



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

Internal review decision and reasons for decision of Alison (Position Number 62210358)
Information Law, Legal Services & Assurance

Applicant: Julie via Right to Know
Date of primary decision: 12 November 2018
FOI reference number: FOI 25115
Internal review decision date: 28 March 2019
Internal review reference number: IR 25506

Dear Julie

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 vary the original decision made by Julie (Position Number 62212962), Legal Officer, Information Law, Legal Services & Assurance, to release documents subject to your request in part.

Summary

3. I, Alison (Position Number 62210358), Legal Officer, Information Law, Legal Services & Assurance, am an officer authorised by the Secretary of the Department of Veterans' Affairs (the Department) to review decisions about access to documents in the possession of the Department in accordance with section 54C of the FOI Act.
4. On 11 October 2018 you made a request for access to documents in the possession of the Department of Veterans' Affairs (the Department). Your request sought access to:

"...Under FOI I seek a copy of all documents (including emails, sms messages, file notes and any other 'document' type the FOI Act recognises) between the DVA officers in the Information Law area of the Legal Services & Assurance Branch and any other area of the DVA (including the Information Law area) and any external party that refers to, or contains mention of (the number is the search key, not the whole text):

*^DVA FOI 24057,
^DVA FOI 24563*

^DVA FOI 24297

^DVA FOI 24465

^DVA FOI 24432

The scope period is 17 August 2018 to 11 October 2018 inclusive. Duplicate and identical documents are to be excluded, so only one version is copied.

Where documents consist of the same chain of identical emails, only the most recent chain is to be copied (again, to exclude unnecessary duplicates)..."

5. On 12 November 2018 you were provided with a decision relating to access to documents within scope of your request. The forty three (43) documents relevant to your request were provided to you in part, in accordance with sections 22, 42, 47C and 47E of the FOI Act.
6. On 15 November 2018 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 vary the original decision made by Julie (Position Number 62212962), Legal Officer, Information Law, Legal Services & Assurance on 12 November 2018, to release documents subject to your request in part.
9. Where I have decided to grant access in part, I have provided access to an edited copy of the documents, modified by redactions in accordance with section 22(2) of the FOI Act.
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 42 Documents subject to legal professional privilege
 - 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 provisions I used to make my decision are provided in Schedule 2.

Documents subject to legal professional privilege (s42)

13. Section 42(1) exempts a document that is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP). The underlying policy basis for LPP is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice.
14. The FOI Guidelines provide that, at common law, determining whether a communication is privileged requires a consideration of:
 - (a) Whether there is a legal adviser-client relationship;
 - (b) Whether the communication was for the purpose of giving or receiving legal advice or for use or in connection with actual or anticipated litigation;
 - (c) Whether the advice given is independent; and
 - (d) Whether the advice given is confidential.
15. I have decided to affirm the original decision made by Julie (Position Number 62212962) to redact parts of the documents relevant to your request in accordance with this exemption provision. My reasons follow.

Legal adviser-client relationship

16. As noted in the original decision, the Department engaged an independent external legal adviser to undertake work to finalise FOI 24563. I am satisfied that the requisite legal adviser-client relationship existed between the Department and the external legal adviser.

Dominant purpose

17. The material which I have decided to exempt under this exemption provision includes email correspondence between the Department and the external legal adviser about FOI 24563. The correspondence was made for the dominant purpose of obtaining or giving legal advice in connection with this matter.

Confidentiality

18. I am satisfied that the correspondence between the Department and the external legal adviser was developed on the understanding that the usual and well-established relationship of confidence between solicitor and client existed. I am therefore of the view that the material is confidential for the purposes of section 42.

No waiver

19. As explained in the original decision, section 42(2) of the FOI Act provides that a document is not exempt because of subsection (1) if the person entitled to claim privilege in relation to the production of the document in legal proceedings waives that claim.
20. Privilege can be waived either expressly or by implication. A person entitled to claim privilege can impliedly waive that privilege if their conduct is inconsistent with the maintenance of the privilege. This will depend on the circumstances of the case, including whether the disclosure was for any advantage.
21. I uphold the original decision-maker's view that there is no evidence to indicate that the substance of the communications which has been marked as exempt under this exemption provision has been disclosed more broadly, or used in any way that would be inconsistent with maintaining the confidentiality of the communications.

22. Accordingly, I am satisfied that legal professional privilege exists over the documents I have identified at **Schedule 1**. I am of the view that this material is exempt under section 42 of the FOI Act.

