



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI/2016/192

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: William Summers

DECISION BY: Debbie Arnold
Acting Assistant Secretary
Honours, Symbols and Legal Policy Branch

The FOI request

In an email dated 8 November 2016 the applicant made a request to the Department of the Prime Minister and Cabinet (the Department) under the *Freedom of Information Act 1982* (the FOI Act) in the following terms:

Under the terms of the Freedom of Information Act, I am requesting a copy of all letters sent from the Prime Minister(s) of Australia to Queen Elizabeth II (or her representatives) since 1 January 2013.

Authorised decision-maker

I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

Searches for relevant documents

Having regard to my knowledge of where documents potentially relevant to the applicant's request would be held, if they existed, I arranged for the following searches to be undertaken:

- The Department's file management system was searched for potentially relevant files.
- Inquiries with officers who have knowledge of the subject matter and would be likely to be able to locate documents within the scope of the request.

As a result of these searches I have identified 11 documents that fall within the scope of the request, as described in the schedule at [Attachment A](#).

Material taken into account

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

- The content of the 11 documents that fall within the scope of the request;
- The FOI Act (including, in particular, sections 33 and 47C); and
- The Guidelines issued by the Australian Information Commissioner under section 93A of the *Freedom of Information Act 1982* (the FOI Guidelines).

Decision

I have decided to refuse access to Documents 1-11, as indicated in the schedule at Attachment A.

Reasons for decision

Section 33 Documents affecting national security, defence or international relations

Section 33 of the FOI Act provides:

A document is an exempt document if disclosure of the document under this Act:

(a) would, or could reasonably be expected to, cause damage to:

(i) the security of the Commonwealth;

(ii) the defence of the Commonwealth; or

(iii) the international relations of the Commonwealth; or

(b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

In paragraph 5.31 the FOI Guidelines explain that:

The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible damage, such as loss of trust and confidence in the Australian Government or one of its agencies. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; the nature and extent of the relationships. There must also be real and substantial ground for the conclusion that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each.

Document 1 contains material communicated in confidence from the Australian Prime Minister to Her Majesty the Queen. I am satisfied that Document 1 was sent and received in the expectation of confidentiality, disclosing this document could reasonably be expected to cause damage to the international relations of the Commonwealth by diminishing the confidence of authorities, agencies and representatives of other countries that Australia is a reliable recipient of confidential communications.

I have therefore decided to refuse access to Document 1 in accordance with section 33 of the FOI Act.

Section 47C - Deliberative processes

A document is conditionally exempt under section 47C of the FOI Act if its disclosure would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency, a Minister or the Government of the Commonwealth. However, purely factual information is not deliberative matter, in accordance with section 47(2) of the FOI Act.

Do the documents contain deliberative matter?

I am satisfied that Documents 2 – 11 contain deliberative matter, in the form of recommendations and advice to Her Majesty the Queen. Each document was prepared to inform a deliberative process with recommendations and advice relating to functions of an agency.

Was the deliberative matter obtained, prepared or recorded in the course of, or for purpose of, the deliberative process involved in the functions of an agency, Minister or the Government of the Commonwealth?

I am satisfied that Documents 2 – 11 contain deliberative material for the purpose of section 47C (1) of the FOI Act because the information consists of advice and recommendations prepared by the Prime Minister. Each document was created for instances where recommendations were required to perform agency functions.

Are the documents excluded from conditional exemption?

Section 47C (2) provides that deliberative matter does not include operational information and purely factual material. However, as the FOI Guidelines explain at paragraph 6.73, 'purely factual material' does not extend to factual material that is embedded in or intertwined with the deliberative content such that it is impracticable to excise it.

To the extent that factual material is included in these documents, I am satisfied that no part of the documents constitutes purely factual or operational material. Any factual material in the documents is so closely intertwined with the advice, opinion and recommendation in the documents that it is not reasonably possible to edit the documents to permit the factual information to be disclosed.

In preparing an edited copy of a document so that it does not contain exempt or irrelevant material, the FOI Guidelines, at paragraph 3.88, provide that:

...an agency or Minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.

I am satisfied that is the case in this instance and that the applicant would not wish to have access to documents edited to the extent required to delete the deliberative material from them.

I have therefore decided that Documents 2- 11 contain deliberative matter for the purposes of section 47C (1) of the FOI Act as the information consists of recommendations prepared by the Prime Minister in the course of the deliberative processes involved in the functions of the Government of the Commonwealth.

