



**Australian Government**  
**Department of Finance**

Reference: IR FOI 23-24/034  
Contact: FOI Team  
E-mail: [foi@finance.gov.au](mailto:foi@finance.gov.au)

‘Me’  
via Right to Know website

**By email only:** [foi+request-10722-40ce0565@righttoknow.org.au](mailto:foi+request-10722-40ce0565@righttoknow.org.au)

Dear Me,

**Notice of Internal Review Decision (s 54C(4)) – FOI 23-24/034**

The purpose of this letter is to advise you of my decision following your request for internal review of the Department of Finance’s (Finance) decision to refuse part access to documents you requested under the *Freedom of Information Act 1982* (Cth) (FOI Act).

**Background**

*The primary request*

On 29 September 2023, Finance received your request made under the FOI Act to access the following documents:

*“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.*

*This request includes:*

- *Work-related personal information of Finance and ASIC SES (e.g., name, signature block details)*
- *Work-related personal information of SES-equivalent staff in a Minister's office (if applicable)*
- *The domain of any email addresses in documents in scope*

*This request excludes:*

- *Personal information of non-SES staff*
- *Personal information of third parties (that is, this personal information is excluded under s 22, not s 47F...)*

On 19 October 2023, you agreed to revise the scope of your request to the following terms:

*“... 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.*

*I note that personal information of third parties is excluded from the scope of my request. It should be redacted under s 22. Once it is redacted, the remaining 'personal information' is anonymous, and therefore ceases to be personal information. As a result, s 47F will not arise...”*

On 19 February 2024, Finance released five (5) documents which were identified as being in scope of your request. Finance advised you of the decision to grant access in part to those documents.

### ***The internal review request***

On 20 March 2024, you sought an internal review of that decision. Relevantly, you contested Finance’s application of:

- section 22 – Access to edited copies with exempt or irrelevant matter deleted.
- section 42 – Documents subject to Legal Professional Privilege.
- section 47E – Public interest conditional exemptions – certain operations of agencies.

I also understand you have sought a review of the searches and documents identified as part of your request.

The purpose of this letter is to inform you of the outcome of the internal review.

### **Authorised decision-maker**

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

### **Decision**

I have decided to vary the decision relating to 5 documents, which were released to you within the primary request by granting you further access to the documents.

I have also decided to grant you part access to one additional document that was identified during the course of our additional searches. The reasons provided below are applicable to my decision on release of this document.

Specifically, I have decided to:

- vary some exemptions made under section 22(a)(ii) to grant you further access to the documents.
- vary some exemptions made under section 47E(d) to grant you further access to the documents.
- affirm exemptions made in accordance with section 42.
- grant part access to an additional document (document 6) subject to section 42, 47E(d) and irrelevant material removed under section 22.

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

- the terms of your review request;
- the content of the documents that fall within the scope of your request;
- additional searches conducted by Finance;
- consultations with internal staff;
- consultations with third parties in accordance with the FOI Act and submissions made by those third parties;
- the relevant provisions of the FOI Act;
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines); and
- section 11B of the FOI Act.

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

## Reasons

I have considered your submissions seeking an internal review of the decision dated 19 February 2024, and have decided to vary and affirm those decisions, subject to the following provisions:

### *Material related to legal professional privilege (section 42)*

You have submitted that legal professional privilege was not adequately justified and should not be removed on the basis that the author of the documents are not legal professionals for the purposes of section 42. Section 42(1) provides that:

*“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.”*

To determine whether a communication is legally privileged regard must be had to:

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

Further, the FOI guidelines at paragraph 5.174 provides that legal advice can be summarised and communicated while maintaining legal privilege:

*“Modern organisations often work in teams and several people may need to know about privileged communications, both in the requesting client organisation and in the firm of legal advisers. Similarly, a limited disclosure of the existence and effect of legal advice could be consistent with maintaining confidentiality in the actual terms of the advice. The Legal Services Directions 2017 issued by the Attorney-General require legal advices obtained by Australian Government agencies to be shared in particular circumstances, and complying with this requirement does not waive privilege.”*

I am satisfied that parts of the documents contain information that reveals confidential and privileged communications provided by external lawyers to the Commonwealth. This information was communicated to another officer of the agency to assist in their decision of an Act of Grace claim.

