



Australian Government
Attorney-General's Department

Our ref: FOI24/077; CM24/3400

8 May 2024

John B

By email: foi+request-11085-2a6de618@righttoknow.org.au

Dear John

Freedom of Information Request FOI24/077 – Decision letter

The purpose of this letter is to give you a decision about your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) which you submitted to the Attorney-General's Department (the department).

Your request

On 8 February 2024, you requested access to:

My request pertains to the policies and decision-making processes within the Attorney-General's Department or OLSC regarding the remuneration of junior counsel (barristers) engaged by the government.

Specifically, I am seeking documents detailing the following:

- 1. The policy of setting fees for new counsel rates at \$1100 per day.*
- 2. The basis or criteria used to cap fees at a 6-hour day for junior counsel.*
- 3. Any analyses, reports, or correspondence discussing the comparison between the government's rate of \$1100 per day and the average market rate/market cap (which is currently \$2500 for most junior counsel as a starting rate, with a capped 10-hour day).*
- 4. Any analyses, reports, or correspondence discussing why the initial rate of \$1100 per day has not changed in over a decade.*
- 5. Policy or guidance given to agencies relating to the annual adjustments of barristers' fees by government agencies.*

Should AGD consider the application of any conditional exemptions, the following public interest matters should be considered: It is in the public interest to understand the rationale behind the setting of barrister fees at a relatively low amount by government agencies. The fees paid to legal counsel engaged by government departments directly impact the allocation of taxpayer funds and the quality of legal representation in matters of public importance. It is well known that the Commonwealth struggles to brief good barristers because of the low rates, and this problem is only increasing over time because the daily rates are not keeping up with inflation. Transparency regarding the decision-making process behind fee structures not only ensures accountability in the expenditure of public funds but also allows for an informed discourse on the adequacy of

compensation for legal professionals. Additionally, insight into the factors influencing fee caps and adjustments is essential for assessing the fairness and competitiveness of government contracts within the legal services market, ultimately safeguarding the integrity of legal processes and the public's trust in the justice system.

On 12 February 2024, the department acknowledged your request and sought a 30-day extension of time under section 15AA of the FOI Act to process your request. You responded the same day consenting to the extension of time.

On 4 April 2024, the department advised that the processing time of your request had been extended by 30-days to enable the department to consult with a third party.

A decision in relation to your request is due on 8 May 2024.

My decision

I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to freedom of information requests made to the department.

I have identified 5 documents that fall within the scope of your request. I did this by making inquiries of staff likely to be able to identify relevant documents and arranging for comprehensive searches of relevant departmental electronic and hard copy holdings.

In making my decision regarding access to the relevant documents, I have taken the following material into account:

- the terms of your request
- the content of the documents identified as within scope of your request
- the provisions of the FOI Act
- the views of a third party consulted by the department under s 27 and,
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the Guidelines).

I have decided to:

- Grant access in full to 3 documents
- Grant access to 1 document in part with deletion of material which may be regarded as irrelevant to your request under s 22(1) of the FOI Act; and is exempt pursuant to s 47E(d) and s 47F of the FOI Act
- Refuse access in full to 1 document on the basis that the material it contains is variously exempt pursuant to s 47C of the FOI Act.

Additional information

I would like to take this opportunity to clarify a few matters regarding the Commonwealth's policy for the engagement of counsel as set out in Appendix D to the *Legal Services Directions 2017* (Directions).

The counsel rate regime in Appendix D serves to ensure Commonwealth agencies can receive quality legal services at competitive rates. Agencies retain responsibility for selecting counsel and negotiating appropriate rates, having regard to the complexity of the matter and the experience of the counsel. The oversight provided by the regime promotes consistency across government, and helps the Commonwealth leverage its purchasing power to place downward pressure on counsel rates. However, this is not at the expense of allowing appropriate discretion to agencies to negotiate individual rates.