Section 11A (5) - Public interest factors

Subsection 11A (5) of the FOI Act provides that access must generally be given to a conditionally exempt document unless it would, on balance, be contrary to the public interest. In determining whether disclosing the conditionally exempt information would, on balance, be contrary to the public interest, I have not taken into account any irrelevant factors identified in section 11B(4) of the FOI Act.

Public interest factors favouring disclosure

Section 11B of the FOI Act lists the public interest factors favouring access. Of these factors, I consider that one is relevant to your request: promoting the objects of the FOI Act as disclosing the exempt material may increase public participation in Government processes.

Public interest factors favouring nondisclosure

In the decision in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 (8 December 2015), Deputy President S A Forgie in the Administrative Appeals Tribunal accepted that public servants need to be able to give totally frank advice to Ministers, that on occasions they need to do so on an understanding that the advice will be confidential, and that Ministers need to be confident that advice provided by their department is full and frank.

I consider that disclosing the exempt information in Documents 2 – 11 could reasonably be expected to adversely affect the relationship between the Prime Minister and Her Majesty the Queen because the effectiveness of such a relationship requires trust and confidence. Communications between Her Majesty the Queen and the Prime Minister are sent and received with the expectation of confidentiality.

I consider that public interest in maintaining the confidentiality of the letters prepared by the Prime Minister to Her Majesty the Queen should be accorded significant weight because of the importance for the effective and efficient operation of the Government that Her Majesty the Queen is assured of being provided with comprehensive, frank and confidential recommendations. Disclosing this deliberative material could reasonably be expected to have adverse impact on the relationship between the Department and Her Majesty the Queen.

Accordingly, I attribute significant weight to this public interest factor favouring nondisclosure.

Balancing the public interest

I am satisfied that the public interest factors against access outweigh the public interest factors favouring disclosure. As a result, I am satisfied that disclosing the exempt documents would,

on balance, be contrary to the public interest. I have therefore decided that Documents 2 – 11 are exempt in full under section 47C of the FOI Act.

Processing and access charges

I have decided not to impose processing charges in respect of the applicant's request.

Review rights

Information about the applicant's rights of review is attached to this decision.

Complaint rights

The applicant may make a complaint to the Information Commissioner about the Department's actions in relation to this decision. Making a complaint about the way the Department has handled an FOI request is a separate process to seeking review of the Department's decision. Further information about how to make a complaint is available at <https://www.oaic.gov.au/freedom-of-information/foi-complaints>.



Debbie Arnold
Acting Assistant Secretary
Honours, Symbols and Legal Policy Branch
18 January 2017

FOI REQUEST: FOI/2016/192
SUBJECT – APPLICANT



FOI

Document	Date	Description	Number of pages	Decision
1.	Novemeber 2010	Correspondence between the Prime Minister and Her Majesty The Queen	1	Exempt in full under section 33 of the FOI Act
2.	Decemeber 2013	Correspondence between the Prime Minister and Her Majesty The Queen	1	Exempt in full under section 47C of the FOI Act
3.	March 2014	Correspondence between the Prime Minister and Her Majesty The Queen	1	Exempt in full under section 47C of the FOI Act
4.	June 2014	Correspondence between the Prime Minister and Her Majesty The Queen	1	Exempt in full under section 47C of the FOI Act
5.	Decemeber 2014	Correspondence between the Prime Minister and Her Majesty The Queen	1	Exempt in full under section 47C of the FOI Act
6.	February 2015	Correspondence between the Prime Minister and Her Majesty The Queen	1	Exempt in full under section 47C of the FOI Act
7.	March 2015	Correspondence between the Prime Minister and Her Majesty The Queen	1	Exempt in full under section 47C of the FOI Act
8.	March 2015	Correspondence between the Prime Minister and Her Majesty The Queen	1	Exempt in full under section 47C of the FOI Act
9.	April 2015	Correspondence between the Prime Minister and Her Majesty The Queen	1	Exempt in full under section 47C of the FOI Act
10.	May 2016	Correspondence between the Prime Minister and Her Majesty The Queen	1	Exempt in full under section 47C of the FOI Act
11.	October 2016	Correspondence between the Prime Minister and Her Majesty The Queen	1	Exempt in full under section 47C of the FOI Act



Freedom of information – Your review rights

July 2012

If you disagree with the decision of an Australian Government agency or minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if someone is to be granted access to information that is about you, if the agency has informed you that it will impose a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by the agency, and external review by the Australian Information Commissioner.

Internal review

If an agency makes an FOI decision that you disagree with, you can ask the agency to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless the agency extended the application time. You should contact the agency if you wish to seek an extension. The agency must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed.

