



## Internal review decision made under the *Freedom of Information Act 1982*

Internal review decision and reasons for decision of Frank White, Assistant Director,  
Information Law, Legal Services & Assurance

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**Applicant:** Mr Jackson Gothe-Snape  
**Date of primary decision:** 23 December 2016  
**FOI reference number:** FOI 12492  
**Internal review decision date:** 23 January 2017  
**Internal review reference number:** IR 13334

Dear Mr Gothe-Snape

1. The purpose of this letter is to give you a decision about your request for internal review under the *Freedom of Information Act 1982* (FOI Act).
2. I have made a decision to affirm the original decision made by Nadia Vittoria, Legal Officer, Legal Services & Assurance, to release documents subject to your request in part.

### Summary

3. I, Frank White, Assistant Director, Information Law, Legal Services & Assurance, am an officer authorised by the Secretary of the Department of Veterans' Affairs (the Department) to make decisions about access to documents in the possession of the Department in accordance with section 23(1) of the *Freedom of Information Act 1982* (the FOI Act).
4. On 15 November 2016 you made a request for access to documents in the possession of the Department of Veterans' Affairs (the Department). Your request sought access to:  
  
*'...the topics list for briefs created in preparation for hearings of Senate 2016-2017 Supplementary Budget Estimates'*
5. On 23 December 2016, you were provided with a decision relating to access to documents within scope of your request. The documents relevant to your request were provided to you in part, in accordance with section 47C of the FOI Act.
6. On 23 December 2016 you requested an internal review of the decision to grant access in part.

7. The Department has undertaken a search of its records and has identified all documents that fall within the scope of your request, as set out above. The documents relevant to your request are listed in the schedule of documents at Schedule 1.

### **Decision and Reasons for Decision**

8. I have made a decision to affirm the original decision made by Nadia Vittoria, Legal Officer, Legal Services & Assurance, to release documents subject to your request in part.
9. In accordance with Section 22(2), I have decided to provide access to an edited copy, modified by deletions.
10. In accordance with Section 26(1)(a) of the FOI Act, the findings on any material question of fact, referring to the material on which those finding were based and the reasons for my decision to grant partial access to documents follow.
11. I have taken the following material into account in making my decision:
- the content of the documents that fall within the scope of your request;
  - Sections 3, 11 and 11A of the FOI Act which give the Australian community a legally enforceable right to obtain access to information held by the Government of the Commonwealth. I also considered the following provisions of the FOI Act relevant to my decision:
    - Section 11B Public interest exemption – factors
    - Section 22 Access to edited copies with exempt or irrelevant material deleted
    - Section 47C Public interest conditional exemptions--deliberative processes
  - the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines).
12. A full extract of all provisions I used to make my decision are provided in Schedule 2.

### **Conditional Exemptions**

#### ***Deliberative processes (s47C)***

13. A document may be conditionally exempt if it includes deliberative matter. 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
  - a consultation or deliberation that has taken place
  - in the course of, or for the purposes of, a deliberative process of the agency or minister (s 47C(1)).
14. I am satisfied that the Senate Estimates topic list was prepared for the purposes of a deliberative process of both the Department of Veterans' Affairs, the Minister for Veterans' Affairs and the Minister representing the Minister for Veterans' Affairs at Senate Estimates.

15. The specific deliberative process is the decision-making process about answering questions at Senate Estimates hearings. The document, being the list of potential topics for discussion at Senate Estimates, forms an integral part of this deliberative process and was created following deliberations about which topics were likely to be addressed during the hearing.
16. In reaching my decision, I have also considered the Australian Information Commissioner's determination in *Penny Wong and Department of the Prime Minister and Cabinet [2016] AICmr 6*. In that case, the Commissioner decided that the document did not contain deliberative matter, as it did 'not reveal any opinions, advice, recommendations, consultations or deliberations that have taken place.'
17. However, in order to satisfy the criteria for conditional exemption, the document may also contain 'matter ... **relating to** (emphasis added), opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place...'. This document relates to the deliberations of the Department and the Minister outlined above, and consequently I consider that it meets the criteria for the conditional exemption.
18. Having decided that the document meets the criteria for the conditional exemption, I must now decide whether release of the document is contrary to the public interest.

#### ***Public interest conditional exemption***

19. Section 11A(5) provides that an agency 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 would, on balance, be contrary to the public interest.
20. In order to assess whether release of the exempt material would be contrary to the public interest, I considered the following factors which favour disclosure:
  - (a) promote the objects of the Act.
21. I also considered the following factors which do not favour disclosure:
  - (a) disclosure would reveal the substance of matters considered, or to be considered by Cabinet;
  - (b) disclosure could reasonably be expected to impede the ability of senior officers and Ministers to make decisions about answering questions at Senate Estimates hearings; and
  - (c) disclosure has the potential to anticipate decisions, arrangements and the compilation of future lists of issues which are yet to be determined.
22. On balance, I considered that the public interest against disclosure to be more persuasive than the public interest factors favouring disclosure. I am satisfied that the public interest is to withhold the exempt material.
23. In reaching this decision, I have decided that it would not be contrary to the public interest to release the topics which were discussed at the Supplementary Budget Estimates hearing in 2016. I have made this decision because the fact that these topics were discussed has become a matter of public record, and it cannot be said that it would be contrary to the public interest to release this material.