Conditional Exemptions

23. Where a document is assessed as conditionally exempt, the agency or minister must give access to it unless in the circumstances access would, on balance, be contrary to the public interest (s 11A(5)). The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making. The statement of reasons for the decision must include the public interest factors taken into account (s 26(1)(aa)). Further guidance on conditional exemptions and the public interest test is in Part 6.

Certain operations of agencies (s47E)

24. Section 47E conditionally exempts documents where disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on certain listed agency operations.
25. I have decided to affirm the original decision to exempt the surnames of non-Senior Executive departmental staff and direct contact details of staff because I am satisfied that the release of this material could have a substantial adverse effect on the management of personnel by the Department (section 47E(c)) and the proper and efficient conduct of the operations of the Department (section 47(d)). Where the document contains information exempt under section 47E of the FOI Act, an edited copy has been prepared pursuant to section 22 of the FOI Act with these details redacted.
26. As outlined in the original decision, the Department has established certain channels of communication to allow clients and other relevant stakeholders to contact the Department. These lines of communication have been implemented to ensure that all Departmental resources are managed as efficiently as possible as well as to protect the wellbeing and safety of Departmental staff.
27. I am satisfied that releasing the surnames and direct contact details of staff in the circumstances would have an adverse effect on the Department's ability to engage in its operations properly and efficiently as the established lines of communication could be circumvented, disrupting the staff's ability to provide services and carry out the other operations and functions of the Department in a proper and efficient manner.
28. I also consider that releasing the material in the circumstances could have a substantial adverse effect on the management or assessment of personnel. There have been circumstances in which Departmental staff have been targeted, insulted or harassed both internally as well as online based on the release of their name and/or direct contact details. As such, releasing the names and direct contact details of staff could have a substantial adverse effect on the Department's ability to manage the welfare of staff and retention of personnel by the Department.
29. Accordingly, I have decided that parts of the 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) of the FOI Act.

Application of the public interest test:

30. 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.

31. In order to assess whether release of the exempt material would be contrary to the public interest, I considered the following factor which favours disclosure:

- (a) disclosure would promote the objects of the FOI Act., including enhance the scrutiny of government decision making.

32. 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 management or assessment of personnel by the Commonwealth;
- (b) disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Department;
- (c) disclosure could reasonably be expected to harm the interests of an individual or group of individuals, in this instance, non-Senior Executive staff of the Department; and
- (d) disclosure could reasonably be expected to prejudice the management function of the Department.

33. 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.

Material redacted under section 22

34. As was noted in paragraph 9 of the original decision, parts of the documents contains information outside of the date range you specified in your request (17 August 2018 to 11 October 2018 inclusive). I have maintained the redaction of this material under section 22 on this basis.

35. In your request you specified the following 'where documents consist of the same chain of identical emails, only the most recent chain is to be copied.' In your request for internal review, you expressed concern about the number of pages which were redacted under section 22 of the FOI Act in accordance with the original decision. As advised in paragraph 9 of the original decision, duplicates of email chains were redacted under section 22. In an effort to address your concern, I have removed the redactions applied under section 22 to this material.

36. Further, parts of the documents contain information irrelevant to the scope of your request. I have also redacted this information under section 22.

Your rights of review

Your rights of review

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

Information Commissioner Review

38. 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

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.

39. 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

40. 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: information.access@dva.gov.au

Yours sincerely

Alison (Position Number 62210358)

Legal Officer

Information Law

Legal Services & Assurance

28 March 2019



Schedule of documents

Applicant: Julie via Right to Know

Decision date: 28 March 2019

IR reference number: IR 25506

Document reference number	Date of document	Document description	Page numbers	Decision	Exemption provision and/or irrelevant material removed
1	No date	FOI 25047: File notes	1-3	Release in part	s 22 s 47E(c) s 47E(d)
2	22/08/2018	FOI 25047: Internal correspondence	4-5	Release in part	s 22 s 47E(c) s 47E(d)
3	22/08/2018	FOI 25047: FOI Acknowledgement	6	Release in part	s 22 s 47E(c) s 47E(d)
4	30/08/2018	FOI 25047: Internal correspondence	7-37	Exempt in full	s 22 s 47E(c) s 47E(d)
5	17/09/2018	FOI 25047: Decision covering email enclosing decision letter Documents subject to that request have since been provided to you in FOI 24563. As such, they have not been included here.	38-50	Release in full	s 22
6	18/09/2018	FOI 24563: Email from you	50-51	Release in full	s 22
7	19/09/2018	FOI 24563: Acknowledgement of internal review	52-54	Release in full	s 22
8	No date	FOI 24563: File notes	55-57	Release in part	s 22 s 42