Internal review is not available if a minister or the chief officer of the agency made the decision personally.

Review by the Information Commissioner

The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act.

Is a review the same as a complaint?

No. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that an agency decision is wrong, it will be treated as an application for a review. Your matter will be treated as a complaint when a review would not be practical

or would not address your concerns (for example, if you were not consulted about a document that contains your personal information before it was released). For more information see [How do I make an FOI complaint?](#)

Do I have to go through the agency's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.


Do I have to pay?

No. The Information Commissioner's review is free.

How do I apply?

You must apply in writing and you can lodge your application in one of the following ways:

online: www.oaic.gov.au
post: GPO Box 5218, Sydney NSW 2001
fax: +61 2 9284 9666
email: enquixxx@xxxx.xxv.au
in person: Level 3
175 Pitt Street
Sydney NSW 2000



An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Can I get help in completing the application?

Yes. The Information Commissioner's staff are available to help you with your application if anything is unclear.

When do I have to apply?

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the Information Commissioner within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances.

Who will conduct the review?

Staff of the Information Commissioner will conduct the review. Only the Information Commissioner, the FOI Commissioner or the Privacy Commissioner can make a decision at the end of the review.

Does the Information Commissioner have to review my matter?

No. The Information Commissioner may decide not to review an application that is frivolous, misconceived or lacking in substance, or if you fail to cooperate with the process or cannot be contacted after reasonable attempts. You cannot appeal against that decision.

Alternatively the Information Commissioner may decide that the Administrative Appeals Tribunal (AAT) would be better placed to review the matter, and if so, will advise you of the procedure for applying to the AAT. This will not be common.

Can I withdraw my application?

Yes. An application can be withdrawn at any time before the Information Commissioner makes a decision.

What happens in the review process?

The review process is designed to be as informal as possible. The Information Commissioner may contact you or any of the other parties to clarify matters and seek more information. The Information Commissioner may also ask the agency or minister to provide reasons for their decision if the reasons given were inadequate.

Most reviews will be made on the basis of the submissions and papers provided by the parties. Sometimes the Information Commissioner may decide to hold a hearing if one of the parties applies. Parties may participate in a hearing by telephone. If confidential matters are raised, the hearing may be held partly or wholly in private.

Will there be other parties to the review?

There may be. The Information Commissioner can join other parties who are affected by the application. For example, if you are objecting to someone else being granted access to information that concerns you, that person may be joined in the review.

Can someone else represent me?

Yes, including a lawyer. However, the Information Commissioner prefers the process to be as informal and cost-effective as possible and does not encourage legal representation.

Will the Information Commissioner look at all documents, including ones that are claimed to be exempt?

Yes. The Information Commissioner's review is a fresh decision, so all the relevant material must be examined, including documents that the agency or minister has declined to release. Developments that have occurred since the original decision may also be considered.

What powers does the Information Commissioner have?

While the review process is designed to be informal, the Information Commissioner has formal powers to require anyone to produce information or documents, to compel anyone to attend to answer questions and to take an oath or affirmation that their answers will be true.

An agency or minister can also be ordered to undertake further searches for documents.

What decisions can the Information Commissioner make?

After reviewing a decision, the Information Commissioner must do one of three things:

- set the decision aside and make a fresh decision
- affirm the decision, or
- vary the decision.

The Information Commissioner will give reasons for the decision.

Will the decision be made public?

Yes. The Information Commissioner will publish decisions on the website. Exempt material (that is, material that is not released) will not be included. Nor will the name of the review applicant, unless that person requests otherwise or there is a special reason to publish it.

What can I do if I disagree with the Information Commissioner's review decision?

You can appeal to the AAT. The Information Commissioner will not be a party to those proceedings. There is a fee for lodging an AAT application, although there are exemptions for health care and pension concession card holders, and the AAT can waive the fee on financial hardship grounds. For further information see www.aat.gov.au/FormsAndFees/Fees.htm.

FOI applications made before 1 November 2010

The Information Commissioner can only review an agency's or minister's FOI decision if you made your FOI request on or after 1 November 2010. If you made your FOI request before 1 November, even if the decision was made after that date, the review process is different.

You must first ask the agency for internal review of the decision. You may then appeal to the AAT if you are not satisfied with the decision.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

telephone: 1300 363 992

email: xxxxxxxx@xxxx.xxx.au

write: GPO Box 5218, Sydney NSW 2001
or visit our website at www.oaic.gov.au