



Revised decision made under section 55G of the *Freedom of Information Act 1982*

Revised decision and reasons for decision of Alison (Position Number 62210358), Legal Officer, Information Law Section, Legal Services & Audit Branch, Department of Veterans' Affairs

Applicant:	Julie (Right to Know)
Primary decision:	FOI 25071 – issued on 26 October 2018
Internal Review decision:	IR 25411 – issued on 26 November 2018
Revised decision:	ICR 27675 – issued on 25 June 2019
Sent by email:	foi+request-4886-b69647a7@righttoknow.org.au

Dear Julie,

1. The purpose of this correspondence is to advise you of a revised decision the Department of Veterans' Affairs (**Department**) has made under section 55G of the *Freedom of Information Act 1982* (*Cth*) (**FOI Act**) in relation to FOI 25071; as affirmed in IR 25411.

Decision

2. I have made a decision to vary the Internal Review decision made by Nick (Position Number 62209913), Acting Director, Information Law, Legal Services and Audit Branch. Nick made a decision to affirm the primary decision, which was to refuse your request on the basis that the documents did not exist.
3. In the interests of resolving your application for Information Commissioner Review (IC Review; MR19/00922 refers), the Department has agreed to undertake a revised decision on a 'new scope'. I have made a decision to grant you partial access to four (4) documents falling within the new scope of your request.

Summary

4. I, Alison (Position Number 62210358), Legal Officer, Information Law Section, Legal Services and Audit Branch, am an officer authorised by the Secretary of the Department of Veterans' Affairs

(Department) to vary decisions about access to documents in the possession of the Department in accordance with section 23(1) of the FOI Act.

5. 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 People and Culture Committee for FY17/18...

6. On 26 October 2018, you were provided with a decision relating to your request. The decision was to refuse access to the documents subject to your request on the basis of section 24A of the FOI Act, as the documents could not be found or did not exist.
7. On 26 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's handling of my FOI request 'People and Culture Committee'.

Yet another senior DVA executive committee identified by DVA's own Corporate Plan as existing, yet surprisingly no documentary record, apart from the Corporate Plan, exists....

Yet again the hostility of DVA towards FOI is on full display.

Either DVA has a unethical policy of breaching the Archives Act by destroying records, so as to avoid their capture by FOI, or is the most unique public sector agency in the world, in that its identified executive corporate governance committees never meet and never record anything, ever.

I seek internal review on the basis to claim such records do not exist approaches fantasy, given the existence of these committees is identified by DVA itself.

These types of committee simply do not exist in a vacuum, given the members are all at the SES bands, and they report to the DVA band.

It seems like intentional bad faith is in play here, and it is quite disturbing that DVA would go as far as to knowingly lie (but then again, I guess, your flam s 15AB application that the OAIC knocked back as being too ridiculous proves that your willingness to go that far)...

8. On 26 November 2018, the Department issued you with its decision on Internal Review. The decision was to affirm the primary decision, as the documents did not exist.
9. On 19 March 2019, the Office of Australian Information Commissioner (OAIC) sent the Department a notice under s 54Z of the FOI Act, advising the Department that the Information Commissioner had commenced review of the Department's decision.

10. During the course of the IC Review, the Department provided the OAIC with information demonstrating that the documents you sought access to do not exist. The reasons for this were as explained to you in the Department's decisions; the People and Culture Committee did not exist in the 2017/2018 Financial Year.
11. In an attempt to resolve the IC Review, the Department sought clarification of whether a similar committee may have existed. It was confirmed that there was a former People Committee. As such, the Department advised the OAIC that it could progress the request to be for "*...the Minutes of the DVA People Committee for the 17/18 Financial Year...*" The OAIC confirmed that you were notified of this and that the Department would be issuing a revised decision to you, based on the new scope as described above.
12. The documents relevant to the new scope are listed in the schedule of documents at **Schedule 1**.

Material taken into account

13. In accordance with section 26(1)(a) of the FOI Act, the finding on any material question of fact, referring to the material on which those findings were based and the reasons for my decision to grant partial access to the documents follows.
14. I have taken the following material into account in making my decision:
 - the terms of your original FOI request;
 - the terms of your request for Information Commissioner review;
 - the terms of the 'new scope' of your request;
 - 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 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).
15. A full extract of all provisions I used to make my decision are provided in **Schedule 2**.

