



3 April 2019

Our reference: LEX 42296

FOI Applicant

Only by email: [foi+request-5243-1375e4b9@righttoknow.org.au](mailto:foi+request-5243-1375e4b9@righttoknow.org.au)

Dear FOI Applicant

### Decision on your Freedom of Information Request

I refer to your revised request, dated and received by the Department of Human Services (**department**) on 2 February 2019, for access under the *Freedom of Information Act 1982* (**FOI Act**) to the following documents:

2. How many GP practices are currently participating in the ePIP program (as of 2 February 2019)?
3. A list, current of 2 February 2019, of all GP practices participating in the ePIP program.
4. From the commencement date until 2 February 2019, how many GP practices have participated in the ePIP program?

### My decision

The department holds one document (totalling 154 pages) that relate to parts 2 and 3 of your request.

I have decided to **refuse access** to this document, as it is exempt under the following provisions of the FOI Act:

- section 38, as the document contains information that is protected under the *National Health Act 1953*, subsections 135A(1), (4) and (9), and the *Health Insurance Act 1973*, subsections 130(1), (4) and (9); and
- section 47G(1)(b), as the document contains information regarding the business affairs of an organisation, which if released could reasonably be expected to prejudice the future supply of information to the commonwealth for the purpose of the administration of a law or matters administered by an agency and release is contrary to the public interest.

I have also decided to **refuse access** to part 4 of your request under section 24A of the FOI Act, on the basis that all reasonable steps have been taken to locate documents and I am satisfied that the documents do not exist.

Please see the schedule at **Attachment A** to this letter for a detailed list of the documents and the reasons for my decisions, including the relevant sections of the FOI Act.

### **You can ask for a review of our decision**

If you disagree with any part of the decision you can ask for a review. There are two ways you can do this. You can ask for an internal review from within the department, or an external review by the Office of the Australian Information Commissioner. You do not have to pay for reviews of decisions. See **Attachment B** for more information about how to arrange a review.

### **Further assistance**

If you have any questions please email [FOI.LEGAL.TEAM@humanservices.gov.au](mailto:FOI.LEGAL.TEAM@humanservices.gov.au).

Yours sincerely

Molly  
Authorised FOI Decision Maker  
Freedom of Information Team  
Employment Law and Freedom of Information Branch | Legal Services Division  
Department of Human Services



**SCHEDULE OF DOCUMENTS FOR RELEASE**  
**FOI Applicant (Right to Know) - LEX 42296**

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
1.	1 - 154	Undated	Report listing practices registered for the eHealth Practice Incentives Program (ePIP) as at 2 February 2019	Exempt in full	s 38 s 47G(1)(b)	<p>Pages 1 – 154: protected information under the <i>National Health Act 1953</i>, subsections 135A(1), (4) and (9), and the <i>Health Insurance Act 1973</i>, subsections 130(1), (4) and (9) (section 38 – secrecy provisions).</p> <p>Pages 1 – 154: the information could reasonably be expected to prejudice the future supply of information to the Commonwealth (section 47G(1)(b) – business).</p>



## REASONS FOR DECISION

### What you requested

On 2 February 2019, you requested access to the following documents under the *Freedom of Information Act 1982 (FOI Act) (original request)*:

Could you please provide documents that include the information that relates to the Practice Incentives Program eHealth Incentive Program [‘ePIP’] as per this webpage: <https://www.humanservices.gov.au/organisations/health-professionals/enablers/ehealth-incentive/47761>

1. What date did this program commence?
2. How many GP practices are currently participating in the ePIP program (as of 2 February 2019)?
3. A list, current of 2 February 2019, of all GP practices participating in the ePIP program.
4. From the commencement of the ePIP program until 2 February 2019, how many GP practices have participated in the ePIP program?
5. Briefing notes, or summaries, or audits relating to the effectiveness of the ePIP program.
6. The total sum of all payments made under the ePIP program.
7. The total number of shared health summaries uploaded to My Health Record, by virtue of the ePIP program.

On 9 February 2019, you revised your original request to the following terms (**request**):

Further to the original request lodged 2 February 2019, I wish to narrow the scope of some of the requested documents. Subsequent to the lodgement of the request, publicly available information makes clear that the ePIP requirement to upload shared health summaries [‘SHS’] to the My Health Record [‘MHR’] system was introduced after the commencement of the ePIP program.

Accordingly, the scope of items 1, 4, 5, 6 are narrowed as follows:

1. What date did the ePIP eligibility requirement for participating practices to upload SHS for a minimum of 0.5% of the practice’s standardised whole patient equivalent become mandatory [‘the commencement date’]?
4. From the commencement date until 2 February 2019, how many GP practices have participated in the ePIP program?
5. Briefing notes, or summaries, or audits relating to the effectiveness of the ePIP program after the commencement date.

