



Daniel Styles

Via email: [foi+request-5588-baa1c0e3@righttoknow.org.au](mailto:foi+request-5588-baa1c0e3@righttoknow.org.au)

Dear Mr Styles

### Decision on your Freedom of Information request

I refer to your request received by the Department of Agriculture (**department**) on 20 August 2019 for access under the *Freedom of Information Act 1982* (**FOI Act**) to the following documents:

- '1. Documents created in 2019 concerning the matter of whether rent free housing provided to employees of the Department posted overseas should be treated as salary for superannuation purposes;
2. Communications between the Department and the Department of Finance in 2019 concerning the matter of whether rent free housing provided to employees of the Department posted overseas should be treated as salary for superannuation purposes.'

### My decision

The department holds two documents (totalling five pages) that relate to your request. The parts of the documents that are out of scope of your request were excluded from consideration.

I have decided to **refuse access to** both documents.

I have decided that the documents, or parts of documents, that you have requested are exempt under the FOI Act as they:

- contain material which is subject to legal professional privilege;
- contain material that is deliberative matter, the disclosure of which would be contrary to the public interest; and
- contain personal information, the disclosure of which would be contrary to the public interest.

Please see **Attachment A** to this letter for the reasons for my decision.

### Charges

On 2 September 2019, the department made a preliminary estimate of the charges applicable to your request in the amount of \$27.30. On 2 September 2019, the department received payment in full.

I have assessed the charge under Regulation 10 of the *Freedom of Information (Charges) Regulations 1982* and the cost of processing your request exceeded the amount estimated. The department has decided to fix the charge under this provision.

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

If you wish to seek an internal review, you must apply to the department within **30 days** after the day you are notified of this decision. An application for internal review must be made in writing by post to the FOI Officer or email to [foi@agriculture.gov.au](mailto:foi@agriculture.gov.au).

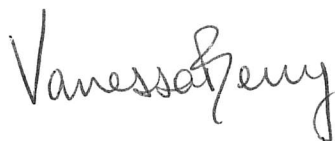
Alternatively, you may apply directly to the Office of the Australian Information Commissioner (OAIC) to review my decision. An application for review by the Information Commissioner must be made in writing within **60 days** after the day you are notified of this decision. You can also make a complaint to the Information Commissioner if you have concerns about how the department handled your request.

You can find information about requesting a review, making a complaint, and other information about FOI on the OAIC website [www.oaic.gov.au](http://www.oaic.gov.au) or phone the OAIC on 1300 363 992.

### **Further assistance**

If you have any questions, please email [foi@agriculture.gov.au](mailto:foi@agriculture.gov.au).

Yours sincerely



Vanessa Berry  
Assistant Secretary  
Financial Operations Branch  
Finance and Business Support Division

21 October 2019

## REASONS FOR DECISION

### What you requested

On 20 August 2019, you requested access to the following documents:

- '1. Documents created in 2019 concerning the matter of whether rent free housing provided to employees of the Department posted overseas should be treated as salary for superannuation purposes;
2. Communications between the Department and the Department of Finance in 2019 concerning the matter of whether rent free housing provided to employees of the Department posted overseas should be treated as salary for superannuation purposes.'

### What I took into account

In reaching my decision, I took into account:

- your request dated 20 August 2019;
- parts of document one, and document two as the documents that fall within the scope of your request;
- consultation with third parties about documents which contain information concerning them;
- information 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 (**Guidelines**);
- the FOI Act.

### Reasons for my decision

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

I have decided that documents one and two are exempt under the FOI Act. My findings of fact and reasons for deciding that an exemption applies are discussed below.

#### Section 47C of the FOI Act – Deliberative processes

I have applied the conditional exemption in section 47C to documents one and two in full.

Section 47C of the FOI Act provides:

'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.'

Paragraph 6.58 of the Guidelines relevantly provides:

A deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have bearing upon one's course of action. In short, deliberative processes involved in the functions of an agency are thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

Document one includes pages contained within a report that was prepared for the department by a third party. The relevant pages include information about an assessment of various superannuation allowances, as well as recommendations made by that third party in relation to various superannuation allowances.

Document two is a briefing minute addressed to the department's Chief Finance Officer. The briefing minute contains information related to document one, for example, advice and recommendations on the assessment of various superannuation allowances, as well as information about legal advice.

