

Attachment B – Reasons – Internal Review of Freedom of Information Request No. LEX5527

Authority

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

Relevant material and considerations

1. In reaching my decision, I referred to the following:
 - the terms of your request (LEX4807);
 - the documents relevant to your internal review request;
 - the FOI Act; and
 - Guidelines published by the Office of the Information Commissioner under section 93A of the FOI Act (FOI Guidelines).

Decision

2. With regard to the relevant Documents identified in **Attachment A.1** for Part 1 of the FOI Request, I have decided to:

Part 1

- Grant access in full: Document Nos. 2, 6a, 7a, 39, 56a, 57, 61, 81
- Grant access in part: Document Nos. 1, 3-7, 8-18a, 20-38, 40-44, 47-56, 58, 59, 60, 62-63a, 67a, 67b, 67c, 70f, 71, 72, 73, 76, 80, 82
- Refuse in full: Documents Nos. 19, 45, 45a, 45b, 46, 64-67, 68-70g, 74, 75, 77-79A.

3. With regard to the relevant documents identified in **Attachment A.2** for Part 2 of the FOI request, I have decided to:

Part 2

- Grant access in full: Document Nos. 17, 19a, 19b
- Grant access in part: Document Nos. 1, 1a, 3, 5, 6, 7, 18, 19, 20
- Refuse in full: Documents Nos. 1b, 1c, 2, 3a, 4, 4a, 4b, 5a, 6a, 6b, 6c, 6d, 7a, 7b, 8-16

Detailed Reasons

4. Attachments A.1 and A.2 indicate each Relevant Document to which access is refused or access is granted, and where it differs from the original decision-maker. My reasons for refusing or granting access are given below.

Exemptions

Section 22 – Irrelevant material

1. I found that the documents as identified with “s 22” in Attachments A.1 and A.2 contained material that would reasonably be regarded as irrelevant your FOI request.

2. 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.
3. I found that:
 - it is possible to prepare an edited copy of some documents (identified in Attachment A as “s 22 – release in part”) modified by redactions, 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.
4. I found that it is not possible or practical to prepare an edited copy of some documents (identified in Attachments A1. and A.2 as “s 22 – exempt in full”), due to the nature and extent of the modifications that would be required to ensure that no exempt information is released. Indeed, I have found that many of these documents that are identified in Attachments A.1 and A.2 as “s 22 – exempt in full” contain no information that is within the scope of your FOI Request.
5. I had regard to section 22 of the FOI Act and paragraphs 3.95–3.100 of the FOI Guidelines.
6. For the sake of clarity and transparency in my decision these documents are listed documents in the schedule.

Section 42 – Legal Professional Privilege

7. Section 42(1) exempts a document if the document would be exempt from production in legal proceedings on the ground of legal professional privilege.
8. I found that the documents, as identified in Attachments A1. and A.2, were documents of such a nature that they would be privileged from production in legal proceedings on the ground of legal professional privilege.
9. A document is exempt from production on the ground of legal professional privilege if all of the following apply:
 - a) there exists a lawyer-client relationship;
 - b) there have been confidential communications which are recorded in the document;
 - c) the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
 - d) the privilege has not been waived.
10. The AEC has a legal branch which is staffed by lawyers admitted to practice and who hold practising certificates. The lawyers in this branch provide independent legal advice. They do not work on policy or other issues. I am satisfied that the AEC’s in-house lawyers provided legal assistance in relation to this matter and that a lawyer-client relationship existed between the AEC and its in-house lawyers. The documents to which the exemption has been applied contain communications which were at the time and remain confidential and which took place

in the context and for the dominant purpose of providing advice or in actual or anticipated legal proceedings.

Consideration of public statements – ticks and crosses

11. I note you have contended that the AEC has made ‘public statements’ regarding legal advice that has resulted in the AEC waiving legal professional privilege over these documents.
12. I have reviewed these documents and considered the impact on legal professional privilege of extracts of advice relating to the application of savings provisions in the context of ‘ticks and crosses’ having been published by the AEC: [referendum-formality-savings-provisions-legal-advice.pdf \(aec.gov.au\)](#).
13. I have decided to vary the original decision with respect to the 1988 AGS legal advice and 2023 AGS legal advice referred to in the media statement, and release some additional paragraphs that relate to the extracts that were publicly released and are within the scope of your FOI Request (see Documents 38, 58, 62, 63a, and 67b).
14. However, I have also determined that the remainder of the 2023 AGS legal advice is exempt as irrelevant material under s 22. The remainder of this piece of legal advice would reasonably be regarded as irrelevant to your request.

Conclusion

15. I find that disclosure of all the other documents (other than Documents 38, 58, 72, 63a and 67b) are exempt in full under section 42(1) would involve disclosure of documents that would be exempt from production in legal proceedings on the ground of legal professional privilege.
 - I note that, on review, I have found that some of these documents to which the original decision-maker applied s 42 to exempt in full are wholly outside of the scope of your FOI request. I have noted these changes in Attachment A.1.
16. I note that I have not been able to find any indication that the AEC has made any public other statements regarding other legal advice to which the exemption applies.

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

17. 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.
18. 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 affect the proper and efficient conduct of the operations of AEC.
19. 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.*

Consideration of documents in Attachment A.1

1. I have considered your submissions in reviewing the documents in Attachment A.1 to which the s 47E(d) exemption was applied. I agree with your contention in principle that now that the referendum has passed, different considerations apply in considering whether the disclosure of information would or could reasonably be expected to adversely affect the proper and efficient conduct of the operations of the AEC.
2. I have determined that the s 47E(d) exemption is not applicable to the documents and have changed my decision with respect to those documents identified in Attachment A.1. Accordingly, some additional information will be released to you. However, for some documents I have determined that while s 47E(d) is not applicable, another exemption applies.