					s 47E(c) s 47E(d)
9	18/09/2018	FOI 24563: Internal review request	58-60	Release in part	s 22 s 47E(c) s 47E(d)
10	Various within September 18	FOI 24563: Internal correspondence	61-136	Release in part	s 22 s 42 s 47E(c) s 47E(d)
11	No date	FOI 24563: Copy of FOI Act provisions	137-147	Release in full	
12	No date	FOI 24297: LEX notes	148-149	Release in part	s 22 s 47E(c) s 47E(d)
13	04/09/2018	FOI 24297: Internal correspondence	150	Release in part	s 22 s 47E(c) s 47E(d)
14	05/09/2018	FOI 24297: Acknowledgement	151	Release in part	s 22 s 47E(c) s 47E(d)
15	05/09/2018	FOI 24297: Internal correspondence	152-156	Release in part	s 22 s 47E(c) s 47E(d)
16	02/09/2018	FOI 24297: Decision covering email enclosing decision letter The 11 documents identified in FOI 24297 have not been reproduced in this FOI.	157-171	Release in full	
17	No date	FOI 24465: File notes	172-176	Release in part	s 22 s 47E(c) s 47E(d)
18	12/09/2018	FOI 24465: Internal correspondence	177-178	Release in part	s 22 s 47E(c) s 47E(d)
19	26/09/2018	FOI 24465: Internal correspondence	179-183	Release in part	s 22 s 47E(c) s 47E(d)
20	27/09/2018	FOI 24465: Email from you	184-186	Release in full	s 22
21	03/10/18	FOI 24465: Internal correspondence	187	Release in part	s 22 s 47E(c) s 47E(d)

22	03/10/2018	FOI 24465: Email from you	188-189	Release in full	s 22
23	03/10/2018	FOI 24465: Internal correspondence	190-192	Release in part	s 22 s 47E(c) s 47E(d)
24	03/10/2018	FOI 24465: Email to you	193-194	Release in full	s 22
25	03/10/2018	FOI 24465: Internal correspondence	195-198	Release in part	s 22 s 47E(c) s 47E(d)
26	12/10/2018	FOI 24465: Notice of extension request	199-200	Release in full	s 22
27	17/09/2018	FOI 24465: FOI Acknowledgment	201	Release in full	s 22
28	17/09/2018 & 20/09/18	FOI 24465: Internal correspondence	202-206	Release in part	s 22 s 47E(c) s 47E(d)
29	27/09/2018	FOI 24465: Request for extension of time	207	Release in full	s 22
30	03/10/2018	FOI 24465: Internal correspondence	208-210	Release in part	s 22 s 47E(c) s 47E(d)
31	03/10/2018	FOI 24465: Email from you	211-214	Release in full	s 22
32	03/10/18-08/10/18	FOI 24465: Exempt document	215-221	Release in part	s 22 s 47E(c) s 47E(d)
33	10/10/2018	FOI 24465: Email from you	222-223	Release in full	s 22
34	No date	FOI 24432: File notes	224-226	Release in part	s 22 s 47E(c) s 47E(d)
35	11/09/2018	FOI 24432: Internal correspondence	227-229	Release in part	s 22 s 47E(c) s 47E(d)
36	12/09/2018	FOI 24432: Acknowledgement	230-231	Release in full	s 22
37	No date	FOI 24432: Exempt document	232	Release in full	
38	27/09/2018	FOI 24432: Emails with you about the request for extension of time	233-239	Release in full	s 22
39	03/10/2018	FOI 24432: Email from you	240-241	Release in full	s 22
40	08/10/18-10/10/18	FOI 24432: Internal correspondence	242-247	Release in part	s 22 s 47E(c) s 47E(d)
41	10/10/2018	FOI 24432: Email from you	248-249	Release in full	s 22

42	17/4/18	FOI 24432: Internal correspondence and documents that were attached to another email. The documents attached to the email are out of scope for this request because the documents were found to be out of scope for FOI 24432.	250-266	Release in full	s 22
43	12/10/18	FOI 24432: Internal correspondence	267-275	Release in part	s 22 s 47E(c) 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).

42 Documents subject to legal professional privilege

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that:
 - (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
 - (b) the information is operational information of an agency.

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).