



## Australian Government

### Department of the Prime Minister and Cabinet

FOI

FOI/2013/019

#### ***FREEDOM OF INFORMATION ACT 1982***

**REQUEST BY:** Mr Renai LeMay

**DECISION BY:** Ms Linda Geddes  
Assistant Secretary  
Cyber Policy and Crisis Management Branch

#### **FOI request**

In an email dated 30 January 2013 to the Department of the Prime Minister and Cabinet (the Department), the applicant made a request under the *Freedom of Information Act 1982* (FOI Act), in the following terms:

...any documents put to the Prime Minister or the Department of the Prime Minister & Cabinet over the preceding calendar year before 24 January 2013 which proposes establishing an Australian Cyber Security Centre.

The request was received by the Department on 30 January 2013.

#### **Authorised decision-maker**

I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

#### **Searches for documents**

The following steps were taken to locate documents relevant to the request:

- the Department's relevant document management system (SlipStream) was searched;
- the Department's file management system (TRIM) was searched;
- Departmental branches responsible for the subject-matter of the request searched their document management systems; and
- relevant officers were asked to search their records.

Documents relevant to the request identified as a result of these searches are described in Attachment A.

#### **Decision**

My decision on access to the documents is set out in Attachment A. My reasons for decision are set out below. Relevant extracts from the FOI Act are set out at Attachment B.

## **Section 34 – Cabinet Documents**

### *Document 1*

Paragraph 34(1)(c) of the FOI Act provides that a document is exempt if it was brought into existence for the dominant purpose of briefing a Minister on a document which is proposed or has been submitted to Cabinet for its consideration and was brought into existence for the dominant purpose of submission for consideration by the Cabinet. One of the documents relevant to the request is a Cabinet brief. Accordingly, I have decided to exempt this document in full under paragraph 34(1)(c) of the FOI Act.

### *Document 2*

Paragraph 34(1)(a) of the FOI Act provides that a document is exempt if it was submitted to Cabinet or proposed to be submitted to Cabinet for its consideration and was brought into existence for the dominant purpose of submission for consideration by the Cabinet. I am satisfied that one of the documents satisfies both of these elements and I have therefore decided to exempt this document in full under paragraph 34(1)(a) of the FOI Act.

### *Documents 3 and 4*

Subsection 34(2) of the FOI Act exempts a document to the extent that it is a copy or part of, or contains an extract from, a document to which paragraph 34(1)(a) of the FOI Act applies. I find that parts of documents 3 and 4 contain extracts from a document to which subsection 34(1)(a) of the FOI Act applies.

Subsection 34(3) of the FOI Act provides that a document is an exempt document to the extent that it contains information, the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed. I am satisfied that parts of documents 3 and 4 contain reference to a decision or deliberation of Cabinet, the existence of which has not been officially disclosed.

I am satisfied that none of the exceptions listed in subsections 34(4) to (6) of the FOI Act preclude exemption of the documents 1 to 4 under section 34.

In reaching my decision on documents 1 to 4, I consulted the Cabinet Secretariat as custodian of the official records of the Cabinet.

## **47C Public interest conditional exemptions—deliberative processes**

### *Documents 3 and 4*

A document is conditionally exempt from release under section 47C of the FOI Act if it includes deliberative matter. Deliberative matter is matter that is in the nature of, or relating to either:

- opinion, advice or recommendation that has been obtained, prepared or recorded; or
- consultation or deliberation that has taken place;

in the course of, or for the purposes of, a deliberative process involved in the functions of an agency, Minister or the Commonwealth Government.

Documents 3 and 4 are documents containing departmental officers' advice and recommendations which were prepared for the purposes of the deliberative processes involved in the functions of the Department, the Prime Minister and the Government. The information in the documents contains material which has a close proximity to Cabinet and, if released, inferences could be drawn as to possible Cabinet deliberations or decisions.

I am therefore satisfied that the material in these documents is deliberative matter within the meaning of subsection 47C(1) of the FOI Act.

I am satisfied that none of the material I have decided to exempt under section 47C is excluded from the application of section 47C under subsections 47C(2) and 47C(3) of the FOI Act. Accordingly, subject to consideration of whether disclosure would be contrary to the public interest, I am satisfied that the deliberative matter in the documents is conditionally exempt under subsection 47C(1).

