



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

Decision and reason for decision of Leia (Position Number 62210022), Information Law Section, Legal Services and Assurance Branch, Department of Veterans' Affairs

Applicant: Julie (Right to Know)
Decision date: 12 November 2018
FOI reference number: FOI 25066
Sent by email: foi+request-4883-c0011eca@righttoknow.org.au

Dear Julie,

Freedom of Information Request: FOI 25066

1. I have made a decision to refuse access to the documents relevant to your request.

Summary

2. I, Leia (Position Number 62210022), Assistant Director, Information Law Section, am an officer authorised by the Secretary of the Department of Veterans' Affairs (**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* (**FOI Act**).
3. On 13 October 2018, you made a request for access to documents in the possession of the Department. Your request sought access to:

"...the minutes of the DVA Audit and Risk Management Committee for FY17/18 ..."
4. As no extensions of time have been applied to process your request, a decision on your request is due 12 November 2018.
5. 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*.
6. The Department has undertaken a reasonable search of its records and has identified six (6) documents relevant to your request, as set out above. The documents relevant to your request are listed at **Schedule 1**.

Decision

7. I have made a decision to refuse access to the documents relevant to your request. The documents that I have chosen to refuse access to are set out in **Schedule 1**, together with applicable exemption provisions.

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 refuse access to the documents follows.

9. I have taken the following material into account in making my decision:

- the terms of your request;
- 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 45 Documents communicated in confidence
 - Section 47C Public interest conditional exemptions--deliberative processes
 - Section 47E Public interest conditional exemptions--certain operations of agencies; and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**).

10. A full extract of all FOI Act provisions used to make my decision are provided in **Schedule 2**.

Reasons for decision

11. I have decided to refuse access to documents within the scope of your request in accordance with the following exemptions in the FOI Act:

Documents containing material obtained in confidence (section 45)

12. Section 45 of the FOI Act provides that a document is an exempt document if its disclosure under the Act would found an action by a person for a breach of confidence. The FOI Guidelines provide that,

To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:

- (a) it must be specifically identified;
- (b) it must have the necessary quality of confidentiality;
- (c) it must have been communicated and received on the basis of a mutual understanding of confidence;
- (d) it must have been disclosed or threatened to be disclosed, without authority; and
- (e) unauthorised disclosure of the information has or will cause detriment.

13. The documents you seek access to contain confidential details of deliberations of the Department's financial affairs, risks, fraud controls and fraud investigations.
14. The information over which this exemption is claimed can be specifically identified, and includes all information contained in the Audit and Risk Management Committee minutes. Some of the information in those minutes relates to the Department's ongoing affairs.
15. As required under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the Department has established appropriate internal systems and controls for the positive and transparent oversight and management of risk. Effective risk management, considering both threat and opportunity, leads to well informed decision making, and this is crucial for the Department during a sustained period of service delivery innovation. In this way, our Risk Management Framework enables the Department to identify and manage maximum benefits derived from new initiatives, challenges and opportunities.
16. Enterprise risks are oversights by the Audit and Risk Committee (**Committee**), which was established in compliance with section 45 of the PGPA Act and PGPA Rule 17 Audit Committees for Commonwealth Entities. The Committee's role is to provide independent assurance to the Secretary on the following four functions (as per the Department of Finance — Resource Management Guide 202):
 - (a) financial reporting;
 - (b) performance reporting;
 - (c) system of risk oversight and management; and
 - (d) system of internal control.

