



14/371

21 March 2014

Mr Jason Wilson

Email: foi+request-503-18936a6@righttoknow.org.au

Dear Mr Wilson

Freedom of Information Request no. 13/221

The purpose of this letter is to provide you with a decision regarding access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

Summary

I, Stephen Bouwhuis, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

You requested access to documents relating to the appointment of Tim Wilson on 31 December 2013. Specifically you sought access to:

- *all correspondence related to the appointment of Tim Wilson as a Human Rights Commissioner, including emails and other correspondence from the Attorney-General to AGD staff or advisers, correspondence with AHRC staff or Commissioners, and any correspondence between Mr Wilson and the Attorney-General concerning the appointment.*
- *all correspondence, including email correspondence, which mentions the appointment, and where arrangements for Mr Wilson to be appointed are made.*

Background

On 15 January 2014 the Department wrote to you requesting an extension of time under section 15AA of the FOI Act. Following your approval the request became due on 13 February 2014. On 31 January 2014 the Department notified you of third party extension of time which extended your request by a further 30 days with a new due date of 13 March 2014.

A further request for an extension of time, to complete consultation process, was requested under s15AA. You agreed to a 7 day extension with a due date of 20 March 2014.

I identified 41 documents which fell within the scope of your request. I did this by arranging for searches of both electronic and hard copy records as well as making enquiries of those who may have been able to help locate documents within the scope of your request.

I am satisfied that the searches undertaken by the relevant areas of this department constitute a 'reasonable search' for the purposes of Part 3 of the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act: that is, '*a reasonable search on a flexible and common sense interpretation of the terms of the request*'.

The attached schedule of documents at **Attachment A** provides a description of each document that falls within the scope of your request and the access decision for each of those documents.

With regard to the documents you requested (set out in the schedule attached), I have decided to grant access to edited versions of 32 documents. More information, including my reasons for my decision, is set out below.

Decision and reasons for decision

With regard to the documents identified in the attached schedule, I have decided to grant access in part, to 27 documents with irrelevant matter deleted under section 22. I have also considered and applied the following exemptions:

- s34 of the FOI Act as their disclosure would disclose Cabinet documents
- s47C (1)(a) of the FOI Act as their disclosure would disclose deliberative matter.
- s47E(d) of the FOI Act as their disclosure would affect the efficient conduct of the operations of the Department.
- s47F(1) of the FOI Act as disclosure would involve the unreasonable disclosure of personal information about an individual.

Material taken into account

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

- the content of the documents that fall within the scope of your request
- the FOI Act (specifically sections 34, 47C(1), 47E(d) and 47F)
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act
- the views of a third party consulted by the Attorney-General's Department under section 27A, and
- *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission (2012) A1Cmr 19 at [15]-[22]*.

The schedule indicates each document to which access is refused. My reasons for refusing access are given below.

I consider documents 21 and 23 to be exempt under section 34(1)(d) of the FOI Act. They are drafts of documents that were submitted to Cabinet for its consideration, and were brought into existence for the dominant purpose of submission for consideration by Cabinet.

I consider documents 3 and 11 to be conditionally exempt from disclosure under section 47C(1) of the FOI Act as their disclosure would disclose deliberative matter. I further consider that access to these documents would on balance be contrary to the public interest under subsection 11A(5) of the FOI Act. Accordingly I have found that the above mentioned documents to be exempt from disclosure under the FOI Act.

I consider documents 1; 2; 4; 5; 7; 15; 16; 17; 20; 21; 22; 23; 27; 28; 30; 33; 34; 35; 36; 37 and 41 to be conditionally exempt from disclosure under sections 47C(1) and 47E(d) of the FOI Act as its disclosure would disclose deliberative matter and would have a substantial adverse effect on the proper and efficient conduct of the operations of the Department. I further consider that access to these documents would on balance be contrary to the public interest under subsection 11A(5) of the FOI Act. Accordingly I have found that the above mentioned documents to be exempt from disclosure under the FOI Act.

1. Cabinet documents

(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*

...

(d) *it is a draft of a document to which paragraph (a), (b) or (c) applies.*

2. Public interest conditional exemption – deliberative processes.

(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.*

3. Public interest conditional exemption – 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:

...

(d) *have a substantial adverse effect on the proper and efficient conduct of the operations of an agency*

The term 'deliberative matter' is explained in *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission (2012) A1Cmr 19 at [15]-[22]* as:

The action of deliberating, in common 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 process.

I note that deliberative matter does not include operational information or purely factual material.

Documents 3 and 11 are both letters from the Attorney-General Senator Brandis to the Prime Minister. The letters contains deliberative matter consisting of advice and opinion on a particular course of action.

