



Decision and Statement of reasons issued under the *Freedom of Information Act 1982*

Decision and reason for decision of Jo (Position Number 62210326), Information Law Section, Legal Services and Audit Branch, Department of Veterans' Affairs

Applicant: Mr Alan Ashmore

Decision date: 24 October 2019

FOI reference number: FOI 30921

Sent by: foi+request-5630-57964b71@righttoknow.org.au

Dear Mr Ashmore,

Freedom of Information Request: FOI 30921

Decision

1. The Department of Veterans' Affairs (**Department**) has undertaken a reasonable search of its records and has identified 21 documents relevant to your request.
2. I have made a decision to release three (3) documents in full and 18 documents in part.
3. The documents that I have chosen to grant access in part to are set out in **Schedule 1**, together with applicable exemption provisions. Where I have decided to grant access in part, I have provided access to an edited copy of the documents, modified by deletions in accordance with section 22(2) of the *Freedom of Information Act 1982 (Cth)* (**FOI Act**).

Authority to make decision

4. I, Jo (Position Number 62210326), Assistant Director, Information Law Section, am an officer authorised by the Secretary of the Department to make decisions about access to documents in the possession of the Department, in accordance with section 23(1) of the FOI Act.

Summary

5. On 15 September 2019, you made a request for access to documents in the possession of the Department. Your request sought access to:

I lodged two separate complaints on 28 June 2018.

The specific complaints were:

COMPLAINT 1: IS AGAINST SIMON LEWIS FOR HIS DECEPTIVE, MISLEADING AND DISINGENOUS 10 APRIL 2018 RESPONSE TO MY ANALYSIS AS PRESENTED TO ESORT:

COMPLAINT 2: RELATES TO THE FALSE PUBLISHED MINUTES OF ESORT 9 MARCH 2018 MEETING AS NOTED ON DVA'S WEBSITE.

I require all correspondence and actions taken by DVA since the lodgement of those two complaints which as of today remain unresolved.

6. On 14 October 2019, the Department wrote to you seeking your agreement to a seven day extension of time under section 15AA of the FOI Act.
7. On 17 October 2019, you notified the Department that you agreed to this extension of time.
8. Accordingly, a decision on your request was due on 22 October 2019.
9. In accordance with section 15AC of the FOI Act, the principal officer of the Department is taken to have made a decision personally refusing to give access to the documents on the last day of the initial decision period. Even where a decision has not been issued within the prescribed timeframe, the Department retains an obligation to process and finalise the FOI request. I would like to apologise for the delay in issuing this decision to you and any inconvenience it may have caused.
10. As a decision on your request was not made within the timeframe as prescribed in section 15(5)(b) of the FOI Act, Regulation 7(2) of the Freedom of Information (Charges) Regulations 2019 prescribed that no charge is payable.

Material taken into account

11. 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 partial access to the documents follows.
12. I have taken the following material into account in making my decision:

- the terms of your request
- the types of documents that are in the possession of the Department
- the content of the documents that fall within the scope of your request
- 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 11B Public interest exemption – factors
 - Section 15 Request for Access
 - Section 22 Access to edited copies with exempt or irrelevant material deleted
 - Section 47E Public interest conditional exemptions--certain operations of agencies and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**).

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

Reasons for decision

14. I have decided to **grant access** to three (3) documents in full and 18 documents in part within the scope of your request, subject to the following exemption in accordance with the FOI Act:

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

15. I have found that part of the documents which are listed as exempt in accordance with this provision in **Schedule 1**, contains information that if released, could have a substantial adverse effect on the management of personnel by the Department (section 47E(c) of the FOI Act) and the proper and efficient conduct of the operations of the Department (section 47E(d) of the FOI Act).

16. 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;
 - (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
17. I have redacted the surnames and contact details of non-Senior Executive staff members within the documents to give effect to this conditional exemption, other than the names of those non-Senior Executive staff members whose contacts details you already have or where they are already known to you.
18. The Department's role is to provide support and information to veterans and their families, Australian Defence Force personnel and other categories of people. The services and support which the Department provides include pensions and compensation, health care, rehabilitation and counselling services, amongst other things. It is important that the Department is able to continue to provide these services and to carry out the other legislative functions and administrative and operational processes required of them. Certain processes and specific channels of communication have been implemented which enable clients and other relevant stakeholders to contact the Department in a way that ensures all Departmental resources are managed as efficiently as possible.
19. Release of the exempt information in the circumstances would adversely affect the Department as the established lines of communication could then be bypassed. It is reasonable to expect that this would disrupt and adversely affect the operations of the Department.
20. Further, the release of this information could have a substantial adverse effect on the management or assessment of personnel as well as an adverse effect on the proper and efficient conduct of the operations of the agency including the inability of the Department to retain staff or effectively manage the wellbeing and safety of our staff. Relevantly, some staff have been targeted, insulted or harassed based on disclosure of their details. This presents challenges in managing the welfare of staff and can affect the ongoing management and retention of personnel by the Department. Consequently, in these circumstances, it would not be in the public interest to release this information.

21. Accordingly, I have decided that parts of the documents listed as exempt in accordance with this provision in **Schedule 1**, meet the criteria for this 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) of the FOI Act.
22. Where the document contains information exempt under section 47E of the FOI Act, an edited copy has been prepared (pursuant to section 22 of the FOI Act) with these details redacted.
23. Accordingly, I have decided that the documents which are listed as exempt in accordance with this provision in Schedule 1, meet 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:

24. 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.
25. 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, including enhance the scrutiny of government decision making.
26. I also considered the following factors which do not favour disclosure:
 - a) disclosure would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency and
 - b) disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
27. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.

