



20 May 2019

Our reference: LEX 43923

Ms Evelyn Doyle

Only by email: foi+request-5299-abc3f4fe@righttoknow.org.au

Dear Ms Doyle

Freedom of Information (FOI) – Internal review decision

I refer to your email correspondence received by the Department of Human Services (the **department**) on 19 April 2019.

You have sought an internal review of an FOI decision dated 15 April 2019 (LEX 43040).

The department received your original FOI request on 10 March 2019.

You had requested access under the *Freedom of Information Act 1982* (the **FOI Act**) to the following:

'I note in a Sydney Morning Herald newspaper article dated 30 October 2018, there is mention of a \$51m trial to outsource Centrelink call centre services to Serco.

Since then, the department has proceeded with a large call centre outsourcing project to various companies based on the report outlining the findings of the trial, and from which the decision to outsource was made.

I would like to request a copy of the report under administrative access, as I assume the department has it ready to hand or could provide a link. I searched the Department of Human Services website but have not managed to locate the report.'

The primary decision-maker decided to refuse access to one document within the scope of your request.

Based on your request for an internal review, my review has focused on whether:

- the requested document is exempt under the FOI Act; and
- whether public interest considerations apply, such that the factors favouring access to the document outweigh the public interest against disclosure.

Decision

I have made a fresh decision on your request and decided to **refuse access** to the document.

I have decided to refuse access to the requested document, in its entirety, on the basis that it is an exempt document under section 34(1)(a) of the FOI Act. The document has been

submitted to Cabinet for its consideration and it was brought into existence for the dominant purpose of submission for consideration by Cabinet.

Because section 34(1)(a) of the FOI Act is not a conditional exemption, it is not a requirement under the FOI Act that the document be subject to the 'public interest test' (section 11A, FOI Act).

Accordingly, as the document falls within the exemption set out in section 34(1)(a) of the FOI Act, it is an exempt document.

Please see **Attachment A** for detailed reasons for my decision.

Review

You can ask for 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.

Further assistance

If you have any questions please email FOI.LEGAL.TEAM@humanservices.gov.au

Yours sincerely

Bianca

Authorised FOI Decision Maker
Freedom of Information Team
Legal Services Division
Department of Human Services

REASONS FOR DECISION

I am authorised under subsection 23(1) of the FOI Act to make internal review decisions under section 54C of the FOI Act.

Internal review request

On 19 April 2019 you requested an internal review and stated, amongst other things:

‘...While I understand the exemptions for Cabinet documents and the department's claims that the origin of the report was to examine new policy (and advice and evidence provided in the report), it is within the department's power to declassify the document [the report] and make it available for release.

Given the report's findings outline the reasons and evidence to support the government's decision to outsource the Centrelink call centre function to the private sector, the public has a right to know how the government makes decisions on their behalf. It would not be in the interests of the public for the department to use this as a reason to avoid public scrutiny.

Now that the decision has been made and the process of outsourcing has begun I request the document be made available to the public also noting it is no longer a deliberative process. For these reasons it is against the spirit of the FOI Act (and disclosure) to withhold information which supports the government's decision to make a major change to government processes.’

What I took into account

In reaching my decision I took into account:

- your original request dated 15 April 2019;
- your review request dated 19 April 2019;
- the document within the scope of your request;
- consultations with departmental officers about the document;
- consultations with the Department of the Prime Minister and Cabinet;
- consultation responses from the above parties, received in relation to the original FOI decision (LEX 43040);
- research, as set out in these reasons;
- the Cabinet Handbook issued by the Department of the Prime Minister and Cabinet, 12th Edition;
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the **Guidelines**); and
- the FOI Act.