Documents 1; 2; 4; 5; 7; 15; 16; 17; 20; 21; 22; 23; 27; 28; 30; 33; 34; 35; 36; 37 and 41 concern consultations between agencies on a document prepared for the purposes of briefing the

Attorney-General and the Governor-General in Executive Council, and consultations on documents being prepared for consideration by the Attorney-General and Cabinet. Disclosure of the documents would, or could reasonably be expected to, prejudice or have a substantial adverse effect on the proper and efficient conduct of the operations of the Government and the Department

Public interest considerations

I consider that disclosing the documents would, on balance, be contrary to the public interest. I have found that the benefit of the public resulting from disclosure of the documents is outweighed by the benefit to the public of withholding the documents. In accordance with subsection 11B(3) of the FOI Act, in reaching this decision, I note the following in respect of factors favouring disclosure.

An object of the FOI Act is to give the Australian community access to information held by the Government of the Commonwealth and to facilitate an increase in the public participation in Government processes, with a view to promoting better-informed decision-making. Although the information contained in the document may contribute to the achievement of these objectives, I do not consider that disclosing the form in which the information is presented to the Prime Minister and the Attorney General's office could further usefully inform public debate on this matter.

The FOI Act does not list relevant factors against disclosure of a document. However, the Guidelines do identify possible factors against disclosure.

In this particular case I note that disclosure of the documents 3 and 11 will materially affect the Attorney General's ability to properly inform the Prime Minister through the provision of confidential and sensitive advice and the Department's ability to support that role.

In addition, documents 1; 2; 4; 5; 7; 15; 16; 17; 20; 21; 22; 23; 27; 28; 30; 33; 34; 35; 36, 37 and 41 would reveal consultations and deliberations of public servants engaged in the functions of the Government of the Commonwealth within the responsibilities of their agency. To release such deliberative matter would impede public servants from consulting frankly and fearlessly within and outside Government for the purposes of briefing the Attorney-General, Cabinet and the Executive Council about the performance of their functions.

On balance, I considered that the public interest 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.

2. Public interest conditional exemption – personal privacy

Some material within documents 5; 7; 17; 20; 21; 23 and 35 is conditionally exempt under subsection 47F(1) of the FOI Act. Subsection 47F(1) states that:

A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

Personal information is defined in section 4 of the FOI Act to mean:

Information or an opinion (including information forming part of a database). Whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Material within documents 21,23 and 35 that is personal information includes:

- Names
- Contact details (emails, telephone numbers and addresses)
- Financial information

In my view releasing this material would involve the unreasonable disclosure of individuals' person information. Accordingly I have decided that this information is conditionally except under section 47F(1) of the FOI Act.

Under section 11A(5) of the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest. Using Part 6 of the OAIC Guidelines, I have identified the following factors as relevant in determining whether the disclosure of this information would be in the public interest:

Specific harm:

the unreasonable disclosure of individuals' personal information

Factors favouring disclosure:

to promote the objects of this FOI Act by providing the Australian community with access to information held by the Commonwealth Government (section 11B(3)(a) of the FOI Act 1982).

Factors against disclosure:

could reasonably be expected to prejudice the protection of an individual's right to privacy' (OAIC Guidelines paragraph 6.29)

In accordance with section 11B(4) of the FOI Act, I have ensured that no irrelevant factors have been considered in reaching this decision. In my view, the importance of maintaining individuals' right to privacy outweighs the factors in favour of disclosure. According, I am satisfied that documents 5; 7; 17; 20; 21; 23 and 35 are conditionally exempt from disclosure under section 47F(1) of the FOI Act and that disclosure would be contrary to the public interest.

Access to edited copies with exempt or irrelevant matter deleted

Section 22(1) of the FOI Act provides:

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.*

On this occasion, I consider that it was reasonably practicable for the department to prepare, in accordance with section 22(1) of the FOI Act, a copy (an **edited copy**) of the documents that fall within the scope of your request. I have reached this decision having regard to the reasonable extent of the modifications required to release the documents to you with all exempt and irrelevant material removed.

Your review rights

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the 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

Under section 54 of the FOI Act, you may apply in writing to the Attorney-General's Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, and be lodged in one of the following ways:

online: foi@ag.gov.au
post: FOI and Privacy Section
 Office of Corporate Counsel,
 Attorney-General's Department,
 3-5 National Circuit
 Barton, ACT 2600

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.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: [https://forms.business.gov.au/aba/oaic/foi-review-/](https://forms.business.gov.au/aba/oaic/foi-review/)
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

Questions about this decision

If you wish to discuss this decision, please contact Meagan Wilson on (02) 6141 4311 or by email foi@ag.gov.au.