28. 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.

Delete exempt or irrelevant material from documents and provide access to edited copies (section 22)

29. The Department may refuse access to a document on the ground that it is exempt. If so, the Department must consider whether it would be reasonably practicable to prepare an edited copy of the document for release, that is, a copy with relevant deletions made under section 22 of the FOI Act. The Department is under the same obligation to consider preparing an edited copy of a document by removing information that would reasonably be regarded as irrelevant to the request.
30. As explained above, some of the documents subject to your request contain exempt information. On this basis, I have prepared the documents for release by removing that exempt material in accordance with section 22 of the FOI Act. The material that has been edited for release is marked within the documents as well as at **Schedule 1**.
31. Some of the documents also contain information about a complaint made by another individual. On this basis, I have removed this irrelevant information in accordance with section 22 of the FOI Act. The material that has been edited for release is marked within the documents as well as at **Schedule 1**.

Access to documents

32. The documents released to you in accordance with the FOI Act are enclosed.

Information Publication Scheme

33. 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.
34. In accordance with section 11C(1)(a) of the FOI Act, the document issued to you will not be made available in the disclosure log as it relates to your personal information and it would be unreasonable to publish this information.

Your rights of review

35. If you are dissatisfied with my decision you may apply for Information Commissioner Review of the decision through the Office of the Australian Information Commissioner (**OAIC**). In accordance with section 54E(b) of the FOI Act, Internal Review is not available as the Department did not finalise your FOI request within the prescribed statutory timeframe.

OAIC review

36. Under section 54L of the FOI Act, you may apply to the OAIC to review my decision. An application for review by OAIC 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

37. 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-fact-sheets/foi-factsheet-12-your-review-rights>

Contact us

38. If you wish to discuss this decision, please do not hesitate to contact the Information Law Section using the above details.

Yours sincerely,

Jo (Position Number 62210326)

Assistant Director

Information Law Section

Legal Services and Audit Branch

24 October 2019



Schedule of documents

Applicant: Mr Alan Ashmore

Decision date: 24 October 2019

FOI reference number: FOI 30921

Document No.	Date of document	Document description	Pages	Decision	Exemption
1	3 July 2018	Internal Departmental email	10	Access in part	s 47E(c) and (d)
2	3 July 2018	Internal Departmental email	4	Access in part	s 47E(c) and (d)
3	2 August 2018	Internal Departmental email	2	Access in part	s 47E(c) and (d)
4	8 August 2018	Internal Departmental email	1	Access in part	s 22 s 47E(c) and (d)
5	9 August 2018	Internal Departmental email	1	Access in part	s 22 s 47E(c) and (d)

Document No.	Date of document	Document description	Pages	Decision	Exemption
6	22 August 2018	Internal Departmental email	4	Access in part	s 47E(c) and (d)
7	23 August 2018	Internal Departmental email	4	Access in part	s 47E(c) and (d)
8	22 August 2018	Internal Departmental email	4	Access in part	s 47E(c) and (d)
9	4 July 2018	Internal Departmental email	1	Access in part	s 47E(c) and (d)
10	3 July 2018	Internal Departmental email	2	Access in part	s 47E(c) and (d)
11	N/A	Attachment to Document 10 – Complaints	7	Release in full	N/A
12	2 August 2018	Internal Departmental email	3	Access in part	s 47E(c) and (d)
13	3 July 2018	Attachment to Document 12 - Internal Departmental email	2	Access in part	s 47E(c) and (d)
14	N/A	Attachment to Document 13 – Complaints	7	Release in full	N/A
15	2 August 2018	Internal Departmental email	3	Access in part	s 47E(c) and (d)
16	3 July 2018	Attachment to Document 15 – Internal Departmental email	2	Access in part	s 47E(c) and (d)
17	N/A	Attachment to Document 16 – Complaints	7	Release in full	N/A
18	9 August 2018	Internal Departmental email	4	Access in part	s 22

Document No.	Date of document	Document description	Pages	Decision	Exemption
					s 47E(c) and (d)
19	3 July 2018	Internal Departmental email	3	Access in part	s 47E(c) and (d)
20	3 July 2018	Internal Departmental email	1	Access in part	s 47E(c) and (d)
21	20 August 2018	Internal Departmental email	2	Access in part	s 47E(c) and (d)



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).

11B Public interest exemptions — factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;

- (b) access to the document could result in any person misinterpreting or misunderstanding the document;
- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
- (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

15 Requests for access (as related to the requirements for requests)

Persons may request access

- (1) Subject to section 15A, a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document.

Requirements for request

- (2) The request must:
 - (a) be in writing; and
 - (aa) state that the request is an application for the purposes of this Act; and
 - (b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and
 - (c) give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication).
- (2A) The request must be sent to the agency or Minister. The request may be sent in any of the following ways:
 - (a) delivery to an officer of the agency, or a member of the staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory;
 - (b) postage by pre-paid post to an address mentioned in paragraph (a);
 - (c) sending by electronic communication to an electronic address specified by the agency or Minister.

22 Access to edited copies with exempt or irrelevant matter deleted

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.

Access to edited copy

- (2) The agency or Minister must:
 - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
 - (b) give the applicant access to the edited copy.

Notice to applicant

- (3) The agency or Minister must give the applicant notice in writing:
 - (a) that the edited copy has been prepared; and
 - (b) of the grounds for the deletions; and
 - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

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).