Reasons for my decision

Section 34(1)(a) – Cabinet documents

Exemption

Section 34(1)(a) of the FOI Act states:

‘(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’

In regard to this exemption, the Guidelines relevantly state:

- The Cabinet exemption in section 34 of the FOI Act is designed to protect the confidentiality of the Cabinet process and to ensure that the principle of collective ministerial responsibility (fundamental to the Cabinet system) is not undermined (paragraph 5.55).
- This exemption is not subject to the public interest test. The public interest is implicit in the purpose of the exemption itself (paragraph 5.55).
- To be exempt under section 34(1)(a), a document must have been created for the dominant purpose of being submitted for Cabinet’s consideration and must have actually been submitted or have been proposed by a sponsoring minister to be submitted (paragraph 5.64).
- Whether a document has been prepared for the dominant purpose of submission to Cabinet is a question of fact (paragraph 5.67).

I consider the document is an exempt document under section 34(1)(a) of the FOI Act for the following reasons:

- The applicability of this exemption is a question of fact.
- Based on a further consultation with the Department of Prime Minister and Cabinet and the department’s Capability Improvement Branch, I have been advised that the document is exempt in full as it was brought into existence for the dominant purpose of consideration by Cabinet and was considered by Cabinet.
- The Minister for Human Services and Digital Transformation, the Hon Michael Keenan MP stated in a letter tabled in the Senate, dated 4 December 2018, ‘*The KPMG report is a Cabinet document, created for the purpose of informing decisions of the Cabinet*’. This letter is available [online via this link](#).

Exceptions

Section 34(6) of the FOI Act states:

‘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.'

Section 34(1)(a) of the FOI Act operates to exempt a document from release, if, based on fact, the document falls within that exemption.

In counter, the operation of section 34(6) of the FOI Act is to allow for the release of 'purely factual material' contained in an exempt document, in circumstances where the requirements of section 34(6) are satisfied.

'Purely factual material' is not defined in the FOI Act.

It has been held that purely factual material, 'comprises merely of simply factual material. It does not contain material that can be described as opinion, advice or recommendation or even conjecture' (*Re Waterford and Treasurer of the Commonwealth (No 1)* [1984] AATA 518; *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson* [2015] AATA 361).

The Guidelines at paragraph 5.77 state, 'Purely factual material includes material such as statistical data, surveys and factual studies. A conclusion involving opinion or judgement is not purely factual material. For example, a projection or prediction of a future event would not usually be considered purely factual.'

I consider the exception in section 34(6) of the FOI Act does not apply to the document for the following reasons:

- The document is not comprised of just purely factual material. The document contains evaluation and assessment information, as well as material that can be described as opinion or recommendations.
- To the extent that the document contains some purely factual material, this material is intertwined with other material.
- It has been held that where purely factual material is mixed with opinion, advice or recommendation that is exempt under the FOI Act, consideration must be given to whether that exempt matter can be deleted from the document in accordance with section 22 of the FOI Act (*Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson* [2015] AATA 361.)
- I consider it is not possible for the purely factual material to be separated from the other material in the document. The purely factual material is so intertwined with other material in the document, redactions are either not possible, or would result in redundant material remaining.

It is not therefore necessary for me to consider whether there has been an official disclosure of the existence of a Cabinet deliberation or decision which excludes the document from being exempt under section 34(6).

However, for completeness, my research indicates that there has been no such official disclosure. While the report has been a topic of some media interest, I am not aware of any media releases that make a definitive announcement about a decision or deliberation of Cabinet. Therefore, section 34(6) of the FOI Act does not have the effect of removing the exemption under section 34(1)(a) of the FOI Act.



Attachment B

INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Application for review of decision

The *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of this decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of this decision by the Information Commissioner.

Information Commissioner review

You must apply in writing within 60 days of the receipt of the decision letter and you can lodge your application in one of the following ways:

Online: www.oaic.gov.au
Post: GPO Box 5218, Sydney NSW 2001
Email: enquiries@oaic.gov.au

An application form is available on the website at 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.

Complaints to the Commonwealth Ombudsman

You may complain to the 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 Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au

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