



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

Internal review decision and reasons for decision of Nick (Position Number 62209913), Information Law Section, Legal Services and Assurance Branch, Department of Veterans' Affairs

Applicant:	Julie (Right To Know)
Date of primary decision:	2 October 2018
FOI reference number:	FOI 24297
Internal review decision date:	26 March 2019
Internal review reference number:	IR 24864
Sent by email:	foi+request-4766-7f73f37e@righttoknow.org.au

Dear Julie (Right To Know)

Freedom of Information Request: FOI IR 24864

1. The purpose of this letter is to give you a decision about your request for an internal review under the *Freedom of Information Act 1982 (FOI Act)*.
2. I have made a decision to affirm the original decision made by Leia (Position 62210022), Assistant Director, Information Law, Legal Services and Assurance Branch, to refuse access to the documents requested.

Authority to make this decision

3. I am an officer authorised by the Secretary of the Department of Veterans' Affairs (**Department**) to review decisions about access to documents in the possession of the Department in accordance with section 54C of the FOI Act.

Summary

4. On 31 August 2018, you made a request for access to documents in the possession of the Department. Your request sought access to:

A copy of all the DVA Executive Management Board Minutes for FY16/17.

5. As no extensions of time were applied to process your request, a decision on your request was due by 30 September 2018.
6. On 2 October 2018 you were provided with a decision relating to access to documents within scope of your request. The decision was to refuse access in full to 11 documents itemised in **Schedule 1** of the original decision. The reasons given in that decision hold for this Internal Review decision.
7. On 2 October 2018, you requested an Internal Review of the primary decision. In your request, you specifically noted:

I am writing to request an internal review of Department of Veterans' Affairs' handling of my FOI request 'Department's Executive Management Board Minutes'.

8. As no extensions of time have been applied to process this internal review, a decision on your Internal Review request was due by 1 November 2018. We acknowledge the deemed nature of this decision.

Decision

9. I have made a decision to affirm the original decision made by Leia (Position 62210022), Information Law Section, Legal Services and General Counsel Branch to refuse access to the documents relevant to your request.

Material taken into account

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 refuse access to documents follow.
11. I have taken the following material into account in making my decision:
 - the terms of your primary request;
 - the terms of your request for an internal review;
 - the types of documents that are in the possession of the Department;
 - 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 47C Public interest conditional exemptions--deliberative processes
 - 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).
12. A full extract of all FOI Act provisions used to make my decision are provided in **Schedule 2**.

Reasons for decision

13. In your application for an Internal Review, you described the content of the Minutes of the Executive Management Board as: “Minutes are not transcripts and it is not the convention for them to record in minutia discussions, but rather to record decisions and outcomes reached, and tasks and activities assigned -- this is not deliberative material”.
14. The Executive Management Board is chaired by the Secretary, with the Deputy Secretary Policy and Programs as the Deputy Chair.
15. The Executive Management Board's purpose is:
 - to act as an internal advisory committee to the Secretary
 - to provide a primary forum for senior leadership consideration, discussion and endorsement of the following matters, before the Secretary's formal delegation is exercised:
 - strategic planning in policy and operational matters
 - performance monitoring
 - organisational health including, people and culture and resource allocation (departmental budget and investment).

Section 47C: Public interest conditional exemptions – deliberative processes

16. Section 47C of the FOI Act provides that a document is conditionally exempt if it would disclose deliberative matter in the nature of, or relating to, opinion, advice or recommendations obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes in the functions of the Department.
17. I have taken into account that the Minutes contain purely factual information as well as a record of deliberations. However, some of this factual material relates to options and opinions being discussed. Thus, to release these facts would disclose the nature of the advice being considered.
18. In the AAT decision of *Wood; Secretary, Department of the Prime Minister & Cabinet and (Freedom of Information)* [2015] AATA 945, Forgie DP explains that the meaning of the words ‘opinion’, ‘advice’ and ‘recommendation’ all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.
19. The Minutes of the Executive Management Board contain a record of such deliberations.
20. I am satisfied that the documents requested contain deliberative matter which is conditionally exempt under sub-section 47C(1) of the FOI Act.

Application of the public interest test:

21. 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.
22. 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;
- (ii) reveal the reason for a government decision and any background or contextual information that informed the decision; and
- (iii) enhance the scrutiny of government decision making.

23. I also considered the following factors which do not favour disclosure:

- b. disclosure 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, a Minister or the Government of the Commonwealth;
- 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; and
- e. disclosure could reasonably be expected to prejudice the competitive commercial activities of an agency (insofar as content relates to the commercial affairs of the Commonwealth).

24. Releasing the documents sought may significantly reduce the quality, clarity or frankness of discussions between Board members and ultimately, the advice and recommendations that arise from these meetings. This potential detriment to the public interest of release of the documents outweighs the factors in favour of access.

25. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.

26. 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.

Section 47E(d): Public interest conditional exemptions – certain operations of agencies

27. Sub-section 47E(d) provides for documents to be conditionally exempt if disclosure under the FOI Act would, or could reasonably be expected to, have a substantially adverse effect on the proper and efficient conduct of the operations of an agency.