## Your rights of review

### Your rights of review

24. If you are dissatisfied with my decision, you may apply for Information Commissioner review of the decision.

### Information Commissioner Review

25. Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

**Online:** [www.oaic.gov.au](http://www.oaic.gov.au)

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

**Facsimile:** (02) 9284 9666

**Email:** [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

**In person:** Level 3, 175 Pitt Street, Sydney NSW.

26. More information about your review rights under the FOI Act is available in Fact Sheet 12 published by the Office of the Australian Information Commissioner: <http://oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-fact-sheets/foi-factsheet-12-your-review-rights>

### Contacts

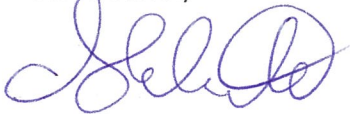
27. If you wish to discuss this decision, please do not hesitate to contact me using the following details:

**Post:** Legal Services, Assurance & Deregulation, Department of Veterans' Affairs  
GPO Box 9998, Canberra ACT 2601

**Facsimile:** (02) 6289 6337

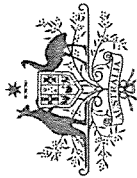
**Email:** [foi@dva.gov.au](mailto:foi@dva.gov.au)

Yours sincerely



Frank White  
Assistant Director  
Information Law  
Legal Services & Assurance

23 January 2017



## Schedule of documents

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Doc ref	Date of document	Document description	Pages	Decision	Exemption provision
1	October 2016	Hot Topics Briefs – Supplementary Budget Estimates October 2016	2	Part access	s 47C



## Schedule of relevant provisions in the FOI Act

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### 3 Objects—general

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:
  - (a) requiring agencies to publish the information; and
  - (b) providing for a right of access to documents.
- (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
  - (a) increasing public participation in Government processes, with a view to promoting better informed decision-making;
  - (b) increasing scrutiny, discussion, comment and review of the Government's activities.
- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

### 11 Right of access

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
  - (a) a document of an agency, other than an exempt document; or
  - (b) an official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
  - (a) any reasons the person gives for seeking access; or
  - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

### 11A Access to documents on request

#### *Scope*

- (1) This section applies if:
  - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
    - (i) a document of the agency; or
    - (ii) an official document of the Minister; and
  - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

### *Mandatory access—general rule*

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

### *Exemptions and conditional exemptions*

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (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.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
- (a) a conditionally exempt document; and
  - (b) an exempt document:
    - (i) under Division 2 of Part IV (exemptions); or
    - (ii) within the meaning of paragraph (b) or (c) of the definition of exempt document in subsection 4(1).

## **22 Access to edited copies with exempt or irrelevant matter deleted**

### *Scope*

- (1) This section applies if:
- (a) an agency or Minister decides:
    - (i) to refuse to give access to an exempt document; or
    - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
  - (b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:
    - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
    - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
  - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
    - (i) the nature and extent of the modification; and
    - (ii) the resources available to modify the document; and
  - (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

### *Access to edited copy*

- (2) The agency or Minister must:
- (a) prepare the edited copy as mentioned in paragraph (1)(b); and

- (b) give the applicant access to the edited copy.

*Notice to applicant*

- (3) The agency or Minister must give the applicant notice in writing:
  - (a) that the edited copy has been prepared; and
  - (b) of the grounds for the deletions; and
  - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

**23 Decisions to be made by authorised persons**

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.
- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

**26 Reasons and other particulars of decisions to be given**

- (1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:
  - (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
  - (aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
- (c) give to the applicant appropriate information concerning:
  - (i) his or her rights with respect to review of the decision;
  - (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
  - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.
- (1A) Section 13 of the Administrative Decisions (Judicial Review) Act 1977 does not apply to a decision referred to in subsection (1).
- (2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.  
(see section 11A).



## Public interest conditional exemptions

### 47C Public interest conditional exemptions—deliberative processes

#### *General rule*

- (1) 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:
  - (a) an agency; or
  - (b) a Minister; or
  - (c) the Government of the Commonwealth; or
  - (d) the Government of Norfolk Island.

#### *Exceptions*

- (2) Deliberative matter does not include either of the following:
  - (a) operational information (see section 8A);
  - (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

- (3) This section does not apply to any of the following:
  - (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
  - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
  - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).