17. In addition to the key functions, the ARC also considers matters relating to:
 - (a) legislative and policy compliance;
 - (b) internal audit;
 - (c) external audit; and
 - (d) relevant parliamentary committee reports and external reviews.
18. The Committee is to provide advice to the Secretary of the Department in order to give confidence in connection with the appropriateness of the four functions listed above. As such, the Committee must review the appropriateness of the Department's financial reporting, performance reporting, system of risk oversight and management, and system of internal control.
19. The Committee is also to support the Secretary by reviewing the appropriateness of the Department's system of risk oversight and management taking account of the Department's purposes and specific operating context. The Committee's role is to include reviewing whether identified risks and their treatments are consistent with the committee's understanding of the Department's operating context and the committee's experience in risk management.
20. This task is crucial to the effectiveness of and ultimate compliance with the PGPA Act. The Committee's relationship with the Secretary is crucial to the committee's effectiveness.
21. From the time the Committee commenced, it has operated on the understanding that information would be treated as confidential and that members of the Committee must not use or disclose information obtained by the Committee except in meeting their responsibilities or where required to do so by law. A part of this process included the discussion of matters with other parties, subject to confidentiality considerations. To ensure best record keeping can take place, it is important that discussions within those meetings and the subsequent minutes of this and other such Committees, are not compromised. This information would be used and disclosed only as needed to progress related matters for related purposes, or to the extent that information is required to be disclosed in accordance with any legal obligations.
22. The relevant information claimed to be exempt under section 45 was received on the basis of a mutual understanding of confidence. The information in the documents is only known to those with a need to know, being a limited group of people and has not been broadly disclosed.
23. For the above reasons, I am satisfied that the documents you seek access to are created and received in confidence and disclosure would found an action for breach of confidence. As the documents are exempt under section 45 of the FOI Act I am not required to consider any public interest.

Public interest conditional exemptions--deliberative processes (section 47C)

24. Section 47C of the FOI Act provides that a document is conditionally exempt if its 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. I consider that the documents in issue are conditionally exempt under section 47C of the FOI Act in their entirety.
25. The FOI Guidelines provide that a deliberative process involves the exercise of judgement in developing and making a selection from different options. In particular, the Guidelines state that:

“... the action of deliberating, in commons understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes-the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action...”
26. A deliberative process may include the recording or exchange of opinions, advice and/or recommendations, as well as interim decisions or deliberations.
27. The deliberative process must relate to the functions of the agency. As is evident in paragraphs 13 to 23 above, the Committee's functions directly relate to the functions of the Department.
28. One relevant 'deliberative process' these documents relate to, concerns the Committee's functions in considering the relevant issues pertaining to the subject matters noted above. The specific deliberations could involve discussions and evaluations of various factors including, but not limited to, the nature of the relevant projects or audits and also whether they should be established. It can also include discussions about the financial affairs of the Department as well as setting strategies and policies to be followed or explored.
29. As noted above, the Committee is to treat information as confidential and maintain the confidentiality of its deliberations relating to its functions, where required. The information as recorded in the documents in issue is clearly for the purposes of the thinking processes connected to the Committee's functions.
30. Information over which this exemption is claimed is not purely operational information or factual material. To the extent that there is non-deliberative material within the conditionally exempt sections, I am satisfied that the deliberative and non-deliberative matter is inextricably intermingled, and cannot be disclosed without revealing the contents of the deliberative material.
31. The reasons provided in paragraphs 13 to 23 above also apply to this exemption, in terms of context as well as justification of the application of section 47C of the FOI Act to these documents.

32. Accordingly, I have decided that 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).

Public interest conditional exemptions--certain operations of agencies (section 47E)

33. 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.

34. The reasons provided at paragraphs 13 to 35 above also apply to this exemption, in terms of context as well as justification of the application of section 47E(a), (b) and (d) of the FOI Act to these documents.

35. Further to this, unauthorised disclosure of information relating to either the process or discussions about audits, risks or fraud to the Department, could reasonably be expected to have a substantial adverse effect on the Department's management of these issues.

36. It is important the Department is able to capture as fulsome and as accurate as possible, minutes of these meetings. The effectiveness and openness of these meetings is in part due to the ability of participants to openly share their opinions on the types of issues raised in those meetings; noting again that information is to be treated confidentially and within a limited group of people. This has a flow on effect to the overall effectiveness of the Department's process and policies. This will also impact on the level of detail provided by participants in the meetings. The release of information in the documents could reasonably be expected to affect the ability of individuals to provide similar and as detailed information in future meetings. This could reasonably result in a perception that the Department lacks integrity with respect to protecting the confidentiality of these types of records; thus affecting the proper and efficient conduct of the operations of the Department.