Furthermore, I consider that a legal adviser-client relationship exists between the external lawyers and the Commonwealth at the time that the advice was provided, and that the advice was brought into existence for the dominant purpose of giving legal advice.

I note for completeness, that the author of the document therefore is not required to be a legal practitioner for LPP to apply, as the exempt material relates to external legal advice that was provided by a lawyer in their capacity as a legal practitioner.

You have submitted that even if LPP applies, the decision maker is required to consider the ‘real harm’ test and did not. However, the ‘real harm’ test is not a relevant consideration in determining whether advice is legally privileged.<sup>1</sup> Nor is it a relevant consideration under the FOI Act for determining whether a document is legally privileged and therefore exempt under section 42. However, paragraph 5.177 of the FOI guidelines states:

*A ‘real harm’ criterion is not an element of the common law doctrine of legal professional privilege. Likewise, the test is not a feature of the FOI Act. Historically, government, through convention, has referenced the test as a relevant discretionary factor in determining FOI requests.*

Accordingly, I have considered whether the disclosure of the information would result in ‘real harm’ and have not taken into consideration any irrelevant factors as provided in section 11B of the FOI Act. I am satisfied therefore, that disclosure of the legal advice which was provided to assist in the proper decision making of one of the Department’s functions would harm the administration of justice and would harm the sound decision making of the Department.

Accordingly, I am satisfied that LPP applies, and I affirm the primary decision of the application of section 42 to refuse access to parts of documents 1-6.

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

You have submitted that the section 47E exemptions that were applied to the documents are too broad. In considering your submission, I have reviewed the documents and have

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<sup>1</sup> The FOI Guidelines at 5.150.

decided to vary the decisions made in the primary request relating to section 47E. I consider that some of the material is not subject to the exemption, and that on balance, disclosure would be in favour of the public interest.

I have granted you further access to the documents by removing the redactions that were previously applied.

However, I consider that other parts of those documents are exempt under this provision and affirm the decision on those parts of the documents for the following reasons:

Section 47E of the FOI Act provides:

*(d) 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.*

The FOI Guidelines at paragraph 6.101 provide that for section 47E to apply:

*“... the predicted effect needs to be reasonably expected to occur... There must be more than merely an assumption or allegation that damage may occur if the document were to be released. ...*

*An agency cannot merely assert that an effect would occur following disclosure. The particulars of the predicted effect should be identified during the decision making process, including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision maker’s statement of reasons, if they can be included without disclosing exempt material...”*

Documents 1-6 contains information relating to the decision-making process of Act of Grace claims. Specifically, parts of the document discuss submissions made by other Commonwealth departments in response to the Act of Grace claim, which was taken into consideration by the decision maker.

The Department of Finance relies on the advice and submissions of other Commonwealth departments as a prominent element of their decision making process. The material that has been conditionally exempt would, if disclosed, identify key processes and considerations of the Commonwealth when determining the outcome of a claim.

In *DZ and Commonwealth Ombudsman*, it was found that disclosure of certain material could adversely affect the willingness of agencies to cooperate with another investigative body.<sup>2</sup> Furthermore, the IC provided that:

*“It is likely that a situation will arise in future that involves information held across more than one agency and that agencies will be less forthcoming about the issues this raises if the information is not treated confidentially. If agencies are less forthcoming and less willing to consider and consult on the proper course of action in this situation, the [Ombudsman’s] investigations will be less efficient.”*

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<sup>2</sup> *DZ and Commonwealth Ombudsman* [2014] AICmr 137.

I am of the view that the submissions made by ASIC and Treasury – who were consulted about those submission – were provided with the expectation that they would not be disclosed or at the very least, not disclosed to the world at large. Act of Grace is a discretionary payment under the *Public Governance, Performance and Accountability Act 2013*. There is no situation which creates an automatic entitlement to an act of grace payment and a decision maker must consider all relevant facts to determine whether a special circumstance exists to justify a payment.<sup>3</sup> Other agencies provide comprehensive and candid submissions relating to specific matters to assist in the making of an act of grace decision. Finance is reliant on the submissions of other departments to enable it to consider all relevant material relating to the claim and determine whether a special circumstance exists.