#### *Public interests factors in favour of disclosure*

Factors favouring access to the documents in the public interest include whether access to the documents would do the following:

- promote the objects of the FOI Act (including all the matters set out in sections 3 and 3A); and
- inform debate on a matter of public importance.

#### *Factors against disclosure*

I consider the following public interest factors favour non-disclosure of the documents:

- the public interest in maintaining effective relationships between departments and their ministers by ensuring that officers can continue to explore and discuss sensitive issues with a reasonable expectation of confidentiality; and
- the public interest in the maintenance of Cabinet confidentiality.

Weighing the public interest factors for and against release, I attach less weight to the factors favouring release than to the factors against release. In particular, while the exempt material might promote the objects of the FOI Act and inform debate, I do not consider that it would do so in such a significant manner as to outweigh the damage that would be done to the various public interests favouring non-disclosure.

Accordingly, I consider, on balance, that it would be contrary to the public interest to disclose the exempt material under subsection 11A(5) of the FOI Act. I am therefore satisfied that documents 3 and 4 are exempt under subsection 47C(1) of the FOI Act.

#### **Processing and access charges**

On 19 February 2013, the Department notified the applicant that the estimated charge for processing the request was \$209.13. On 13 March 2013, the applicant paid a deposit of \$52.30 to enable processing to continue.

The estimate of charge included a component for possible third-party consultation. Having decided the documents to be exempt in full, consultation with third parties has not been

considered necessary. Accordingly, I have reassessed the processing charge to be \$54.92. Given the applicant has already paid \$52.30, I have decided to waive the difference of \$2.62 and accept the charge has been paid in full.

**Review and complaint rights**

I understand that information about the applicant's rights of review and complaint will be provided together with this decision.

A handwritten signature in black ink, appearing to read 'Linda Geddes', is positioned above the typed name.

Linda Geddes  
Assistant Secretary  
Cyber Policy and Crisis Management Branch  
5 April 2013



FOI

Document	Description	Proposed decision
1.	Brief	s34(1)(c) of the FOI Act
2.	Memorandum	s34(1)(a) of the FOI Act
3.	Brief	s34(2), s34(3) and s47C of the FOI Act
4.	Committee Memorandum	s34(2), s34(3) and s47C of the FOI Act

## Section 34 – Cabinet documents

### *General rules*

- (1) A document is an exempt document if:
  - (a) Both of the following are satisfied:
    - (i) It has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;
    - (ii) It was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or
  - (b) It is an official record of the Cabinet; or
  - (c) It was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or
  - (d) It is a draft of a document to which paragraph (a), (b) or (c) applies.
- (2) A document is an exempt document to the extent that it is a copy of part of, or contains an extract from, a document to which subsection (1) applies.
- (3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

### *Exceptions*

- (4) A document is not an exempt document only because it is attached to a document to which subsection (1), (2) or (3) applies.  
 Note: However, the attachment itself may be an exempt document.
- (5) A document by which a decision of the Cabinet is officially published is not an exempt document.
- (6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because of this section if the information consists of purely factual material, unless:
  - (a) The disclosure of the information would reveal a Cabinet deliberation or decision; and
  - (b) The existence of the deliberation or decision has not been officially disclosed.

## 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).



## Freedom of information – Your review rights

July 2012

If you disagree with the decision of an Australian Government agency or minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if someone is to be granted access to information that is about you, if the agency has informed you that it will impose a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by the agency, and external review by the Australian Information Commissioner.

### Internal review

If an agency makes an FOI decision that you disagree with, you can ask the agency to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless the agency extended the application time. You should contact the agency if you wish to seek an extension. The agency must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed.

Internal review is not available if a minister or the chief officer of the agency made the decision personally.

### Review by the Information Commissioner

The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act.

### Is a review the same as a complaint?

No. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that an agency decision is wrong, it will be treated as an application for a review. Your matter will be treated as a complaint when a review would not be practical

or would not address your concerns (for example, if you were not consulted about a document that contains your personal information before it was released). For more information see FOI fact sheet 13 – *Freedom of information: How to make a complaint*.

### Do I have to go through the agency's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.

### Do I have to pay?


No. The Information Commissioner's review is free.

### How do I apply?

You must apply in writing and you can lodge your application in one of the following ways:

online: [www.oaic.gov.au](http://www.oaic.gov.au)  
post: GPO Box 2999, Canberra ACT 2601  
fax: +61 2 9284 9666  
email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
in person: Level 8, Piccadilly Tower  
133 Castlereagh Street  
Sydney NSW





An application form is available on the website at [www.oaic.gov.au](http://www.oaic.gov.au). Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

#### **Can I get help in completing the application?**

Yes. The Information Commissioner's staff are available to help you with your application if anything is unclear.

