerations weighs in favour of not releasing the section 47E information in the released documents.

Final Outcome

Accordingly, I am satisfied that the documents identified in Attachment A are conditionally exempt under section 47E of the FOI Act and, because disclosure would be contrary to the public interest, the documents should be treated as exempt from disclosure under the FOI Act.

Section 47F - personal privacy

Findings

I found that the documents, as identified in Attachment A contained the personal information of AEC staff, and third parties, including names and contact details.

Consideration

Section 47F of the FOI Act conditionally exempts a document if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person (with certain exceptions regarding the disclosure to a person of their own personal information).

Subsection 47F(1) of the FOI Act provides:

47F Public interest conditional exemptions—personal privacy

General rule

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).*

In making my decision I had regard to:

- the extent to which the information is well known;
- 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;
- the availability of the information from publicly accessible sources;
- Part 6 (Conditional Exemptions) of the FOI Guidelines;
- Submissions made by third parties in response to consultation.

I determined that the personal information identified - that is the names, contact details, role titles and other personal information - in these documents is not well known, nor is it available from publicly accessible sources.

Initial outcome

Accordingly, I am satisfied that the documents identified fall within the scope of the conditional exemption for personal privacy provided by section 47F of the FOI Act.

Weighing of public interest factors

Under subsection 11A(5) of the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest.

I consider that the public interest in releasing the full names of these individuals is extremely low. I have considered the relevant factors in s 11B of the FOI Act, and the release of this information would not aid the public in scrutinising, commenting or reviewing the activities of the AEC, nor would it further inform any public debate on a matter of importance (s 11B(3)(b)).

I have also balanced this public interest with the consideration of whether this disclosure of personal information would be unreasonable.

- a. The disclosure of this information could reasonably be considered to prejudice the relevant individuals' right to privacy.
- b. The disclosure of AEC staff members' and/or third parties names and personal information may expose these parties to harm or a continued harassment campaign.

In accordance with subsection 11B(4) of the FOI Act I excluded from my consideration the following matters:

- a. access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
- b. access to the document could result in any person misinterpreting or misunderstanding the document;
- c. the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
- d. access to the document could result in confusion or unnecessary debate.

In my view, having regard to the above considerations and the factors set out in sections 11 and 47F of the FOI Act, I have decided that the balancing of considerations weighs in favour of not releasing the personal information in the released document.

Final Outcome

Accordingly, I am satisfied that the documents identified in Attachment A are conditionally exempt under section 47F of the FOI Act and, because disclosure would be contrary to the public interest, that the documents should be treated as exempt from disclosure under the FOI Act.

Preparation of edited copy

In accordance with section 22 of the FOI Act, I considered whether it is possible and practicable to prepare an edited copy of the Relevant Documents from which exempt and irrelevant material are redacted.

Findings

I found that:

- it is possible to prepare an edited copy of some documents (identified in Attachment A as "release in part") modified by deletions, ensuring that:
 - access to the edited copy would be required to be given under section 11A (access to documents on request) of the FOI Act; and
 - the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the FOI Request;
- it is reasonably practicable for the AEC to prepare the edited copy, having regard to:
 - the nature and extent of the modifications; and
 - the resources available to modify the document; and
- it is not apparent that you would decline access to the edited copy.

- I found that it is not possible or practical to prepare an edited copy of some documents (identified in Attachment A as “exempt”), due to the nature and extent of the modifications that would be required to ensure that no exempt information is released.

I had regard to section 22 of the FOI Act and paragraphs 3.95–3.100 of the FOI Guidelines.

Outcome

I concluded that it is both possible and practicable to prepare an edited copy of the documents that are identified in Attachment A as “release in part.”

I concluded that it is not possible or practicable to prepare an edited copy of the documents that are identified in Attachment A as “exempt.”

Attachment C - FOI Review rights

Internal review

Under section 54 of the FOI Act, you may apply in writing to the AEC for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.

Where possible, please attach reasons why you believe review of my decision is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner review

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

online: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints>

email: foidr@oaic.gov.au

post: Director of FOI Dispute Resolution, GPO Box 5218, Sydney NSW 2001

fax: 02 9284 9666

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>

FOI Complaints

If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. We may be able to rectify the problem. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. Complaints can be lodged in one of the following ways:

online: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints>

email: foidr@oaic.gov.au

post: GPO Box 5218 Sydney 2001

More information about complaints is available on the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>

If you are not sure whether to lodge an Information Commissioner review or an Information Commissioner complaint, the Office of the Australian Information Commissioner has more information at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.