



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

Decision and reason for decision of Julie (Position Number 62212962), Information Law Section, Legal Services and Assurance Branch, Department of Veterans' Affairs

Applicant: Julie (Right to Know)
Decision date: 7 January 2019
FOI reference number: FOI 25965
Sent by email: foi+request-5148-35bc2ebd@righttoknow.org.au

Dear Julie,

Freedom of Information Request: FOI 25965

1. I have made a decision to create and **grant part access** to a document relevant to your request. I have **refused access** to part 6 of your request where you have sought information about the “...*Salary Band \$ (not actual salary but the salary band as per the current agreement/determination)...*” and refused access to information relating to staff acting in senior executive positions at the time.

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 8 December 2018, you made a request, under the FOI Act, for access to information in the Department's possession. Your request was made in the following terms:

...I seek the following document to be created under s 17 of the Freedom of Information Act from the digital data held by the Department of Veterans' Affairs in its intranet, human resource information system and records management system (as is reasonably necessary), to provide the following for each Senior Executive Service employee of the Department (as at today, or nearest date):

A table which provides the following information, for each SES employee:

1) Position Number

2) First Name

3) Last Name

4) Position Title

5) Departmental Branch position exists in

6) Salary Band \$ (not actual salary but the salary band as per the current agreement/determination)

7) The DVA Tier One and/or Tier Two Committee Memberships the SES employee has (see page 92 of the DVA Annual Report for 2017-2018 for overview)

8) Who SES Member Directly Reports To

9) Number of Direct Reports to SES Member...

4. As no extensions of time have been applied to process your request, a decision on your request is due by 7 January 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 information relevant to your request, as set out above. One document has been created, in accordance with section 17 of the FOI Act, relevant to your request. The document relevant to your request is listed at **Schedule 1**.

Decision

7. I have made a decision to create and **grant part access** to a document relevant to your request. I have **refused access** to part 6 of your request where you have sought information about the “...*Salary Band \$ (not actual salary but the salary band as per the current agreement/determination)...*” and refused access to information relating to staff acting in senior executive positions at the time.

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 grant part access to the document follows.
9. In creating the document under section 17 of the FOI Act, I have decided that it is unreasonable to include information you have sought at item 6 of your request as this information is conditionally exempt from disclosure under sections 47E and 47F of the FOI Act.

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

- the terms of your request, dated 8 December 2018;
- the type of information that is in the possession of the Department;
- 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 17 Requests involving use of computers etc (e.g. request for the Department to create a document)
 - Section 47E Public interest conditional exemptions--certain operations of agencies
 - Section 47F Public interest conditional exemptions--personal privacy; and
- the guidelines issued by the Office of the Australian Information Commissioner (**OAIC**) under section 93A of the FOI Act (**FOI Guidelines**).

11. A full extract of all FOI Act provisions used to make my decision are provided in **Schedule 2**.

Reasons for decision

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

12. 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; and
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

13. I have decided that part 6 of your request is information that if released, could have a substantial adverse effect on the management of personnel by the Department and on the proper and efficient conduct of the operations of the Department (sections 47E(c) and 47E(d) of the FOI Act). As such, this information is conditionally exempt from release.

14. The information you have requested relates solely and directly to the management of senior executive personnel in the Department, specifically in the context of remuneration.
15. Senior Executive Service (SES) employees in the Department are not covered by the Department's enterprise agreements. The terms and conditions of SES employment are a matter of individual negotiation between the Secretary and each SES employee in accordance with the *Public Service Act 1999* (Cth). Temporary arrangements are also put in place for staff acting in senior executive positions.
16. Specific information about an individual's remuneration is not publicly available nor is it generally internally available due to its sensitive nature. If this type of information were released, it would reveal information that is of a private and sensitive nature. Maintaining confidence in this process is vital.
17. The heads of Commonwealth agencies, including the Secretary of this Department, are already accountable for their expenditure on SES remuneration by way annual reporting. This information is available publicly within the Department's Annual Reports. The Department is not required to make public the individual remuneration of each SES employee. Further, under the *Privacy Act 1988* an individual's remuneration information is considered personal information.
18. Taking the above into account, I am satisfied that the disclosure of specific SES remuneration data would fundamentally alter the Department's relative bargaining position, would undermine the negotiation process, and could therefore reasonably be expected to have a substantial adverse effect on both the management or assessment of personnel by the Commonwealth and the proper and efficient conduct of the operations of the Department. This information is conditionally exempt under sections 47E(c) and (d) of the FOI Act.
19. Further, some of the information contained within the document relates to staff that were acting in senior executive positions at the time. As those individuals were not substantive SES at the time or subject to ongoing SES arrangements, release of this information could reasonably be expected to have a substantial adverse effect on both the management and assessment of personnel by the Commonwealth and the proper and efficient conduct of the operations of the Department. This information is also conditionally exempt under sections 47E(c) and (d) of the FOI Act.
20. Where information is assessed as conditionally exempt, access must be given subject to the public interest test in accordance with section 11A(5) of the FOI Act. This is assessed below.