#### **When do I have to apply?**

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the Information Commissioner within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances.

#### **Who will conduct the review?**

Staff of the Information Commissioner will conduct the review. Only the Information Commissioner, the FOI Commissioner or the Privacy Commissioner can make a decision at the end of the review.

#### **Does the Information Commissioner have to review my matter?**

No. The Information Commissioner may decide not to review an application that is frivolous, misconceived or lacking in substance, or if you fail to cooperate with the process or cannot be contacted after reasonable attempts. You cannot appeal against that decision.

Alternatively the Information Commissioner may decide that the Administrative Appeals Tribunal (AAT) would be better placed to review the matter, and if so, will advise you of the procedure for applying to the AAT. This will not be common.

#### **Can I withdraw my application?**

Yes. An application can be withdrawn at any time before the Information Commissioner makes a decision.

#### **What happens in the review process?**

The review process is designed to be as informal as possible. The Information Commissioner may contact you or any of the other parties to clarify matters and seek more information. The Information Commissioner may also ask the agency or minister to provide reasons for their decision if the reasons given were inadequate.

Most reviews will be made on the basis of the submissions and papers provided by the parties. Sometimes the Information Commissioner may decide to hold a hearing if one of the parties applies. Parties may participate in a hearing by telephone. If confidential matters are raised, the hearing may be held partly or wholly in private.

#### **Will there be other parties to the review?**

There may be. The Information Commissioner can join other parties who are affected by the application. For example, if you are objecting to someone else being granted access to information that concerns you, that person may be joined in the review.

#### **Can someone else represent me?**

Yes, including a lawyer. However, the Information Commissioner prefers the process to be as informal and cost-effective as possible and does not encourage legal representation.

#### **Will the Information Commissioner look at all documents, including ones that are claimed to be exempt?**

Yes. The Information Commissioner's review is a fresh decision, so all the relevant material must be examined, including documents that the agency or minister has declined to release. Developments that have occurred since the original decision may also be considered.

### What powers does the Information Commissioner have?

While the review process is designed to be informal, the Information Commissioner has formal powers to require anyone to produce information or documents, to compel anyone to attend to answer questions and to take an oath or affirmation that their answers will be true.

An agency or minister can also be ordered to undertake further searches for documents.

### What decisions can the Information Commissioner make?

After reviewing a decision, the Information Commissioner must do one of three things:

- set the decision aside and make a fresh decision
- affirm the decision, or
- vary the decision.

The Information Commissioner will give reasons for the decision.

### Will the decision be made public?

Yes. The Information Commissioner will publish decisions on the website. Exempt material (that is, material that is not released) will not be included. Nor will the name of the review applicant, unless that person requests otherwise or there is a special reason to publish it.

### What can I do if I disagree with the Information Commissioner's review decision?

You can appeal to the AAT. The Information Commissioner will not be a party to those proceedings. There is a fee for lodging an AAT application, although there are exemptions for health care and pension concession card holders, and the AAT can waive the fee on financial hardship grounds. For further information see [www.aat.gov.au/FormsAndFees/Fees.htm](http://www.aat.gov.au/FormsAndFees/Fees.htm).

### FOI applications made before 1 November 2010

The Information Commissioner can only review an agency's or minister's FOI decision if you made your FOI request on or after 1 November 2010. If you made your FOI request before 1 November, even if the decision was made after that date, the review process is different.

You must first ask the agency for internal review of the decision. You may then appeal to the AAT if you are not satisfied with the decision.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

#### For further information

**telephone:** 1300 363 992

**email:** [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

**write:** GPO Box 2999, Canberra ACT 2601  
or visit our website at [www.oaic.gov.au](http://www.oaic.gov.au)



# Freedom of information – How to make a complaint

October 2010

You may complain to the Australian Information Commissioner if you have concerns about how an Australian Government agency handled a request for documents under the *Freedom of Information Act 1982* (the FOI Act) or took any other action under that Act. If you are unhappy with the agency's decision about giving or refusing access to documents, you should ask for the decision to be reviewed, which is a separate process.