In the Administrative Appeals Tribunal (AAT) decision of *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 914, Deputy President Forge provided that the meanings of the words 'opinion', 'advice' and 'recommendation' are all expressing the notion of consideration, followed by the formation of a view either about a certain subject or about a course of action, and subsequent transmission of that view.

On this basis, I am satisfied that the above mentioned documents contain deliberative matter for the purposes of section 47C of the FOI Act. I am further satisfied that the documents are conditionally exempt under section 47C of the FOI Act.

*Do the documents include operational information or purely factual material?*

Operational information is defined in section 8A of the FOI Act as meaning information held by an agency to assist the agency to perform or exercise its functions or powers in making decisions or recommendations affecting members of the public, a particular person or entity, or class persons or entities. Examples include rules, guidelines, practices and procedures relating to decisions and recommendations. I am satisfied that the documents concerned do not contain operational material.

Further, I am satisfied that the documents do not contain 'purely factual material'. To the extent that there is information which could be characterised as being factual, I consider that the information is intertwined and cannot be reasonably separated and forms an integral part of the deliberative content and purpose of the documents. Given the above, I am satisfied that the documents are conditionally exempt under section 47C of the FOI Act.

### *Public interest considerations*

Section 11A(5) of the FOI Act provides:

'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.'

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would promote the objects of the FOI Act.

I have also considered the relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure may prejudice the department's ability to seek professional financial and legal advice in relation to matters which relate to the department's financial operations. I consider that disclosure could impact the department's ability to receive confidential advices, as well as the department's ability to properly consider the advice and recommendations.

Based on the above factors, I have decided that in this instance, the disclosure of the documents would, on balance, be contrary to the public interest.

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

### *Conclusion*

In summary, I am satisfied that documents one and two are conditionally exempt under section 47C of the FOI Act. Furthermore I have decided that on balance it would be contrary to the public interest to release this information.

### Section 42 of the FOI Act – documents subject to legal professional privilege

I have applied the exemption in section 42 to parts of document two.

Section 42 of the FOI Act provides that:

'(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the grounds of legal professional privilege.'

Legal professional privilege is not defined in the FOI Act. To determine the application of section 42 of the FOI Act, consideration must be given to the common law concept of legal professional privilege. At common law, determining whether a communication is privileged requires consideration of:

- whether there is a legal adviser-client relationship;
- whether the communication was for the purposes of giving or receiving legal advice, or use in the connection with actual or anticipated litigation;
- whether the advice given is independent; and

- whether the advice given is confidential.

Document two is a briefing minute addressed to the department's Chief Finance Officer.

I have decided that part of the briefing minute is exempt from release as it reveals the contents of legal advice that was sought by the department. As the advice was independent and provided on a confidential basis, I am satisfied that the material is exempt under section 42 of the FOI Act.

#### Section 47F of the FOI Act - unreasonable disclosure of personal information

I have applied the conditional exemption in section 47F(1) to parts of document two.

Section 47F of the FOI Act relevantly provides:

- '(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.'

#### *Personal Information*

The term 'personal information' is defined as follows:

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

Paragraph 6.130 of the Guidelines provides:

'Personal information can include a person's name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.'

I find that document two contains the personal information of other people. This includes their phone numbers and signatures.

#### *Whether disclosure is 'unreasonable'*

In addition to the factors specified in section 47F(2) of the FOI Act, paragraph 6.127 of the Guidelines provides:



'The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy. The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.'

I am satisfied that the disclosure of the third party personal information would be unreasonable for the following reasons:

- it relates to aspects of an individual's personal affairs; and
- the information is private and not available in full or in part from publicly-accessible sources.

On this basis, I have decided that the personal information included in document two referred to in the Schedule is conditionally exempt under section 47F(1) of the FOI Act.

#### *Public interest considerations*

Section 11A(5) of the FOI Act provides:

'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.'

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would promote the objects of the FOI Act.

I have also considered the relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.

Based on these factors, I have decided that in this instance, the public interest in disclosing the information in the above-mentioned documents is outweighed by the public interest against disclosure.

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

#### *Conclusion*

In summary, I am satisfied that parts of document two, as set out in the Schedule, are conditionally exempt under section 47F(1) 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 documents one and two.

I have decided that:

- document one and two are conditionally exempt in full under section 47C of the FOI Act, and disclosure would be contrary to the public interest for the purposes of 11A(5);
- document two is exempt in part under section 42(1) of the FOI Act; and
- document two is conditionally exempt in part, under section 47F of the FOI Act, and disclosure would be contrary to the public interest for the purposes of section 11A(5).