



Australian Government
Department of Finance

Reference: FOI 23-24/034
Contact: FOI Team
E-mail: foi@finance.gov.au

Me
via Right to Know website

By email only: foi+request-10722-40ce0565@righttoknow.org.au

Dear Me,

Freedom of Information Request – FOI 23-24/034

On 29 September 2023, the Department of Finance (Finance) received your email, in which you sought access to the following under the Commonwealth *Freedom of Information Act 1982* (FOI Act):

- For all unsuccessful (note ‘un’) act of grace applications made against ASIC for the period 1 July 2021 - 30 June 2023, I request:
- A copy of the record entered in the SFC database regarding the application (see FOI 22/119 Document 1)
 - Where the application was for more than \$100,000 (including more than \$500,000), the Ministerial Submission regarding the application
 - Where the application was for under \$100,000, the Minute that contains the reasons for refusal (for the avoidance of doubt, this includes any sort of briefing covered by the policy disclosed under 22/119. It may simply be an email)
 - Where the final decision came after a reconsideration by the Ombudsman or Federal Court, a copy of the final reasons for decision given by the Ombudsman or Federal Court.

On 19 October 2023, you agreed to amend the scope of your request by the following:

- ... the 10 most recent decisions before 30 June 2023, where the decision:
- is not substantially the same as another decision in the set of 10 (that is, the facts underlying each decision are not similar), and
 - resulted in the production of a minute, or other document containing substantive reasons for decision.

The purpose of this letter is to provide you with notice of my decision under the FOI Act.

Authorised decision-maker

I am authorised by the Secretary of Finance to grant or refuse access to documents.

Decision

I have identified five (5) documents as falling within the scope of your request. I have decided to release all five documents to you with material removed as it relates to legal professional privilege and certain operations of agencies. I have also removed personal information under section 22 as per the scope of your request.

In making my decision, I have had regard to the following:

- the terms of your FOI request;
- the content of the documents that fall within the scope of your request;
- consultations with third parties in accordance with the FOI Act and submissions made by those third parties;
- the relevant provisions of the FOI Act; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines).

The documents are identified in the Schedule at **Attachment A**.

Exempt and irrelevant information removed from the documents

I have redacted irrelevant and exempt information from the documents and released the edited form of the documents to you.

Material related to legal professional privilege (section 42)

Section 42 of the FOI Act provides:

- (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.

The FOI Guidelines set out:

[5.128] LPP applies to some but not all communications between legal advisers and clients. The underlying policy basis for LPP is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative. The information in a document is relevant and may assist in determining the purpose of the communication, but the information in itself is not determinative.

[5.129] At common law, determining whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential.

I have examined the documents and I have found it to contain information that falls under the definition of the independent and confidential advice given in a legal adviser-client relationship for the purposes of providing legal advice.

Therefore, I have determined the documents to be partially exempt under section 42 of the FOI Act.

Material related to certain operations of agencies (section 47E)

Section 47E of the FOI Act provides:

- (1) A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:
 - (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
 - (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
 - (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;
 - (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The documents contain details related to the decision-making processes of Finance in assessing the claims for an act of grace under the *Public Governance, Performance and Accountability Act, 2013*. Release of the documents in full may adversely affect the operations of Finance by prejudicing the effectiveness of future examinations of claims for acts of grace payments.

The assessment of each claim required input relating to the operations of other Commonwealth agencies. Disclosure of the material in full is likely to adversely affect the operations of Finance by revealing information that was provided to Finance in confidence.

For these reasons I consider that material removed from the documents is conditionally exempt under section 47E of the FOI Act.

Public interest test

Having formed the view that the documents are exempt, in part, under sections 47E of the FOI Act, I am now required to consider the public interest test for the purposes of determining whether access to the conditionally exempt documents would, on balance, be contrary to the public interest.

Section 11A of the FOI Act provides:

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.

Factors favouring disclosure

Section 11B of the FOI Act provides:

1. Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - a. promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - b. inform debate on a matter of public importance;
 - c. promote effective oversight of public expenditure;
 - d. allow a person to access his or her own personal information.

I consider that giving access to the documents would promote the objectives of the FOI Act by providing access to documents held by an agency. I attribute minimal weight to this factor as this objective applies to all documents, regardless of the effect of releasing the documents.

Factors against disclosure

Paragraph 6.22 of the FOI Guidelines provides a non-exhaustive list of factors against disclosure, of which, I consider the following could reasonably be expected to:

- prejudice the protection of an individual's right to privacy, including where the personal information is that of a government employee in relation to personnel management and the disclosure of the information could be reasonably considered to reveal information about their private disposition or personal life.
- prejudice an agency's ability to obtain similar information in the future.
- harm the interests of an individual or group of individuals.

I attribute significant weight to the above factors for there is a need to preserve reasonably held expectations by Commonwealth agencies that Finance maintains confidentiality. The release of the material that is removed from the documents under section 47E is likely to substantially prejudice the ability of Finance to obtain similar information in the future.

Irrelevant considerations

I have not taken into account any of the irrelevant factors listed under Section 11B of the FOI Act:

3. The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest;
 - 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) a 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.

Balancing the public interest factors

The FOI Guidelines provide:

[6.25] The decision maker must determine whether access to a conditionally exempt document is, at the time of the decision, contrary to the public interest, taking into account the factors for and against disclosure.

[6.27] To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information.

I consider that there is public interest in providing access to documents held by Finance, however, for the reasons listed above, I consider there is greater public interest in protecting the operations of government agencies and the ability of Finance to obtain similar information in the future.