## Disagree with an FOI decision?

If you disagree with an agency's or minister's decision on your request under the FOI Act, you have the right to have the decision reviewed. You can ask an agency to review its decision internally. You also have the right to ask the Information Commissioner to review an agency's or minister's decision. See **FOI Fact Sheet 12 Freedom of information – Your review rights** for more information about the review process.

If you are concerned about the way an agency has handled your matter, you can complain to the Information Commissioner.

## What are the powers of the Information Commissioner?

The Information Commissioner can investigate a complaint about how an agency handled an FOI request, or other actions the agency took under the FOI Act. The Information Commissioner cannot investigate a complaint about a minister.

In conducting the investigation the Information Commissioner has the power to:

- make inquiries of an agency
- obtain information from any person
- take possession of, or inspect, any relevant documents.

If the Information Commissioner decides to investigate your complaint, the agency you have complained about will be notified in writing of the complaint. The Information Commissioner conducts investigations of complaints in private.

## Who can make a complaint?

Any person can make a complaint about the actions of an agency in relation to an FOI activity. You do not need to have requested documents under the FOI Act.

## When should I make a complaint?

You can complain to the Information Commissioner at any time. If your complaint relates to an FOI request you can make the complaint at any stage of the process.

Before making a complaint to the Information Commissioner, you should contact the agency directly to try to resolve your concerns. The Information Commissioner may decide not to investigate your complaint if you have not raised your concerns first with the agency or you have not given the agency a reasonable opportunity to deal with your complaint.

## How do I make a complaint?

Your complaint must be in writing and must specify the agency you are complaining about. You can send your complaint to us using the details at the end of this fact sheet. A complaint form is also available on our website at [www.oaic.gov.au](http://www.oaic.gov.au).

If you need help we can assist you. You can contact us on 1300 363 992 or by email to [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au).

## *What information do I need to put in the complaint?*

To help the Information Commissioner give the best consideration to your complaint, please provide as much relevant information as possible. Be clear about the issues in your complaint and what action or outcome you would like to see as a result.

## *Is there a fee for making a complaint?*

No. There are no costs involved in making a complaint to the Information Commissioner.

## What will happen to my complaint?

An officer of the Information Commissioner will contact you to discuss your complaint and you will be kept informed of the progress of your complaint along the way.

Before deciding whether to investigate your complaint the Information Commissioner may make preliminary inquiries of the agency you have complained about.

If the Information Commissioner decides to investigate your complaint, the Commissioner will write to the agency and request information to assist with the investigation.

## *Can the Information Commissioner decide not to investigate my complaint?*

Yes. The Information Commissioner may decide not to investigate, or may discontinue an investigation, if:


- your complaint does not concern an agency's action under the FOI Act
- it is more appropriate for you to complain to another body (such as the agency or the Commonwealth Ombudsman)
- it is more appropriate for you to ask for the decision to be reviewed
- the agency you complained about has dealt with your complaint, or is in the process of dealing with it
- your complaint is frivolous, lacking in substance or not made in good faith
- you do not have sufficient interest in the matter.

If the Information Commissioner decides not to investigate or discontinues an investigation, the Commissioner will notify you and the agency of the reasons for this in writing.

## How will my complaint be resolved?

In some cases the Information Commissioner's investigation and intervention may result in the agency addressing the issues that you have complained about. In other cases the Information Commissioner may make suggestions or recommendations that the agency should implement. You and the agency will be notified in writing of the outcome of the investigation.





If an agency fails to take adequate and appropriate action to implement any recommendations, the Information Commissioner may issue a formal implementation notice. This notice requires the agency to explain what action it will take to implement the recommendations. The Information Commissioner may also provide a written report to the minister responsible for the agency, and the report will be tabled in Parliament.

Your name will not be included in the report unless there is a special reason and you were first consulted.

### **Investigation by the Ombudsman**

The Commonwealth Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be or has been investigated by the Information Commissioner, the Ombudsman will consult the Information Commissioner to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate, the complaint and all relevant documents must be transferred to the Information Commissioner.

The Information Commissioner can also transfer to the Ombudsman a complaint that could more appropriately be investigated by the Ombudsman. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. It is unlikely that this will be common. You will be notified in writing if your complaint is transferred.

*The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.*

### **For further information**

**telephone:** 1300 363 992

**email:** [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

**write:** GPO Box 2999, Canberra ACT 2601  
or visit our website at

**[www.oaic.gov.au](http://www.oaic.gov.au)**