

Our ref: FOI-2016-5016

3 April 2017

Ms Verity Pane

By email: foi+request-3185-2e3d8487@righttoknow.org.au

Dear Ms Pane

Your Freedom of Information (FOI) request dated 4 March 2017

I refer to your email received by the Ombudsman's office on 4 March 2017, in which you sought access to documents under the *Freedom of Information Act 1982* (the FOI Act). Your request was framed in the following way:

'I request copy of all notes, records, minutes, and any and all other documents and records in the Commonwealth Ombudsman's possession and/or control that relate to this "consultation with the Commonwealth Ombudsman" that DVA and/or the Minister for Veterans' Affairs or any other Commonwealth official or Minister had with the Commonwealth Ombudsman (whether directly with the Commonwealth Ombudsman or any staff member of the Commonwealth Ombudsman).'

Thank you for removing from the scope of your request the personal telephone numbers and email addresses of staff.

This letter constitutes notice of my decision on your request for access. I am authorised to make decisions on behalf of our office under s 23 of the FOI Act.

Decision

Our office identified five documents relevant to your request. I have decided to grant partial access to these documents. My reasons for this decision are set out at Attachment A to this letter.

Attachment B contains a schedule setting out the relevant documents and attachment C provides a copy of the relevant provisions of the FOI Act.

Our office identified the documents provided by searching our records management system.

Review rights

Internal review

Under s 54 of the FOI Act, you may apply in writing to our office for an internal review of my decision. The internal review application must be made within 30 days of the date on which you were notified of my decision.

Where possible, please attach reasons for why you believe review of the decision is necessary. The internal review will be carried out by another Ombudsman officer within 30 days.

Review by the Australian Information Commissioner

Under s 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 at <https://forms.australia.gov.au/forms/oaic/foi-review/>
- via email to enquiries@oaic.gov.au
- by overland mail to GPO Box 5218 SYDNEY NSW 2001
- in person to Level 2, 175 Pitt Street, Sydney NSW.

More information about Information Commissioner review is available on the OAIC website. Go to www.oaic.gov.au/foi-portal/review_complaints.html#foi_merit_reviews.

Complaints to the Information Commissioner

You may complain to the Information Commissioner about action taken by the Ombudsman in relation to your FOI request.

While there is no particular form required to make a complaint, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way in which your request was processed. It should also identify the Ombudsman's office as the agency about which you are complaining.

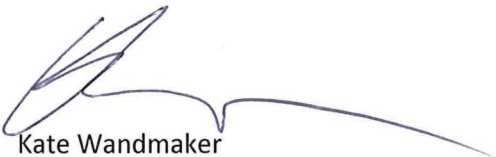
You may lodge your complaint in one of the following ways

- online at www.oaic.gov.au
- by overland mail to GPO Box 5218 SYDNEY NSW 2001
- by email to enquiries@oaic.gov.au.

Contacts

If you require clarification of any of the matters discussed in this letter you should contact me using the contact information set out at the foot of the first page of this letter.

Yours sincerely



Kate Wandmaker
Principal Lawyer
Legal and Information Access Team

ATTACHMENT A – Reasons for decision

Material taken into account

In making my decision I had regard to the following:

- the terms of your request,
- the content of the document to which you sought access,
- relevant provisions of the FOI Act, and
- the Australian Information Commissioner’s Guidelines on FOI, available at www.oaic.gov.au (the Guidelines).

Findings of fact and reasons for decision

Where the schedule of documents at Attachment B indicates that an exemption has been applied to a document, or part of a document, my findings of fact and reasons for deciding that the exemption provision applies to that document, or part of that document, are set out below.

Public interest conditional exemption – deliberative process documents: section 47C

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:*

(a) an agency;

...

Section 11A of the FOI Act provides that while an agency must give a person access to a document that is conditionally exempt, access may be refused if the document’s disclosure would, on balance, be contrary to the public interest.

I have decided that the document to which you seek access is conditionally exempt on the basis of s 47C. Further, I have decided that the disclosure of the relevant document under the FOI Act would be contrary to the public interest.

Deliberative matter

I have formed the view that the document contains material that is deliberative in nature. The relevant material includes a draft version of the Rules and references to the content of the same. This version of the rules was draft and only supplied by the Department of Veteran’s Affairs (DVA) for the purpose of consultation with external agencies including this office and the Information Commissioner. It was likely that changes would be made based on the input.

In this case, the consultation did result in changes to the rules, so this draft is a superseded iteration. For this reason, I have concluded that the relevant material consists of deliberative matter.

I also note that when the relevant Bill was before the Senate, the Government moved amendments to remove the provisions which would have enabled the making of the Rules. Those amendments were accepted and the Bill passed without the enabling provisions related to the draft Rules.

Disclosure not in the public interest

In deciding whether or not access should be given to this information on the basis of public interest I have taken a number of matters into account.

These matters include the public interest factors in favour of disclosure as outlined in s 11B of the FOI Act and the Guidelines, as well as matters peculiar to the functions and operating environment of the agencies involved. In your request on 4 March 2017, you submit that 'as this matter is being publicly reported and debated in the media, and has generated considerable controversy, this is a matter of public importance and interest.'

Relevant factors in favour of access therefore include:

- Promoting the objects of the FOI Act, particularly increasing scrutiny, discussion, comment and review of the Government's activities (s 3(2)(b) of the FOI Act), and;
- Access to the relevant material could inform debate on a matter of public importance.

In my opinion however, the public interest is best served by withholding this information on the grounds that disclosure could impact negatively on the Ombudsman's ability to consult with external agencies, in private, to provide guidance on draft legislation. I have concluded that the draft rules and references to its content are exempt for this reason.

I have also concluded that the information contained in the exempted material would not properly inform debate on matters of public importance, given that the relevant Bill has since passed both Houses of Parliament in a form that is different in material respects from that to which the draft rules in the possession of this office related. As outlined above, there is now no provision to make the rules in any event.

ATTACHMENT B – Schedule of relevant documents

Schedule of Documents – Freedom of Information Request FOI -2017-50016

Doc No.	Date	Pages	Author	Addressee(s)	Description of Document	Decision on access	Exemption
1.	21.02.17	1	Kate Wandmaker of OCO	Emily Wilson-Kwong, Diane Mutch, Eleanor Mills of OCO	Email in relation to DVA's consultation	Access in part	Section 47C – public interest conditional exemption – deliberative matter
2.	22.02.17	2	Eleanor Mills of OCO	Kate Wandmaker of OCO	Email forwarding calendar appointment for meeting with DVA on 24.02.17	Access in part	Personal email address redacted
3.	23.02.17, March 2017	10	DVA	OCO, Brenton Attard of OAIC, cc Carolyn Spiers and Louise Cairns of DVA	Draft Rules and email to OAIC	Access in part	Section 47C – public interest conditional exemption – deliberative matter
4.	24.02.17	4	Kate Wandmaker of OCO	N/A	Notes from meeting on 24.02.17 between DVA and OCO	Access in part	Section 47C – public interest conditional exemption – deliberative matter
5.	28.02.17	1	Emily Wilson-Kwong on behalf of Doris Gibb OCO	Carolyn Spiers, Lisa Foreman of DVA	Email to DVA Follow-up from meeting	Access in part	Section 47C – public interest conditional exemption – deliberative matter

ATTACHMENT C – Relevant FOI Act provisions

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).

11B Public interest exemptions—factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (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 own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

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.

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).