I have determined that releasing the conditionally exempt information in the documents would, on balance, be contrary to the public interest.

Charges

On 30 October 2023, we sent you our preliminary charges notice in the amount of \$255.00.

On 4 December 2023, you contested the amount of the preliminary charges notice.

On 12 January 2024, we sent you our decision in relation to your charges contention, in which we set aside our preliminary charges decision to impose a charge of \$255.00. This meant that there was no charge.

Third party consultation

Finance consulted with a third party and provided them with a copy of the documents with our proposed redactions. We did not receive any objections to the release of the documents.

Review and appeal rights

You are entitled to request an internal review or an external review by the Office of the Australian Information Commissioner (OAIC) of my decision. The process for review and appeal rights is set out at **Attachment B**.

Publication

Finance will publish the documents released to you on our [Disclosure Log](#). Finance's policy is to publish the documents the working day after they are released to you.

If you have any questions regarding this request, please contact the FOI Team on the above contact details.

Yours sincerely,

meagan wilson

Meagan Wilson
Assistant Secretary
Comcover and Discretionary Payments | Risk, Insurance and Discretionary Payments
Department of Finance
14 February 2024

SCHEDULE OF DOCUMENTS RELEVANT TO FOI 23-24/034

| Document No. | Date of Document | No. of Pages | Description of Document | Decision |
|---------------------|-------------------------|---------------------|--|---|
| 1 | 01/10/2024 | 5 | Minutes related to Act of Grace claims | Release in part Irrelevant material redacted under section 22 Exempt material redacted under sections 42 and 47E. |
| 2 | 30/09/2022 | | | |
| 3 | 17/02/2023 | | | |
| 4 | 24/02/2023 | | | |
| 5 | 31/05/2023 | | | |



Australian Government

Department of Finance

Freedom of Information – Your Review Rights

If you disagree with a decision made by the Department of Finance (Finance) or the Minister for Finance (Minister) under the *Freedom of Information Act 1982* (the FOI Act) you can have the decision reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request, if you have made a contention against the release of the documents that has not been agreed to by Finance or the Minister, or if your application to have your personal information amended was not accepted. There are two ways you can seek a review of our decision: an internal review (IR) by Finance or the Minister, or an external review (ER) by the Australian Information Commissioner (IC).

Internal Review (IR)

If, Finance or the Minister (we/our), makes a Freedom of Information (FOI) decision that you disagree with, you can seek a review of the original decision. The review will be carried out by a different decision maker, usually someone at a more senior level.

You must apply for an IR within 30 calendar days of being notified of the decision or charge, unless we agree to extend your time. You should contact us if you wish to seek an extension.

We are required to make an IR decision within 30 calendar days of receiving your application. If we do not make an IR decision within this timeframe, then the original decision stands.

Review by the Australian Information Commissioner (IC)

The Office of the Australian Information Commissioner (OAIC) is an independent office who can undertake an ER of our decision under the FOI Act. The IC can review access refusal decisions, access grant decisions, refusals to extend the period for applying for an IR, and IR decisions.

If you are objecting to a decision to refuse access to a document, impose a charge, or a refusal to amend personal information, you must apply in writing to the IC within 60 calendar days of receiving our decision.

Third parties

If you are a third party objecting to a decision to grant someone else access to your information, you must apply to the IC within 30 calendar days of being notified of our decision to release your information. Further assistance is located [here](#).

Do I have to go through the internal review process?

No. You may apply directly to the OAIC for an ER by the IC.

If I apply for an internal review, do I lose the opportunity to apply for an external review?

No. You have the same ER rights of our IR decision as you do with our original decision. This means you can apply for an ER of the original decision or of the IR decision.

Do I have to pay for an internal review or external review?

No. Both the IR and ER are free.

How do I apply?

Internal review

To apply for an IR of the decision of either Finance or the Minister, you must send your review in writing. We both use the same contact details, and you must send your review request in writing.

In your written correspondence, please include the following:

- a statement that you are seeking a review of our decision;
- attach a copy of the decision you are seeking a review of; and
- state the reasons why you consider the original decision maker made the wrong decision.

Email: foi@finance.gov.au

Post: The FOI Coordinator
Legal and Assurance Branch
Department of Finance
One Canberra Avenue
FORREST ACT 2603

External review (Information Commissioner Review)

For an ER, you must apply to the OAIC in writing. The OAIC ask that you commence a review by completing their online form [here](#).

Your application must include a copy of the notice of our decision that you are objecting to, and your contact details. You should also set out why you are objecting to the decision.

Email: FOIDR@oaic.gov.au

Post: Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

The IC's enquiries phone line is 1300 363 992.

Can I appeal the Information Commissioner's external review decision?

Yes. You can appeal the Information Commissioner's ER decision to the Administrative Appeals Tribunal (AAT).

There is a fee for lodging an AAT application (as at 17 February 2023 it is \$1,011).

Further information is accessible [here](#).

The AAT's number is 1800 228 333.

Complaints

Making a complaint to the Office of the Australian Information Commissioner

You may make a written complaint to the OAIC about actions taken by us in relation to your application.

Further information on lodging a complaint is accessible [here](#).

Investigation by the Commonwealth Ombudsman

The Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be, or has been, investigated by the IC, the Ombudsman will consult with the IC to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate the complaint, then they are to transfer all relevant documents and information to the IC.

The IC can also transfer a complaint to the Ombudsman where appropriate. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. You will be notified in writing if your complaint is transferred.

Complaints to the Ombudsman should be made online [here](#).

The Ombudsman's number is 1300 362 072.