6. The total sum of all payments made under the ePIP program from the commencement date.

The scope of the other documents requested at items 2, 3 and 7 remain unchanged.

## Transfer

On 13 February 2019, I notified you that the following parts of your request were transferred to the Department of Health (**Health**) pursuant to section 16 of the FOI Act:

1. What date did the ePIP eligibility requirement for participating practices to upload SHS for a minimum of 0.5% of the practice's standardised whole patient equivalent become mandatory ['the commencement date']?

5. Briefing notes, or summaries, or audits relating to the effectiveness of the ePIP program after the commencement date.

6. The total sum of all payments made under the ePIP program from the commencement date.

7. The total number of shared health summaries uploaded to My Health Record, by virtue of the ePIP program.

The department processed the following parts of your request:

2. How many GP practices are currently participating in the ePIP program (as of 2 February 2019)?

3. A list, current of 2 February 2019, of all GP practices participating in the ePIP program.

4. From the commencement date until 2 February 2019, how many GP practices have participated in the ePIP program?

## What I took into account

In reaching my decision I took into account:

- your original request dated 2 February 2019;
- your revised request dated 9 February 2019;
- consultations with Health;
- consultations with departmental officers about:
  - the nature of the documents; and
  - the department's operating environment and functions;
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the **Guidelines**);
- the FOI Act;

- the *National Health Act 1953*, subsections 135A(1), (4) and (9); and,
- the *Health Insurance Act 1973*, subsections 130(1), (4) and (9).

### **Reasons for my decisions**

I am authorised to make decisions under section 23(1) of the FOI Act.

I have decided that document one, relating to parts 2 and 3 of your request, is exempt under the FOI Act. I have also decided to refuse access to part 4 of your request. My findings of fact and reasons are discussed below.

### Section 24A of the FOI Act

There are no documents in the department's possession which satisfy the scope of part 4 of your request.

Section 24A of the FOI Act provides that:

- (1) An agency or Minister may refuse a request for access to a document if:
  - a. all reasonable steps have been taken to find the document; and
  - b. the agency or Minister is satisfied that the document:
    - i. is in the agency's or Minister's possession but cannot be found; or
    - ii. does not exist.

I consulted with the Assistance Programmes Branch (**Branch**), which is the Branch responsible for administering the ePIP program, regarding part 4 of your request. The Branch advised that they searched the electronic database in which the information regarding ePIP participants are stored. They advised that they do not hold any documents within the scope of part 4.

### *Conclusion*

On the basis of these searches, I am satisfied that in accordance with section 24A of the FOI Act:

1. all reasonable steps have been taken to find the document; and
2. the document do not exist.

### Section 17 of the FOI Act

Section 17 of the FOI Act provides that:

- (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.

Paragraph 3.207 of the Guidelines, citing the Full Federal Court's decision in *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67 (Collection Point) provides:

...the reference in s 17(1)(c)(i) to a 'computer or other equipment that is ordinarily available' means 'a functioning computer system including software, that can produce the requested document without the aid of additional components which are not themselves ordinarily available ... [T]he computer or other equipment ... must be capable of functioning independently to collate or retrieve stored information and to produce the requested document.

*Does section 17 of the FOI Act apply?*

In processing your revised request, the department considered whether, pursuant to section 17 of the FOI Act, a written document could be produced which would satisfy part 4 of your revised request in a discrete form, by the use of a computer or other equipment that is ordinarily available to the department for retrieving or collating stored information.

I consulted with the Branch, which confirmed that, in this instance, the department cannot produce discrete written documents which show how many practices have participated in the ePIP program, since the commencement date until 2 February 2019.

Specifically, the Branch advised that they do not have the ability to produce a report that provides the number of practices registered for ePIP between two specific dates. This is because practices can withdraw from the incentive at any time and then re-apply and the program can only produce a report of the registered practices at a particular point in time.

Consequently, the Branch would be required to manually review each date, within the timeframe you seek, in order to tally the total number of practices whose information has been requested. The Branch would also need to manually ensure that the figure does not

include duplicates of practices in instances where they have withdrawn and re-registered to the ePIP program.

The Full Court of the Federal Court in *Collection Point* explains, at [44] that:

Section 17(1)(c)(i) is directed at ensuring that an agency will not be obliged to produce a document unless the effective and comprehensive means of doing so are ordinarily available to it for the specified purpose. In that context, the computer or other equipment ordinarily available for the specified purpose must be capable of *functioning independently to collate or retrieve stored information* and to produce the requested document. (Emphasis added).

