



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

Internal review decision and reasons for decision of John (Position Number 62230915),
Information Law Section, Legal Services and Assurance Branch

Applicant: Julie (Right To Know)
Date of primary decision: 12 November 2018
FOI reference number: FOI 25066
Internal review decision date: 17 December 2018
Internal review reference number: IR 25504
Sent by email: foi+request-4883-c0011eca@righttoknow.org.au

Dear Julie (Right To Know)

Freedom of Information Request: FOI 25504

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 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, John (Position Number 62230915), Information Law Officer, Information Law Section, 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 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 & Risk Management Committee for FY17/18.

5. As no extensions of time were applied to process your request, a decision on your request was due by 12 November 2018.
6. On 12 November 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 six documents itemised in **Schedule 1** of the original decision. The reasons given in that decision hold for this Internal Review decision.
7. On 16 November 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 the Department of Veterans' Affairs handling of my FOI request 'Audit & Risk Committee Minutes for FY17/18.

8. As no extensions of time have been applied to process this internal review, a decision on your request is due by 17 December 2018.

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 45 Documents communicated in confidence
- 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 Audit & Risk Committee as: "Minutes are not deliberative but are a record of decisions taken and actions assigned". This is only partly correct.

14. The Minutes of the Audit & Risk Committee are a compendium of deliberations of the Department's financial affairs, risks, fraud control, fraud investigations and status reports on the Department's ongoing operations.

15. Enterprise risks are oversights by the Audit & Risk Committee and cover:

- a) Financial reporting
- b) Performance reporting
- c) System of risk oversight and management; and
- d) System of internal control.

16. Additionally, the Audit & Risk Committee considers matters relating to:

- a) Legislative and policy compliance
- b) Internal audit
- c) External audit; and
- d) Relevant parliamentary committee reports and external reviews.

Section 45: Documents containing material obtained in confidence

17. 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 give the following five criteria that must be satisfied for Section 45 to apply:

- (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.
18. The Audit & Risk Committee operates 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. The Minutes record the discussions and the opinions of members and third parties.
19. For these reasons, I am satisfied that the documents you seek to access 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.

Section 47C: Public interest conditional exemptions – deliberative processes

20. 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.
21. 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.
22. In the AAT decision of Wood; Secretary, Department of the Prime Minister & Cabinet and (Freedom of Information) [2015]AATA945, 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.
23. The Minutes of the Audit & Risk Committee contain a record of such deliberations.
24. I am satisfied that the documents requested contain deliberative matter which is conditionally exempt under sub-section 47C(1) of the FOI Act.

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

25. 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.
26. The Minutes contain a record of discussions about the audits, risks and frauds within the Department’s jurisdiction.

27. It is important that the Minutes capture an open and frank reporting of these matters.
28. 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 Committee's meetings.
29. 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.

Conclusion

30. I acknowledge that disclosure of the requested documents could promote the objects of the FOI Act.
31. 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.
31. I consider that all three factors weigh heavily against disclosure of the Minutes of the Department's Audit & Risk Committee. 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.
32. 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.
33. None of the factors listed in section 11B(4) of the FOI Act were taken into account in making this decision.
34. On balance, I find that it would be contrary to the public interest to release the information considered conditionally exempt under sections 45, 47C and 47E(d) of the FOI Act.

Your rights of review

32. Under section 54L of the FOI Act, if you are dissatisfied with my decision, you may apply to the OAIC to review my decision. An application for review by the 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.

33. 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>

Contacts

34. 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,

John (Position Number 62209913)

Information Law Officer
Information Law Section | Legal Services & Assurance Branch
Legal Assurance and Governance Division

17 December 2018



Schedule of documents

Applicant: Julie (Right to Know)

Decision date: 17 December 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	As above
3	11 October 2017	Minutes	12	Refused	As above
4	13 December 2017	Minutes	12	Refused	As above
5	13 March 2018	Minutes	12	Refused	As above
6	13 June 2018	Minutes	14	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).

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.

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).