



Statement of reasons made under the *Freedom of Information Act 1982*

Decision and reasons for decision of Nadia Vittoria, Legal Officer, Information Law, Legal Services & Assurance

Applicant: Mr James Smith

Decision date: 27 April 2017

FOI reference number: FOI 14217

Dear Mr Smith,

Freedom of Information Request: FOI 14217

1. I have made a decision to release the documents relevant to your request in part.

Summary

2. I, Nadia Vittoria, Legal Officer, 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).
3. On 27 April 2017 you made a request for access to documents in the possession of the Department. Your request sought access to:

I request all documents wherein the outcome of any enterprise bargaining ballots were communicated to the department by the entity who undertook the ballots.

This shall include the YES/NO vote amounts or percentages as well as any additional information related to the vote. For example, a breakdown of the vote by employee location, or APS level.

The scope of this request covers any such documents that were received as a result of EBA offers made to staff under:

Workplace Bargaining Policy 2015

or

Australian Government Public Sector Workplace Bargaining Policy 2014

4. I have decided not to impose a charge in relation to this request, in accordance with regulation 3(1) of the *Freedom of Information (Charges) Regulations 1982*.

5. The Department has undertaken a reasonable search of its records and has identified two documents relevant to your request, as set out above. The documents relevant to your request are listed at Schedule 1.

Decision

6. I have made a decision to release the documents relevant to your request in part. The documents that I have chosen to grant access in part are set out in Schedule 1, together with applicable exemption provisions. Where I have decided to grant access in part, I have provided access to an edited copy of documents, modified by deletions in accordance with section 22(2) of the FOI Act.
7. During the processing of your request we consulted a third party potentially affected by the release of the documents.

Material taken into account

8. In accordance with section 26(1)(a) of the FOI Act, my findings on any material question of fact, the material on which those findings were based and the reasons for my decision to grant partial access to the documents follow.
9. I have taken the following material into account in making my decision:
 - the content of the documents that falls 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 22 Access to edited copies with exempt or irrelevant material deleted
 - Section 47E Public interest conditional exemptions--certain operations of agencies
 - the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines);
 - the views of a third party consulted by the Department under section 27.
10. In regards to the application of section 22, I have interpreted the scope of your request as seeking information regarding the outcome of the enterprise bargaining ballots, and not including information about administrative or operational matters relating to the ballot process. For example, I have considered irrelevant information relating to background information about the ballot, information about the voter roll, details about the various voting methods available, the use of help desk facilities during the ballot period and screen shots of the various voting and certification forms.
11. A full extract of all FOI Act provisions used to make my decision are provided in Schedule 2.

Reasons for Decision

12. I have decided to grant access to documents within the scope of your request, subject to the following exemptions in accordance with the FOI Act:

Public interest conditional exemptions--certain operations of agencies

13. Section 47E of the FOI Act provides that a document is conditionally exempt if its disclosure 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, by Norfolk Island or by an agency;
 - (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
14. The information I have considered conditionally exempt under this provision, is data breaking down the number and percentage of "Yes" and "No" votes by location. The outcome of the final ballot vote was extremely close, and some staff held strong views about the proposed agreements. Release of the conditionally exempt information would adversely affect DVA's operations, as it would reveal voting trends in each State and Territory (and for overseas voters).
15. In some locations there was also a small number of potential and actual voters. Staff were assured of the confidentiality of their votes, and release of information about the votes of these small voter pools could allow inferences to be drawn about the votes of these staff, which is likely to have an adverse effect on the willingness of staff to participate in similar ballots in future.
16. Accordingly, I have decided that the parts of documents which are listed as exempt in accordance with this provision in Schedule 1, meet the criteria for conditional exemption. Where a document is assessed as conditionally exempt, access must be given subject to the public interest test in accordance with section 11A(5).

Application of the public interest test:

17. 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.
18. 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) disclosure would promote the objects of the FOI Act, including:
 - (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;
 - (b) disclosure would inform debate on a matter of public importance;
 - (c) disclosure would promote effective oversight of public expenditure.
19. I also considered the following factors which do not favour disclosure:
- (a) 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.

- (b) disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy;
 - (c) disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information;
 - (d) disclosure could reasonably be expected to prejudice an agency's ability to obtain similar information in the future;
 - (e) disclosure could reasonably be expected to prejudice the management function of an agency.
20. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.
21. A further factor against disclosure of this voting information broken down by state, is that I am granting access to the total number and percentage of the votes cast for both ballots, as well as other statistics pertaining to voting patterns and methods. I do not consider that release of this further level of voting data would increase public participation in Government processes or contribute to the discussion on this issue in any meaningful way.
22. On balance, I consider the public interest factors 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.

Access to documents

23. The documents released to you in accordance with the FOI Act are enclosed.

Your rights of review

24. If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal Review

25. Under section 54 of the FOI Act, you may apply in writing to the Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.
26. You can make your application for internal review in one of the following ways:

Post: Legal Services & Assurance, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601
Facsimile: (02) 6289 6337
Email: foi@dva.gov.au

Information Commissioner Review

27. 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:

28. You can make your application for Information Commissioner review in one of the following ways:

Online: 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

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

29. 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>

Contact us

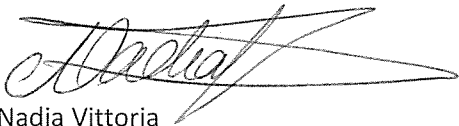
30. If you wish to discuss this decision, please do not hesitate to contact me using the following details:

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

Facsimile: (02) 6289 6337

Email: foi@dva.gov.au

Yours sincerely



Nadia Vittoria
Legal Officer
Information Law
Legal Services & Assurance

27 April 2017



Schedule of documents

Applicant: James Smith

Decision date: 27 April 2017

FOI reference number: FOI 14217

Doc ref	Date of document	Document description	Pages	Decision	Exemption provision
1	15/09/2015	DVA Enterprise Agreement 2015-2018 (1 st) Ballot Report	26	Grant access in part	s 22 s 47E(d)
2	18/12/2015	DVA Enterprise Agreement 2015-2018 (Final) Ballot Report	26	Grant access in part	s 22 s 47E(d)



Schedule of relevant provisions in the FOI Act

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

47E Public interest conditional exemptions—certain operations of agencies

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, by Norfolk Island or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

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