As the program cannot function independently to collate the information, the department is not obliged to produce a document for part 4 of your request.

### *Conclusion*

I am satisfied that section 17 of the FOI Act does not apply to part 4 of your revised request. This is because the department cannot produce a written document in discrete form by the use of a computer that is capable of functioning independently to collate the information you requested.

### Section 38 of the FOI Act

I have applied the exemption in section 38 to document one.

Section 38(1)(b)(i) of the FOI Act provides that a document is an exempt document if its disclosure is prohibited under a provision of an enactment and that provision is specified in Schedule 3. Relevant to this matter is the *National Health Act 1953*, subsections 135A(1), (4) and (9), and the *Health Insurance Act 1973*, subsections 130(1), (4) and (9).

### *Does section 38(1) apply to the document/s?*

Subsection 135A(1) of the NH Act and subsection 130(1) of the HI Act are secrecy provisions that restrict the communication of protected information and specify when and to whom this type of information can be lawfully released. In practice, these secrecy provisions create a strict privacy regime when applied to information collected in the performance of duties' under both the NH and HI Acts.

Subsection 135A(1) of the NH Act provides that a person may not...

divulge or communicate to any person, any information with respect to the affairs of a third person acquired by the first-mentioned person in the performance of duties under [the NH Act].

Subsections 130(1) of the HI Act provides that a person may not...

make a record of, or divulge or communicate to any person, any information with respect to the affairs of another person acquired by [them] in the performance of his or her duties under [the HI Act].

I have found that the document within the scope of your request contains information respecting the affairs of a third party, acquired by Medicare in the performance of duties under both the NH Act and the HI Act.



You have requested documents relating to multiple third parties. The relevant line area has advised me that the ePIP program is administered by Medicare and thus, when a General Practice registers for ePIP, it is Medicare who processes the data. Consequently, the third-party GP information was initially collected 'in the performance of duties' under both the NH and HI Acts.

Given this, I have found that the document within the scope of your request contains information which may not be recorded, divulged or communicated to another person, and is exempt under section 38 of the FOI Act.

The general prohibition on the communication of third party protected information in subsection 135A(1) of the NH Act and subsection 130(1) of the HI Act are subject to specific exceptions. These stipulate that information is protected:

- except in the performance of duties, or in the exercise of powers or functions, under:
  - this Act or for the purpose of enabling a person to perform functions in relation to a medicare program or under the indemnity legislation or the My Health Records Act 2012 (whether as a delegate or otherwise) (NH Act, subsection 135A(1)); or
  - this Act or for the purpose of enabling a person to perform functions in relation to a Medicare program or for the purposes of enabling a person to perform functions under the Dental Benefits Act 2008 , the My Health Records Act 2012 (whether as a delegate or otherwise) or the indemnity legislation (NI Act subsection 130(1)).

None of these exceptions apply in the circumstances of this request. Therefore, I am satisfied that the disclosure of the information is prohibited under subsection 135A(1) of the NH Act and subsection 130(1) of the HI Act, and that this document is exempt under section 38 of the FOI Act.

*Does section 38(2) of the FOI Act apply to the document?*

Section 38(2) of the FOI Act provides that the exemption in section 38(1) does not apply to documents in so far as they contain personal information about you, as the Applicant.

I have found that the entirety of the document contains information concerning third parties. There is no personal information that relates to you. Therefore, section 38(2) of the FOI Act does not apply to any part of the documents and they are exempt in full under section 38(1).

*Conclusion*

For the reasons set out above, I am satisfied that document one contains protected information for the purposes of subsection 135A(1) of the NH Act and subsection 130(1) of the HI Act, and that this document is exempt under section 38 of the FOI Act.

Section 47G of the FOI Act

I have applied the conditional exemption in section 47G(1)(b) to document one.

Section 47G(1)(b) of the FOI Act relevantly provides:

- (1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning ...the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

- a. could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of... the administration of matters administered by an agency.

### *Business affairs*

Paragraphs 6.184 and 6.185 of the guidelines provide:

The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking (s 47G(1)(a)).

... it is intended to protect the interests of third parties dealing with the government.

Furthermore, paragraph 6.192 of the guidelines provides:

The use of the term 'business or professional affairs' distinguishes an individual's personal or private affairs and an organisation's internal affairs. The term 'business affairs' has been interpreted to mean 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.

The document within the scope of the request contains information relating to multiple third parties and their business affairs; namely, their involvement with ePIP.

### *Organisation or undertaking*

Paragraph 6.196 of the guidelines provides:

The term 'organisation or undertaking' should be given a broad application...

A General Practice is an organisation or undertaking for the purposes of the FOI Act.