Under Appendix D, once a counsel has an initial Commonwealth rate, agencies have discretion to engage counsel at rates up to the applicable threshold – \$2,300 per day for junior counsel and \$3,500 per day for senior counsel (both rates inclusive of GST). These rates are prescribed in paragraph 5 of Appendix D. Agencies can still engage counsel at rates above these thresholds, with the approval, if they consider a higher rate is appropriate. The requirement for rates above the thresholds to be approved by the Attorney-General or their delegate does not operate as a bar to higher rates, but merely ensures agencies apply higher rates in a consistent manner.

Whilst the relevant approval thresholds of \$2,300 and \$3,500 per day have been in place since 2011, this has not prevented the rates actually approved and paid by the Commonwealth from increasing over time. Further, the criteria used when considering the approval of higher rates include the expertise and experience of the counsel, their current commercial rate, and past approvals for counsel with similar experience and commercial rates. By linking approvals with a counsel's commercial rate, approved Commonwealth rates are inherently connected to increases which occur in the market.

In your request you raise the issue of a capped '6-hour day' for counsel engagement. Under the Directions, there is no cap on the number of hours counsel may work in a day. The approach to counsel rates set out in the Directions is based on a daily rate. It is then a matter for agencies and counsel to negotiate an appropriate hourly rate, in light of the agreed daily rate and the particulars of the matter. Pursuant to paragraph 6 of Appendix D to the Directions, hourly rates cannot exceed one-sixth of counsel's daily rate without the approval of the Attorney-General or their delegate. Because of this, it is common that agencies and counsel agree to an hourly rate that is one-sixth of the agreed daily rate, in effect resulting in a 6-hour cap to the work day. However, it is open to agencies and counsel to agree to an hourly rate that is less than one-sixth of the daily rate, resulting in a higher cap for the work day. Higher daily rates can also be negotiated, subject to approval, to allow a given hourly rate to extend over a work day longer than 6 hours. These are aspects for negotiation between agencies and counsel, and are not limited by the Directions.

Your request also references annual adjustments of barristers' fees. Whilst it is a matter for each agency how it approaches the negotiation of fees with counsel, from the perspective of the Attorney-General's Department there is no annual adjustments of barristers' fees. Rates above the thresholds mentioned above can be approved either for a specific matter (referred to as a 'one-off' rate), or for the barrister for all future Commonwealth work ('ongoing' rate). An approved ongoing rate above the relevant threshold allows any agency to engage that counsel for a fee up to and including that approved rate, without requiring further approval. These ongoing rates are not reviewed and adjusted routinely. Rather, the department considers whether to approve a higher ongoing rate for a counsel when requested by an agency. This consideration is informed by the history of agencies engaging the counsel at or close to the requested rate (usually on the basis of one-off approvals), thereby exhibiting a demand for that particular counsel at that rate.

Further information on engagement of counsel is available on the Attorney-General's Department website <https://www.ag.gov.au/legal-system/office-legal-services-coordination/engagement-counsel>.

Attachments

Your review rights under the FOI Act are set out at **Attachment A** to this letter.

The schedule of documents at **Attachment B** sets out brief information about each document within the scope of your request and my decision in relation to access to each of those documents.

The statement of reasons at **Attachment C** sets out the reasons for my decision to refuse access to certain material to which you have requested access.

The documents to which I have decided to grant full or partial access under the FOI Act are at **Attachment D**.

Questions about this decision

If you wish to discuss this decision, the FOI case officer for this matter is Radia, who can be reached on (02) 6141 6666 or by email to foi@ag.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Johnson', enclosed in a thin black rectangular border.

Michael Johnson
Assistant Secretary
Office of Legal Services Coordination

Attachments

- Attachment A: Review rights
- Attachment B: Schedule of documents
- Attachment C: Statement of reasons
- Attachment D: Documents



Australian Government
Attorney-General's Department

Attachment A – Your review rights

If you disagree with my decision, you may ask for an internal review or Information Commissioner review. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

You may apply for an internal review of my decision within 30 days of receiving this letter. Your request for internal review must be in writing, and should provide reasons why you believe the review is necessary. You may apply by emailing foi@ag.gov.au or by post to:

Director, Freedom of Information and Privacy Section
Strategy and Governance Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Another officer will make a new decision on your request within 30 days of receiving your request for internal review. If you are unhappy with the internal review decision, you may ask for an information Commissioner review.