Consideration of documents in Attachment A.2

1. I have also considered your submissions with respect to s 47E(d) in relation to the documents in Attachment A.2. However, I have found that the application of that exemption with respect to those documents identified at Attachment A.2 is appropriate.
2. A critically important aspect of the AEC's role to maintain an independent and trusted electoral system is the ability of the AEC to protect the integrity of the ballot paper. The documents to which the s 47E(d) exemption applies contains information, for example vector artwork, that could enable ballot papers to be printed at a high-quality level, similar to the real ballot papers printed by the AEC. This could enable nefarious individuals to undermine the integrity of the ballot paper by printing counterfeit ballot papers and spread these in the community. This could undermine the ability of the AEC to maintain a trusted electoral system.
3. If individuals were able to reproduce ballot papers I am satisfied that this would cause a substantial adverse effect on the AEC's operations.

Weighing of public interest factors

4. 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.
5. 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.
6. 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 would not reveal any additional information about the content of the ballot paper itself, as this information is already public and is in the documentation to be released (for example, lower quality images of the referendum ballot papers from which vector artwork cannot be extracted);

- c. disclosure could reasonably be expected to prejudice the AEC's management function and ability to perform its functions;
 - d. disclosure could reasonably be expected to prejudice the effective and efficient functioning of the AEC.
7. I consider that these factors take on additional weight when considering that the AEC is an independent statutory body. It is crucial to the proper functioning and integrity of the AEC that the agency is able to protect the integrity of the ballot paper.
8. 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.
9. I note that you have raised the following factors with respect to the public interest test for this exemption:
 - *Informing public debate. There is significant public interest and debate regarding how the referendum was planned and conducted. Disclosure of the documents would further inform this important debate by shedding light on the AEC's processes and decision making.*
 - *Promoting transparency and accountability of government decision making. Increased scrutiny of these operations promotes good governance and the objectives of the FOI Act.*
 - *The AEC has specialist expertise but also a statutory duty of accountability that weighs heavily in the public interest test for these documents relating to the referendum.*
10. I note that the documents relating to the production of the referendum ballot paper in Attachment A.2 are being released in part (with some minor edits for personal privacy, discussed below) as well as low quality versions of the referendum ballot papers – just not information that would facilitate the reproduction of the referendum ballot papers. The public will still be able to review how the referendum ballot papers were discussed and produced within the AEC, together with the content of the referendum ballot paper. I have only decided that it is documents which contain information that may enable reproduction of a ballot paper that weighs against the public interest of being disclosed.
11. 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 as identified in Attachment A.2.

Conclusion

12. Accordingly, I am satisfied that the documents identified in Attachment A.2 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 47C – deliberative matter

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation, 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:

- a) an agency; or
- b) a minister; or
- c) the Government of the Commonwealth.

Deliberative matter

Part 6.52 of the OAIC FOI Guidelines provides that 'deliberative matter' is content that is in the nature of, or relating to either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded, or
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).

The Administrative Appeals Tribunal decision of *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 explained that the meaning of the words 'opinion', 'advice' and 'recommendation' all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.

I have carefully reviewed the documents exempted under section 47C and consider that they include opinions, advice and recommendations. The opinions, advice and recommendations relate to the functions of the AEC under the *Referendum (Machinery Provisions) Act 1984* (Cth).

Section 47C does not extend to operational information or purely factual information. I have considered the substance of these documents and consider that while some purely factual information is contained within the relevant documents, this material relates to the advice and opinions being considered. To disclose these facts would disclose the nature of the advice being considered.

Public interest

Having concluded that the documents are conditionally exempt on the basis that they contain deliberative material, I now need to consider whether it would be contrary to the public interest for them to be disclosed to you in accordance with s 11A(5) of the FOI Act.

I consider that the public interest factors that weigh in favour of disclosure are:

- i) informing debate on a matter of public importance, namely how the AEC conducts referendums; and
- ii) 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 consider that the public interest factors that weigh against disclosure are:

- i) the importance of maintaining the full and frank exchange of ideas between agencies, for the purpose of canvassing issues surrounding drafting of legislation, which involves a rigorous consultation process between relevant agencies;
- ii) disclosure could reduce the full and frank testing of ideas between agencies, which ultimately would result in less rigorously tested policy proposals and draft legislation in the future;
- iii) disclosure could reasonably be expected to prejudice the AEC's ability to obtain similar information in the future;
- iv) disclosure could reasonably be expected to prejudice the AEC's ability to attain the objects of the consultation process;
- v) disclosure could reasonably be expected to prejudice the AEC's management function and ability to perform its functions; and
- vi) disclosure could reasonably be expected to prejudice the effective and efficient functioning of the AEC.

I consider that these factors take on additional weight when considering that the AEC is an independent statutory body. It is crucial to the proper functioning and integrity¹ of the AEC that it is consulted on and able to provide frank and fulsome advice to government and to seek information from government on the operation of the Australian electoral framework.

Taking into account the above matters, on balance, I consider that disclosure of the information in Documents 45, 45a, 45b, and 46 exempted under section 47C, is contrary to the public interest.

Section 47F - personal privacy

13. 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).
14. 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.
15. 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. 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

16. 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.
17. 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)).

¹ The proper function and integrity reflects that type of practice identified in *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 that sustains a claim of frankness and candour.

18. 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.
19. 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.
20. 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.

Conclusion

21. 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.