Public interest conditional exemptions--personal privacy (section 47F)

21. Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person).

22. Section 4 of the FOI Act provides that personal information has the same meaning as in the *Privacy Act 1988* (Privacy Act). Personal information is defined in section 6 of the Privacy Act as:

...information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not;
- (b) whether the information or opinion is recorded in a material form or not.

23. The elements of 'personal information' are:

- (a) it relates only to a natural person (not, for example, a company);
- (b) it says something about the individual;
- (c) it may be in the form of an opinion, it may be true or untrue, and it may form part of a database;
- (d) the individual's identity is known or is reasonably ascertainable using the information in the document.

24. If information is personal information, it will be conditionally exempt if disclosure would be 'unreasonable'. In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires me to take into account:

- (a) the extent to which the information is well known;
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
- (c) the availability of the information from publicly accessible sources; and
- (d) any other matter I consider relevant.

25. I am satisfied that the information you have requested at item 6 of your request is personal information about the Department's SES employees whose identities are apparent. Specific remuneration information about these SES employees is not well known as detailed above. For these reasons, as well as those identified above at paragraphs 13 to 20, disclosure of this information would be unreasonable for the purposes of section 47F of the FOI Act.

26. All Commonwealth agencies, including this Department, are required to prepare annual financial statements that include SES remuneration information. The Department's Executive Remuneration Reporting for the 2017-18 Financial Year is available at <https://www.dva.gov.au/about-dva/accountability-and-reporting/executive-remuneration-reporting>.
27. In addition, Rule 27 of the *Public Governance, Performance and Accountability (Financial Reporting Rule 2015)* specifies the financial reporting required by Commonwealth agencies in respect of senior executive remuneration. This rule does not require reporting of an individual's remuneration specifically, whether that be the specific remuneration received or a specific individual's salary band.
28. To ensure non-identification of individual staff, Information on the range of salaries paid to the Department's SES employees is reported in aggregate and the salary range associated with relevant classifications. Public awareness of expenditure on this issue is met by the aggregate reporting.
29. Accordingly, I have decided that information relating to item 6 of your request meets 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 (in relation to sections 47E(c), 47E(d) and 47F):

30. 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.
31. 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;
 - (b) disclosure would inform debate on a matter of public importance.
32. I also considered the following factors which do not favour disclosure:
 - (a) disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy;
 - (b) disclosure could reasonably be expected to harm the interests of an individual or group of individuals;
 - (c) disclosure could reasonably be expected to prejudice the management function of an agency.
33. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.

34. 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.

Access to documents

35. The document released to you in accordance with the FOI Act is enclosed.

Information Publication Scheme

36. The Information Publication Scheme requires the Department to publish information released in response to individual requests made under the FOI Act, except in specified circumstances. I am of the view that details of your request should be made available on the Department's disclosure log. As such details of your request will be published by the Department on its disclosure log, which can be accessed at <http://www.dva.gov.au/about-dva/freedom-information/foi-disclosure-log>

Your rights of review

37. If you are dissatisfied with my decision, you may apply for Internal Review or request the Office of the Australian Information Commissioner (OAIC) 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

38. 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.
39. 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.law@dva.gov.au

Information Commissioner Review

40. Under section 54L of the FOI Act, you may apply to the OAIC to review my decision. An application for Information Commissioner Review 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 2000

41. 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

42. 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

Julie (Position Number 62212962)

Legal Officer

Information Law Section | Legal Services and Assurance Branch

Legal Assurance and Governance Division

7 January 2019



Schedule of documents

Applicant: Julie (Right to Know)

Decision date: 7 January 2019

FOI reference number: FOI 25965

Document reference	Date of document	Document description	Pages	Decision	Exemption provision
1	7 January 2018	Department's SES Employees' Information	1	Part Release	s 47E(c) & (d) s 47F



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).

17 Requests involving use of computers etc

- (1) Where:
- (a) a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;
 - (b) It appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and
 - (ba) it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and
 - (c) the agency could produce a written document containing the information in discrete form by:
 - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
 - (ii) the making of a transcript from a sound recording held in the agency;

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

- (2) An agency is not required to comply with subsection (1) if compliance would substantially and unreasonably divert the resources of the agency from its other operations.

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).

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).

47F Public interest conditional exemptions—personal privacy

General rule

- (1) 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).

- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
- (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

Access given to qualified person instead

- (4) Subsection (5) applies if:
- (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and
 - (b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.
- (5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:
- (a) carries on the same occupation, of a kind mentioned in the definition of qualified person in subsection (7), as the first-mentioned qualified person; and
 - (b) is to be nominated by the applicant.
- (6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.
- (7) In this section:
- qualified person means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:
- (a) a medical practitioner;
 - (b) a psychiatrist;
 - (c) a psychologist;
 - (d) a counsellor;
 - (e) a social worker.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).