Information Commissioner review

Information Commissioner review requests must be submitted within 60 days of receiving this letter. Your request should include your contact details, a copy of my decision, and the reasons why you disagree with my decision. You can apply in one of the following ways:

Online: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

Email: foidr@oaic.gov.au

Mail: Director of FOI Dispute Resolution, GPO Box 5288, Sydney NSW 2001.

More information about Information Commissioner review is available at:

https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-reviews/information-commissioner-review_

FOI Complaints

If you are concerned about how we handled your FOI request, please let us know what we could have done better, as we may be able to rectify the situation. If you are not satisfied with our response, you can make a complaint to the Information Commissioner. Your complaint must be in writing, and can be lodged in one of the following ways:

Online: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1

Email: foidr@oaic.gov.au

Mail: Director of FOI Dispute Resolution, GPO Box 5288, Sydney NSW 2001.

More information about Freedom of information complaints is available at:

https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-complaints_



Attachment B - Schedule of documents - Freedom of Information Request FOI24/077

Doc no.	Date	No. pgs	Description	Access decision	Exemption/s applied
1	2 July 2018	4	<i>Legal Services Directions 2017, Appendix D</i>	Grant access in full	Nil – publicly available document
2	1 April 2019	96	OLSC - Standard Operating Procedures - Counsel rates - update approved October 2023	Grant access in part	Section 22(1): Irrelevant material Section 47E(d): Public interest conditional exemption – Certain operations of agencies Section 47F(1): Public interest conditional exemption - Personal Privacy
3	28 April 2021	5	Briefing	Refuse access	Section 47C(1): Public interest conditional exemption – Deliberative processes
4	3 June 2021	1	Letter	Grant access in full	Nil
5	14 December 2023	1	Counsel Rate Table	Grant access in full	Nil



Attachment C - Statement of reasons - FOI24/077

This document, when read in conjunction with the schedule of documents at **Attachment B**, provides information about the reasons I have decided not to disclose certain material to you in response to your request for documents under the *Freedom of Information Act 1982* (FOI Act).

Section 22: Access to edited copies with exempt or irrelevant matter deleted

Section 22 of the FOI Act provides that if an agency decides to give access to a document that would disclose information that would reasonably be regarded as irrelevant to the request, and it is possible for the agency to prepare a copy (an *edited copy*) of the document, modified by deletions, the agency must prepare the edited copy and give the applicant access to it.

In deciding to delete material which would reasonably be regarded as irrelevant to a request, the FOI Guidelines issued by the Office of the Australian Information Commissioner (OAIC) (the Guidelines) provide at paragraph 3.95 that:

It is important for agencies to keep in mind that the implicit purpose of s 22 is to facilitate access to information promptly and at the lowest reasonable cost through the deletion of material that can readily be deleted, and that an applicant has either agreed or is likely to agree that the material is irrelevant

Having regard to the particular content of the document for your request, I decided that material within document 2 is irrelevant to the scope your request, specifically points 1-5. This includes information about the administrative procedures used by the department to process counsel rate applications and enquiries. Given this, I considered it likely that you would also agree that this information is irrelevant to your request and have deleted this material under s 22 of the FOI Act.

Public interest conditional exemptions

An agency or minister can refuse access to a document or part of a document that is conditionally exempt from disclosure under Division 3 of Part IV of the FOI Act. Documents for your request which are conditionally exempt under Division 3 relate to the following categories:

- deliberative processes (s 47C)
- certain operations of agencies (s 47E)
- personal privacy (s 47F)

Brief information about each of the conditional exemptions applied when making a decision about disclosure of each of the documents to which you have requested access is set out below. Additional information about each of these conditional exemptions can be obtained from the Guidelines available at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions>.

Where a document is assessed as conditionally exempt, it is only exempt from disclosure if disclosure would, on balance, be contrary to the public interest. The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making.