I am of the view that there is a real prospect that if confidential submissions obtained with the cooperation of departments were to be released under FOI, departments would be less forthcoming with the breadth of material and views provided in future submissions. If this occurred, this would materially impact the quality of decision making in relation to act of grace applications.

Accordingly, I am satisfied that the documents subject to section 47E(d) are conditionally exempt on the basis that disclosure would or could reasonably be expected to have a substantial adverse effect on the operations of the agency.

#### Public Interest Test (section 11A and 11B)

As I have found that relevant material is conditionally exempt under s 47E(d), I am required to consider whether it would be contrary to the public interest to grant access to the conditionally exempt material at this time (s 11A(5)).

#### *Factors favouring disclosure*

The FOI Act sets out four factors favouring access, which must be considered if relevant. They are that disclosure would:

- (a) promote the objects of the Act;
- (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 personal information (s 11B(3)).

In particular, I consider that (a) and (c) are the relevant factors favouring access to the documents in this instance. I have turned my mind to the public interest considerations of the relevant 2 factors. Specially, I consider that the following public interest factors are in favour of disclosure:

- (a) promotes the objects of the FOI Act, including to:
  - i. inform the community of the Government's operations, including, in particular, the policies, rules, guidelines, practices and codes of conduct followed by the Government in its dealings with members of the community;
  - ii. reveal the reason for a government decision and any background or contextual information that informed the decision;
  - iii. enhance the scrutiny of government decision making;

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<sup>3</sup> *Public Governance, Performance and Accountability Act 2013* (Cth).

...

- (c) promote effective oversight of public expenditure.

*Factors against disclosure*

Comparatively, the FOI Act does not list any factors weighing against disclosure. The FOI guidelines at paragraph 6.22 provide a non-exhaustive list of factors against disclosure. I consider that the following public interest factors against disclosure are relevant:

...

- (h) could reasonably be expected to prejudice an agency's ability to obtain similar information in the future by disclosing considerations and claims made by other agencies.

...

- (n) could reasonably be expected to prejudice the management function of an agency by:
  - disclosing the deliberations and claims of other parties.
  - disclosing the relevant considerations and recommendations of a decision maker.
  - disclose the factors considered when determining an Act of Grace claim.

I note that many of the documents have been varied with only limited exemptions applied. I am satisfied that the public interest factors against disclosure outweighs the factors favouring disclosure. I recognise that disclosure would promote the objects of the FOI Act, specifically revealing the reason for a government's decision and any background that informed that decision. However, I have given weight to the fact that the management of the function, namely the Act of Grace payments, would be adversely prejudiced by the release of this information at this time. Notably, Act of Grace is a discretionary payment which does not have any guidance or criteria. I consider that the disclosure of this information could disclose factors considered by a decision maker and could be used to tailor a claim to assist in the outcome of a claim.

As such, I am satisfied that the documents which I have found to be conditionally exempt under section 47E(d) of the FOI Act would, on balance, be contrary to the public interest.

***Access to edited copies with exempt or irrelevant matter deleted (section 22)***

You have submitted that section 22 of the FOI Act was liberally applied to your request which resulted in information relevant to your request being redacted. I note that the terms of your request included your agreement to remove non-SES personal information and third-party personal information.

I have considered the examples you have provided in your submissions and have varied the primary decision to remove the redaction from the following information within the documents:

- The number of Act of Grace payments.
- The amounts of Act of Grace payments.
- The number of 'statements of reasons'.
- The name of Assistant Secretary or A/g Assistant Secretary.
- Other information I considered to be relevant to your request and should be released to you.

Your submissions also question the redactions of the names of corporations made under section 22. These redactions have been applied in line with the terms of your request and on the basis that they are irrelevant. As you have specified, the terms of your revised request removed third-party personal information. I understand that corporations do not possess personal information.