Yours sincerely



Stephen Bouwhuis
Assistant Secretary
Attorney General's Department

Attachments

- A. Schedule of documents

Schedule of documents – Freedom of information request no. 13/221

Document no.	Date	Size	Description	Decision on access	Exemption
1	23/01/2014	3 pages	Email within the Department and to PMC	Release with deletions of irrelevant matter under s22	s47C(1), s47E(d)
2	2/12/2013	1 page	Email within the Department	Release with deletions of irrelevant matter under s22	s47C(1), s47E(d)
3	29/11/2013	2 pages	Letter from Senator Brandis QC to the Prime Minister	Access is refused on the basis of one or more specific exemptions	s47C(1)
4	2/12/2013	1 page	Email within the Department	Released with deletions of irrelevant matter under s 22	s47C(1), s47E(d)
5	4/12/2013	3 pages	Email from the Department to Mr T Wilson	Released with deletions of irrelevant matter under s22	s47F, s47C(1), s47E(d)
6	5/12/2013	1 page	Email within the Department and the Attorney General's Office	Released with deletions of irrelevant matter under s22	
7	9/12/2013	4 pages	Email from the Department to Mr T Wilson	Released with deletions of irrelevant matter under s22	s47F, s47C(1), s47E(d)
8	17/12/2013	2 pages	Email from the Department to PM&C	Released with deletions of irrelevant matter under s22	
9	17/12/2013	1 page	Media Release	Released in full	

10	2/12/2013	1 page	Email from the Department to the Office of the Attorney General	Released with deletions of irrelevant matter under s22	
11	29/11/2013	2 pages	Letter from Senator Brandis QC to the Prime Minister	Access is refused on the basis of one or more specific exemptions	s47C(1)
12	5/12/2013	1 page	Email within the Department	Released with deletions of irrelevant matter under s22	
13	5/12/2013	1 page	Email from the Department to Joshua Faulks	Released with deletions of irrelevant matter under s22	
14	17/12/2013	1 page	Email within the Department	Released with deletions of irrelevant matter under s22	
15	10/12/2014	1 page	Email from the Department to PM&C	Released with deletions of irrelevant matter under s22	s47C(1), s47E(d)
16	No date	2 pages	Draft Minute for the Executive Council together with Mr Tim Wilson's CV	Access is refused on the basis of one or more specific exemptions	s47C(1), s47E(d)
17	9/12/2013	3 pages	Email from Mr T Wilson to the Department	Released with deletions of irrelevant matter under s22	s47F, s47C(1), s47E(d)
18	5/12/2013	1 page	Email from the Department to Joshua Faulks	Released with deletions of irrelevant matter under s22	
19	5/12/2013	1 page	Email from Joshua Faulks to the Department	Released with deletions of irrelevant matter under s22	

20	4/12/2013	2 pages	Email from Mr T Wilson to the Department	Released with deletions of irrelevant matter under s22	s47F, s47C(1), s47E(d)
21	4/12/2013	2 pages	Personal information relating to Mr Tim Wilson	Access is refused on the basis of one or more specific exemptions	s47F, s47C(1), s47E(d), s34(1)
22	5/12/2013	2 pages	Email from the Department to Joshua Faulks	Released with deletions of irrelevant matter under s22	s47C(1), s47E(d)
23	4/12/2013	2 pages	Personal information relating to Mr Tim Wilson	Access is refused on the basis of one or more specific exemptions.	s47F, s47C(1), s47E(d), s34(1)
24	4/12/2013	1 page	List of Human Rights Commissioners.	Released in full	
25	17/12/2013	2 pages	Email within the Department	Released with deletions of irrelevant matter under s22	
26	17/12/2013	1 page	The Attorney General's Media Release	Released in full	
27	13/12/2013	2 pages	Email from PM&C to the Department	Released with deletions of irrelevant matter under s22	S47C(1), S47E(d)
28	No date	4 pages	Minute Paper for the Executive Council	Access is refused on the basis of one or more specific exemptions.	S47C(1), S47E(d)
29	5/12/2013	1 page	Email from the Department to Joshua Faulks	Released with deletions of irrelevant matter under s22	

30	3/12/2013	3 pages	Email from the Department to Joshua Faulks	Released with deletions of irrelevant matter under s22	s47C(1), s47E(d)
31	No date	1 page	Draft CV Template	Released in full	
32	No date	1 page	Draft Interest Declaration Template	Released in full	
33	3/12/2013	2 pages	Email from the Department to Mr Tim Wilson	Released with deletions of irrelevant matter under s22	s47C(1), s47E(d)
34	10/12/2013	1 page	Email from the Department to PM&C	Released with deletions of irrelevant matter under s22	s47C(1), s47E(d)
35	No date	4 pages	Minute Paper for the Executive Council	Access is refused on the basis of one or more specific exemptions.	s47F, s47C(1), s47E(d)
36	12/12/2013	2 pages	Email from the Department to Scott Bolitho	Access is refused on the basis of one or more specific exemptions.	s47C(1), s47E(d),
37	No date	2 pages	Media Release	Access is refused on the basis of one or more specific exemptions	s47C(1), s47E(d)
38	17/12/2013	2 pages	Email from the Department attached Media release	Released with deletions of irrelevant matter under s22	
39	17/12/2013	1 page	Attached Media Release	Released in full	
40	17/12/2013	1 page	Email within the Department attaching Question	Released with deletions of	

			Time Brief	irrelevant matter under s22	
41	17/12/2013	2 pages	Question Time Brief	Released with deletions due to one or more specific exemptions	s47C(1), s47E(d)