A single public interest test applies to each of the conditional exemptions. This public interest test includes certain factors that *must* be taken into account where relevant, and other factors which *must not* be taken into account. My reasoning in regard to the public interest are set out under the heading '*Section 11A(5): Public interest test*' below.

Section 47C: Public interest conditional exemption - deliberative processes

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.

In applying this exemption, paragraph 6.55 of the Guidelines provide that:

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.

I am satisfied that the relevant material in document 3 is not purely factual and is deliberative matter within the meaning of s 47C(1), being in the nature of and relating to opinion, advice and recommendations. The deliberative matter described is a document created for the purpose of briefing the Attorney-General in relation to a response to correspondence from the ACT Bar Association.

Accordingly, I am satisfied that this material is conditionally exempt under s 47C(1) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest and have included my reasoning in this regard below under the heading '*Section 11A(5): Public interest test*'.

Section 47E: Public interest conditional exemption - certain operations of agencies

Section 47E(d)

Section 47E(d) of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Material within document 2 consists of information about the operations of the department, the disclosure of which could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the department's operations. Specifically, the material contains procedural details about how the department may use databases and commercial rates to process applications for a Commonwealth counsel rate. The disclosure of this information would (or could reasonably be expected to) undermine the maintenance of confidence that external parties place in the department in handling sensitive information, thereby undermining the department's ability to conduct its operations in an efficient manner.

Accordingly, I am satisfied that this material is conditionally exempt under s 47E(d) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest and have included my reasoning in this regard below under the header '*Section 11A(5): Public interest test*'.

Section 47F: Public interest conditional exemption - personal privacy

Section 47F(1) of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person). For the purposes of the FOI Act, personal information is defined as: information or an opinion about an identified individual, or an individual who is reasonably identifiable whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not.

I have identified the names of private individuals within document 2. In deciding whether to conditionally exempt the personal information described above, I have had regard to the following factors set out in s 47F(2) of the FOI Act:

- (a) the extent to which the information is well known;*
- (b) whether the people to whom the information relates are 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 considers relevant.*

My reasons for applying the s 47F(1) exemption to each of the categories of personal information listed above are set out below.

In my view the relevant personal information is not well known, nor are the persons concerned generally known to be (or to have been) associated with the particular matters dealt with in the documents. The information is known only to the persons whose information appears in the documents and departmental officers with responsibility for the matters concerned. I consider it likely that the persons concerned would object to disclosure of their personal information and, noting that the FOI Act does not control or restrict any subsequent use or dissemination of information disclosed, I consider that disclosure could reasonably be expected to cause distress to the persons concerned.

Accordingly, I am satisfied that the personal information of individuals is conditionally exempt under s 47F(1) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in this regard under the header '*Section 11A(5): Public interest test*'.

Section 11A(5): Public interest test

Access to a conditionally exempt document must generally be given unless doing so would be contrary to the public interest. The Guidelines issued by the OAIC provide at paragraph 6.5 that the public interest test is considered to be:

- *something that is of serious concern or benefit to the public, not merely of individual interest,*
- *not something of interest to the public, but in the interest of the public,*
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests,*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

In deciding whether to disclose conditionally exempt material, I have considered the factors favouring access set out in s 11B(3) of the FOI Act. I have not taken into account the irrelevant factors listed under s 11B(4) of the FOI Act.

Of the factors favouring disclosure, I consider that release of the conditionally exempt material identified for your request would promote the objects of the FOI Act, including by informing the community of the Government's operations.

The FOI Act does not list any specific factors weighing against disclosure. However, I have considered the non-exhaustive list of factors against disclosure in the Guidelines as well as the particular circumstances relevant to the conditionally exempt material.

I consider the release of the conditionally exempt material could, as the case may be, reasonably be expected to prejudice:

- the protection of an individual's right to privacy, including where the personal information is that of a non-government employee,
- prejudice the competitive commercial activities of an agency and,
- the management function of the Attorney-General's Department.

On balance, I consider the factors against disclosure outweigh the factors favouring access and that providing access to the conditionally exempt material identified for your request would be contrary to the public interest.