The Office of the Australian Information Commissioner (OAIC) provides guidance on what is personal information in the government context.<sup>4</sup> The guidance states that information does not have to be explicitly recognised as personal information to constitute personal information under the Privacy Act.<sup>5</sup> The types of information that are personal information are unlimited and can vary widely. This can also include information about an individual's business or work activities. Although the name of the corporation cannot have personal information, the disclosure of this information would likely identify other individuals due to the unique nature of the documents. Specifically, the disclosure of the names of the company would directly or could reasonably identify the owner of the company, and unreasonably disclose the individual's personal information. I consider that the individuals have similar names to the company or can be identified through means of online searches.

The OAIC guidance provides that:

*“An individual can be ‘identifiable’ where the information is able to be linked with other information that could ultimately identify the individual.”*

I am satisfied that the information ‘about’ an individual or individuals in the documents can be inferred by the connection between the information and the individual.

Accordingly, I have affirmed the removal of this information as third-party personal information, on the basis that it is likely to identify other individuals including within the documents.

### ***Validity of searches/Other matters***

In the submissions you have raised concerns surrounding the validity of searches on the basis that you consider:

- Attachments to the decisions should be provided; and
- Only 5 (now 6) decisions were provided, when the scope of your request sought the 10 most recent decisions.

However, your initial request of 29 September 2023 sought only “the Minute that contains the reasons for refusal” for act of grace applications that were under \$100,000. Further your email of 19 October 2023 narrowed the scope to decisions that “resulted in the production of a minute, *or other document containing substantive reasons for decision*”. As a result, it was clear that the scope of your request sought only a statement of reasons for act of grace decisions. As attachments to the decision briefs are supporting documentation to assist the delegate to reach a decision, the attachments are not considered to be part of the substantive reasons for the decision and not within scope of your request. You are able to request these attachments in a new FOI request by emailing [foi@finance.gov.au](mailto:foi@finance.gov.au).

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<sup>4</sup> See: [What is personal information? | OAIC](#)

<sup>5</sup> *Privacy Act 1988* (Cth).



Paragraph 9.34 of the FOI Guidelines provide the principles of internal review decision making, as a tool to determine best practice rather than a formal procedure or criteria. I have considered these principals and have relevantly undertaken additional searches for documents held by the agency and consulted with other agency staff as to the review of your request.

This search process identified 1 additional document in scope of your request. When asked about the decisions located, the business area advised that no more than the 6 documents were identified, as they were the only documents that met the terms of your request. That is, no more than 6 decisions of unsuccessful Act of Grace claims were identified in their searches.

### **Review and appeal rights**

You are entitled to request an external review by the 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,



Rachel Antone  
First Assistant Secretary  
Risk, Insurance & Discretionary Payments Division  
Department of Finance

10 May 2024

**SCHEDULE OF DOCUMENTS RELEVANT TO FOI 23-24/034**

<b>Document No.</b>	<b>Date of Document</b>	<b>No. of Pages</b>	<b>Description of Document</b>	<b>Decision</b>	<b>Relevant exemptions</b>
1	01/10/2021	5	Minutes related to Act of Grace claims	Release in part	s42 s47E(d) s22(a)(ii)
2	30/09/2022	5	Minutes related to Act of Grace claims	Release in part	s42 s47E(d) s22(a)(ii)
3	17/02/2023	6	Minutes related to Act of Grace claims	Release in part	s42 s47E(d) s22(a)(ii)
4	24/02/2023	6	Minutes related to Act of Grace claims	Release in part	s42 s47E(d) s22(a)(ii)
5	3/05/2023	6	Minutes related to Act of Grace claims	Release in part	s42 s47E(d) s22(a)(ii)
6	29/07/2022	4	Minutes related to Act of Grace claims	Release in part	s42 s47E(d) s22(a)(ii)



**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. You can seek a review of our decision by an external review (ER) made by the Australian Information Commissioner (IC).

**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.

**Do I have to pay for an external review?**

No. An ER are free.

**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](mailto: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.