28. The Minutes contain a record of discussions about strategy and planning within the Department's jurisdiction.
29. It is important that the Minutes capture an open and frank reporting of these matters.
30. This has an overall flow on effect to the Department's processes and policies. Inappropriate disclosure of this information could reasonably be expected to jeopardise the reporting of this information and its full disclosure at the Board's meetings.
31. I am satisfied that disclosure of the requested documents would undermine the Department's strategic and planning processes
32. Accordingly, I have decided that the documents requested contain material that is exempt within the meaning of sub-section 47E(d) of the FOI Act. Consequently, I am not required to consider any public interest.

Application of the public interest test:

33. 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.
34. 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:
 - f. disclosure would promote the objects of the FOI Act, including:
 - (iv) 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;
 - (v) reveal the reason for a government decision and any background or contextual information that informed the decision; and
 - (vi) enhance the scrutiny of government decision making.
35. I also considered the following factors which do not favour disclosure:
 - g. disclosure 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, a Minister or the Government of the Commonwealth;
 - h. disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information;

- i. disclosure could reasonably be expected to prejudice an agency's ability to obtain similar information in the future; and
- j. disclosure could reasonably be expected to prejudice the competitive commercial activities of an agency (insofar as content relates to the commercial affairs of the Commonwealth).

36. Release of the Minutes would be contrary to public interest. Board members need to be able to undertake rigorous and candid assessment of all information relevant to the Department's operations, and to consider in confidence, the most effective options and solutions to address the Department's affairs. It is important that Board members feel able to provide information, consider options and deliberate without restriction in order to ensure that the Board always considers all relevant information and opinions.
37. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.
38. 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.

Conclusion

39. I acknowledge that disclosure of the requested documents could promote the objects of the FOI Act.
40. However, the Guidelines at paragraph 6.22 provide a non-exhaustive list of factors against disclosure. In considering these factors, I find that the requested documents, if released, could reasonably be expected to:
- a) Prejudice the Department's ability to obtain confidential information
 - b) Prejudice the Department's ability to obtain similar information in the future; and
 - c) Prejudice the protection of an individual's right to privacy.
32. I consider that all three factors weigh heavily against disclosure of the Minutes of the Department's Executive Management Board. While I accept that there is a public interest in ensuring the Department undertakes its functions in a transparent and proper manner, there is also a public interest in maintaining the confidentiality of the information contained in the requested documents. Disclosure of the sensitive material would potentially impact and harm the Commonwealth's ability to effectively manage its business.
33. I consider that disclosure of the information contained in the requested documents would not increase participation or increase scrutiny of the Government's processes or activities. On the contrary, release of the requested documents at this point would greatly hinder current processes and would also reveal sensitive matters affecting the Department.
34. None of the factors listed in section 11B(4) of the FOI Act were taken into account in making this decision.
35. On balance, I find that it would be contrary to the public interest to release the information considered conditionally exempt under sections 47C and 47E(d) of the FOI Act.

Your rights of review

36. I understand that you have lodged a request for review with the Office of the Australian Information Commissioner, reference MR19/00025. Should you want to make further contact with their Office, here are the details:

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.

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

Contacts

38. If you wish to discuss this decision, please do not hesitate to contact the Information Law Section using the following details:

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

Yours Sincerely,

Nick (Position Number 62209913)

Director

Information Law Section | Legal Services & Assurance Branch

Legal Assurance and Governance Division

27 March 2019



Schedule of documents

Applicant: Julie (Right to Know)

Decision date: 27 March 2019

FOI reference number: FOI IR 24864

Doc ref	Date of document	Document description	Pages	Decision	Exemption provision
1	13 July 2016	Final Minutes of July Meeting	8	Refused	s 47C s 47E(d)
2	16 August 2016	Final Minutes of August Meeting	7	Refused	As above
3	13 September 2016	Final Minutes of September Meeting	7	Refused	As above
4	17 October 2016	Final Minutes of October Meeting	6	Refused	As above
5	16 November 2016	Final Minutes of November Meeting	6	Refused	As above
6	14 December 2016	Final Minutes of December Meeting	7	Refused	As above
7	16 February 2017	Final Minutes of February Meeting	7	Refused	As above
8	16 March 2017	Final Minutes of March Meeting	8	Refused	As above
9	13 April 2017	Final Minutes of April Meeting	9	Refused	As above
10	18 May 2017	Final Minutes of May Meeting	6	Refused	As above
11	15 June 2017	Final Minutes of June Meeting	7	Refused	As above



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).

15 Requests for access (as related to the requirements for requests)

Persons may request access

- (1) Subject to section 15A, a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document.

Requirements for request

- (2) The request must:
- (a) be in writing; and
 - (aa) state that the request is an application for the purposes of this Act; and
 - (b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and
 - (c) give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication).
- (2A) The request must be sent to the agency or Minister. The request may be sent in any of the following ways:
- (a) delivery to an officer of the agency, or a member of the staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory;
 - (b) postage by pre-paid post to an address mentioned in paragraph (a);
 - (c) sending by electronic communication to an electronic address specified by the agency or Minister.

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).

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).