



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

Decision and reason for decision of Position Number 62212962, Information Law Section, Legal Services and General Counsel Branch, Department of Veterans' Affairs

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**Applicant:** Verity Pane  
**Decision date:** 19 November 2018  
**FOI reference number:** FOI 25194  
**Sent by email:** [foi+request-4908-3fb77c68@righttoknow.org.au](mailto:foi+request-4908-3fb77c68@righttoknow.org.au)

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Dear Verity Pane

### Freedom of Information Request: FOI 25194

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

### Authority to make this decision

2. I, Julie (Position Number 62212962), Legal Officer, 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)*.

### Summary

3. On 20 October 2018, you made a request for access to documents in the possession of the Department. Your request sought access to:

*"...I seek a copy under FOI legislation of the most recent DVA employee whole of agency survey (the detailed report, not the summary report circulated to all employees)..."*

4. As no extensions of time have been applied to process your request, a decision on your request is due by 19 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 one (1) document relevant to your request, as set out above. The document relevant to your request is listed at **Schedule 1**.

### **Decision**

7. I have made a decision to refuse access to the document relevant to your request. The document that I have chosen to refuse access to is 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 document 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 document 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 47 Documents disclosing trade secrets or commercially valuable information;  
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 the document within the scope of your request in accordance with the following exemption in the FOI Act:

***Documents disclosing trade secrets or commercially valuable information (section 47)***

12. Section 47 of the FOI Act provides that a document is an exempt document if its disclosure would disclose:
  - (a) trade secrets; or
  - (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.
13. The document you have sought access to is a report provided by a third party, the Australian Public Service Commission (**Commission**) to the Department under a fee-for-service arrangement, through participation of the Census. Where an agency chooses to participate in the Census, they are referred to as a responding agency.
14. The document you are seeking access to is not publicly available, nor is it available for purchase by an agency other than the responding agency. I have therefore decided that the document requested wholly contains information that has a commercial value to the Commission, the Department and more generally, to the Commonwealth.
15. Due to the highly limited audience to whom the document is available, and particularly due to the provision of the document being linked to the service offering accepted by the Department, the commercial value of the reports, should access be available by means other than the service offering, would be greatly diminished, if not destroyed.
16. If bypassing the service arrangement with the Commission were to be accepted, and release be available by means such as through the FOI Act, to persons or organisations other than the responding agency, and more generally, to the world at large (noting that release under the FOI Act is to 'the world at large', in line with the intentions of the FOI Act and FOI Guidelines at 3.36), the value in the service arrangement would be diminished or destroyed, as it is foreseeable that agencies would no longer be willing to provide funding toward the facilitation of the Census if the offerings provided under the arrangements no longer held value. Such effects would have a substantial and adverse effect on the functions of the Commission, contrary to the public interest.
17. The *Public Service Act 1999* (Cth) (**PS Act**) sets out the functions of the Australian Public Service Commissioner (**Commissioner**). Section 41(2)(c) of the PS Act provides that one of the functions of the Commissioner is to develop, review and evaluate the Australian Public Service (**APS**) workforce management policies and practices and manage appropriate databases. Additionally, section 44 of the PS Act notes the Commissioner's functions of annually reporting to Parliament on the state of the APS. These functions are substantially reliant on the evaluation of data provided by Commonwealth agencies and APS employees participating in the Census.
18. The privacy policy of the Commission notes that research consultants are engaged by the Commission as the service provider for the annual Census. The service provider supplies the technical

solutions and support required to administer and report on the Census. The service provider does this on a fee-for-service arrangement. If the commercial value of the service offerings to the responding agency be diminished or destroyed, by way on an alternate means to access the reporting analysis, it is foreseeable that the functions of the Commission would be detrimentally and substantially affected as alternate means of financing the facilitation of the Census would need to be arranged.

19. For the reasons set out above, I am satisfied that the document you have requested, as specified in Schedule 1, contains commercially valuable information subject to exemption under section 47 of the FOI Act. Accordingly, I have determined that the document is exempt in full.
20. As the document is not conditionally exempt from disclosure I am not required to consider any public interest factors.

### **Your rights of review**

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

22. 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.
23. You can make your application for internal review in one of the following ways:

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

**Facsimile:** (02) 6289 6337

**Email:** [information.access@dva.gov.au](mailto:information.access@dva.gov.au)

### **OAIC review**

24. Under section 54L of the FOI Act, 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](http://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](mailto:enquiries@oaic.gov.au)

**In person:** Level 3, 175 Pitt Street, Sydney NSW.

25. 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**

26. If you wish to discuss this decision, please do not hesitate to contact me using the following details:

**Post:** Legal Services & General Counsel Branch, Department of Veterans' Affairs

GPO Box 9998, Canberra ACT 2601

**Facsimile:** (02) 6289 6337

**Email:** [information.law@dva.gov.au](mailto:information.law@dva.gov.au)

Yours sincerely,

**Julie**

**Position Number 62212962**

Legal Officer

Information Law Section | Legal Services & Assurance Branch

Legal Assurance and Governance Division

19 November 2018



## Schedule of documents

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**Applicant:** Verity Pane

**Decision date:** 19 November 2018

**FOI reference number:** FOI 25194

Doc ref	Date of document	Document description	Pages	Decision	Exemption provision
1	2018	APS Employee Census 2018	35	Exempt in full	Section 47



## Schedule of relevant provisions in the FOI Act

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### 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).

**47 Documents disclosing trade secrets or commercially valuable information**

- (1) A document is an exempt document if its disclosure under this Act would disclose:
  - (a) trade secrets; or
  - (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.
- (2) Subsection (1) does not have effect in relation to a request by a person for access to a document:
  - (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
  - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
  - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (3) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.