Reasons for Decision

16. I have decided to grant partial access to documents within the scope of your request, subject to the following exemptions in accordance with the FOI Act:

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

17. 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.
18. I have found material in all four documents to contain information that, if released, could have a substantial adverse effect on the proper and efficient conduct of the Department.
19. Because of the way the Department constructs the email addresses of individual officers, I have decided to redact the surnames of non-Senior-Executive Departmental staff within the documents subject to your request. The Department's role is to provide support and information to veterans and their dependents, Australian Defence Force personnel and other categories of people. The services and support which the Department provides include pensions and compensation, health care, rehabilitation and counselling services, amongst other things. It is important that the Department is able to continue to provide these services and to carry out the other legislative functions and administrative and operational processes required of them. Certain processes and specific channels of communication have been implemented which enable clients and other relevant stakeholders to contact the Department in a way that ensures all Departmental resources are managed as efficiently as possible.
20. I consider the release of the surnames of those staff in the circumstances would adversely affect the Department as the established lines of communication could then be bypassed. It is reasonable to expect that this would disrupt and adversely affect the operations of the Department.
21. Accordingly, I have decided that the 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).

Application of the public interest test:

22. 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.
23. 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;
 - (iii) enhance the scrutiny of government decision making; and
24. 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 proper and efficient conduct of the operations of an agency;
 - (b) disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy;
 - (c) disclosure could reasonably be expected to prejudice the management function of an agency; and
 - (d) disclosure could reasonably be expected to harm the interests of an individual or group of individuals.
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.
27. In accordance with section 22(2), I have decided to provide access to edited copies of the documents, modified by deletions to remove exempt material.

Access to documents

28. The documents released to you in accordance with the FOI Act are enclosed.
29. As explained above, I have prepared documents for release by removing exempt material. The material that has been edited for release is marked within the documents as well as at **Schedule 1**.

Application for Information Commissioner Review – request to withdraw application

30. In light of my decision to vary the Internal Review decision, and to release documents to you based on a new scope, I ask you now consider withdrawing your application for IC Review.

Your rights of review

31. If you are dissatisfied with my decision, you may advise the Information Commissioner that you do not wish to withdraw your application for IC Review.
32. 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>

Contact us

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

Post: Legal Services & Audit Branch, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601

Facsimile: (02) 6289 6337

Email: Information.Law@dva.gov.au

Yours sincerely,

Alison (Position Number 62210358)

Legal Officer
Information Law Section
Legal Services and Audit Branch
Integrity, Assurance and Communications Division

25 June 2019



Schedule of documents

Applicant: Julie (Right to Know)

Decision date: 24 June 2019

Reference number: ICR 27675

Doc ref	Document description	Pages	Decision	Exemption provision
1	People Committee Meeting Minutes 1 August 2017	7	Part Release	section 47E(d)
2	People Committee Meeting Minutes 29 November 2017	7	Part Release	section 47E(d)
3	People Committee Meeting Minutes 16 March 2018	7	Part Release	section 47E(d)
4	People Committee Meeting Minutes 10 May 2018	7	Part Release	section 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).

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).

55G Procedure in IC review--revocation or variation of access refusal decision

- (1) An agency or Minister may vary (or set aside and substitute) an access refusal decision (the original decision) in relation to a request or an application under section 48 at any time during an IC review of the access refusal decision if the variation or substitution (the revised decision) would have an effect of:
 - (a) giving access to a document in accordance with the request; or
 - (b) relieving the IC review applicant from liability to pay a charge; or
 - (c) requiring a record of personal information to be amended or annotated in accordance with the application.

Note: When making the revised decision, a consultation requirement under section 26A (documents affecting Commonwealth-State relations etc.), 27 (business documents) or 27A (documents affecting personal privacy) may apply.

- (2) If an agency or Minister varies (or sets aside and substitutes) an access refusal decision under subsection (1):
 - (a) the agency or Minister must, in writing, notify the Information Commissioner as soon as practicable after the agency or Minister makes the variation or substitution; and
 - (b) the Information Commissioner must deal with the IC review application for review of the original decision as if it were an IC review application for the review of the varied or substituted decision, subject otherwise to this Part.