37. Any action, including by releasing these documents under the FOI Act, that could or would limit the effectiveness and openness of these meetings or record keeping, will have an adverse effect on the efficient conduct of the operations of the Department.
38. Accordingly, I have decided that 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).

Application of the public interest test to exemptions applied under sections 47C and 47E

39. 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.
40. 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;
 - (b) disclosure would inform debate on a matter of public importance; and
 - (c) disclosure would promote effective oversight of public expenditure.
41. I also considered the following factors which do not favour disclosure:
 - (a) disclosure would, or could reasonable be expected to, prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
 - (b) disclosure would, or could reasonable be expected to, prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
 - (c) 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;
 - (d) disclosure would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs;
 - (e) disclosure could reasonably be expected to prejudice the future supply of information to the Commonwealth for the purpose of the administration of a law of the Commonwealth or the administration of matters administered by an agency;

- (f) disclosure could reasonably be expected to prejudice security, law enforcement, public health or public safety;
- (g) disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information;
- (h) disclosure could reasonably be expected to prejudice an agency's ability to obtain similar information in the future;
- (i) disclosure could reasonably be expected to harm the interests of an individual or group of individuals;
- (j) disclosure could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General; and
- (k) disclosure could reasonably be expected to prejudice the effectiveness of testing or auditing procedures.

42. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.
43. It is reasonable to consider that individuals participating in the relevant Committee meetings expect a level of confidence and privacy when discussing sensitive matters relating to the operations, security and financial affairs of the Department. As such, it is reasonable that these participants would expect the Department to maintain a high level of confidentiality in respect to documents that maintain a record of any discussions that has taken place.
44. Releasing the documents you seek access to could reasonably be expected to adversely impact on the Department's ability to gain the confidence of the Committee, or other current or future Committees, and the provision of relevant information in the future. Further, this could significantly undermine the value of these meetings and ultimately undermine the ability of the Department to discuss sensitive issues impacting the Department in the future. Likewise, with respect to the Committee's deliberations, disclosure is likely to undermine the Committee's expectation of confidentiality with respect to its deliberations. This in turn, is likely to have an adverse effect on the Committee's willingness to openly discuss, share opinions and deliberate on issues, substantially interfering with its ability to operate as an effective independent advising body to the Secretary of the Department.
45. 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.

Information Publication Scheme

46. The Information Publication Scheme requires the Department to publish information released in response to individual requests made under the FOI Act, except in specified circumstances. Details of your request will not be published on the Department's disclosure log as no documents have been released to you.

Your rights of review

47. If you are dissatisfied with my decision, you may apply for internal review or request the Office of the Australian Information Commissioner (**OAIC**) review my 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

48. 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.
49. You can make your application for internal review in one of the following ways:

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

OAIC review

50. Under section 54L of the FOI Act, you may apply to the OAIC to review my decision. An application for review by OAIC 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 2000

51. 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-factsheets/foi-factsheet-12-your-review-rights>

Contact us

52. 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, Department of Veterans' Affairs

GPO Box 9998, Canberra ACT 2601

Facsimile: (02) 6289 6337

Email: information.law@dva.gov.au

Yours sincerely,

Leia (Position Number 62210022)

Assistant Director

Information Law Section | Legal Services & Assurance Branch

Legal Assurance and Governance Division

12 November 2018



Schedule of documents

Applicant: Julie (Right to Know)

Decision date: 12 November 2018

FOI reference number: FOI 25066

Doc ref	Date of document	Document description	Pages	Decision	Exemption provision
1	5 September 2017	Minutes	9	Refused	s 45 s 47C s 47E(d)
2	18 September 2017	Joint Meeting with the relevant Committee and the Risk and Fraud Management Committee – Minutes	6	Refused	Same as above
3	11 October 2017	Minutes	12	Refused	Same as above
4	13 December 2017	Minutes	12	Refused	Same as above
5	13 March 2018	Minutes	12	Refused	Same as above
6	13 June 2018	Minutes	14	Refused	Same 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).

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).

45 Documents containing material obtained in confidence

- (1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.
- (2) Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:
- (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or
 - (b) an agency, the Commonwealth or Norfolk Island.

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).