### *Prejudice the future supply of information*

In deciding whether disclosure of a document containing business information would be unreasonable for the purpose of section 47G(1)(b) of the FOI Act, paragraph 6.198 of the Guidelines provides

This limb of the conditional exemption comprises two parts:

- a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government
- the reduction will prejudice the operations of the agency.

This document lists the General Practices participating in ePIP, which is administered by the department. This information is not publicly available, and if released, it is expected that it could reasonably be expected to prejudice the future supply of information to the Commonwealth, including the department. This is because organisations are likely to become reluctant to provide their information the Commonwealth, or any agencies, if they consider that their information will not remain private.

The reduction in the quantity of business affairs information to the government is likely to prejudice the operations of the department in multiple ways. Firstly, a reduction in the provision of business affairs information would result in less registrations to ePIP. This will prejudice the operation of program itself. Secondly, the reduction may have wide-spread effects on other programs across the department and the Commonwealth, for example the Department of Health. Overall, it could be expected that if business affairs information is withheld from the Commonwealth, programs which necessitate business affairs information will be prejudiced, including possible future ventures.

#### *Public interest considerations*

In finding that the document is conditionally exempt, I am required to consider whether it would be contrary to the public interest to grant access.

In considering factors favouring access, as required by section 11B of the FOI Act, I am satisfied that there is a public interest in giving access to the document insofar as doing so would promote the objects of the FOI Act generally.

However, this must be balanced against any public interest factors against disclosure. The factors against disclosure are listed in the Guidelines. Regarding document one, disclosure could reasonably be expected to:

- harm the interests of a business and its employees;
- prejudice the department's ability to obtain confidential information; and
- prejudice the department's ability to obtain similar information in the future.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making my decision.

#### *Conclusion*

In summary, I am satisfied that the material in document one is conditionally exempt under section 47G(1)(b) of the FOI Act. Furthermore I have decided that on balance it would be contrary to the public interest to release this information.

#### **Summary of my decision**

In conclusion, I have decided to:

- **refuse access** to document one, pursuant to section 38 and section 47G(1)(b) of the FOI Act; and
- **refuse access**, on the basis that all reasonable steps have been to locate documents which fall within the scope of part 3 of your request, and I am satisfied that no documents exist.



## Attachment B

### INFORMATION ON RIGHTS OF REVIEW

#### *FREEDOM OF INFORMATION ACT 1982*

#### **Asking for a full explanation of a Freedom of Information decision**

Before you ask for a formal review of a FOI decision, you can contact us to discuss your request. We will explain the decision to you. This gives you a chance to correct misunderstandings.

#### **Asking for a formal review of an Freedom of Information decision**

If you still believe a decision is incorrect, the *Freedom of Information Act 1982 (FOI Act)* gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by:

1. an Internal Review Officer in the Department of Human Services (the **department**); and/or
2. the Australian Information Commissioner.

**Note 1:** There are no fees for these reviews.

#### **Applying for an internal review by an Internal Review Officer**

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be:

- made in writing
- made within 30 days of receiving this letter
- sent to the address at the top of the first page of this letter.

**Note 2:** You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

#### **Applying for external review by the Australian Information Commissioner**

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

If you do not receive a decision from an Internal Review Officer in the department within 30 days of applying, you can ask the Australian Information Commissioner for a review of the original FOI decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can **lodge your application**:

Online: [www.oaic.gov.au](http://www.oaic.gov.au)  
Post: Australian Information Commissioner  
GPO Box 5218  
SYDNEY NSW 2001  
Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

**Note 3:** The Office of the Australian Information Commissioner generally prefers FOI applicants to seek internal review before applying for external review by the Australian Information Commissioner.

**Important:**

- If you are applying online, the application form the 'Merits Review Form' is available at [www.oaic.gov.au](http://www.oaic.gov.au).
- If you have one, you should include with your application a copy of the Department of Human Services' decision on your FOI request
- Include your contact details
- Set out your reasons for objecting to the department's decision.

**Complaints to the Australian Information Commissioner and Commonwealth Ombudsman**

***Australian Information Commissioner***

You may complain to the Australian Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act, There is no fee for making a complaint. A complaint to the Australian Information Commissioner must be made in writing. The Australian Information Commissioner's contact details are:

Telephone: 1300 363 992  
Website: [www.oaic.gov.au](http://www.oaic.gov.au)

***Commonwealth Ombudsman***

You may also complain to the Commonwealth Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Commonwealth Ombudsman may be made in person, by telephone or in writing. The Commonwealth Ombudsman's contact details are:

Phone: 1300 362 072  
Website: [www.ombudsman.gov.au](http://www.ombudsman.gov.au)

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.