



Statement of reasons made under the Freedom of Information Act 1982

Decision and reason for decision of Alex Foulds, Executive Director, Territories Division

Applicant:	Mark Morris
Decision date:	November 2019
FOI reference number:	FOI 20-026
Documents:	Documents relating to fishing laws on Christmas and Cocos Islands

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Summary

1. I have made a decision to release documents subject to your request in part.

Authority to make this decision

2. I, Alex Foulds, Executive Director, Territories Division, am an officer authorised by the Secretary of the Department of Infrastructure, Transport, Cities and Regional Development (the 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 (the FOI Act).

Background

3. On 20 September 2019, you made a request for access to documents in the possession of the department. Your request sought access to:

*Data used for the fishing laws and rules for Christmas Island.
any recommendation, analysis for fishing data provided to any public servant boss or minister; and
any documentation that approved the new laws and rules with supporting data*

Documents subject to this request

4. The department has undertaken a search of its records and has identified 22 documents that fall within the scope of your request. Documents are listed in the schedule of documents at Schedule 1.
5. During the processing of your request we consulted third parties potentially affected by the release of the documents.

Decision

6. I have made a decision to release the documents relevant to your request in part. The documents that I have chosen to grant access to in part 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 FOI Act.

Reasons for decision

7. In accordance with section 26(1)(a) of the FOI Act, the findings on any material question of fact, referring to the material on which those findings were based and the reasons for my decision to grant partial access to the documents follows.
8. I have taken the following material into account in making my decision:
 - the terms of your request;
 - the content of the documents that fall within the scope of your request;
 - the FOI Act;
 - the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines); and
 - 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.

- the following provisions of the FOI Act relevant to my decision:
 - section 11B public interest exemption – factors
 - section 22 access to edited copies with exempt or irrelevant material deleted
 - section 42 Legal Professional Privilege
 - section 47F personal privacy
- advice from departmental officers with responsibility for matters relating to the documents to which you sought access;
- the views of relevant third parties consulted by the department pursuant to the FOI Act.

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

Statement of reasons

10. I have decided to grant partial access to documents within the scope of your request, subject to the following exemption in accordance with the FOI Act.

Documents subject to legal professional privilege (section 42)

11. Section 42 of the FOI Act relevantly provides:
- (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 ground of legal professional privilege.*
 - (2) *A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.*
12. Legal professional privilege (LPP) protects confidential communications between a lawyer and a client from compulsory production.
13. The Australian Information Commissioner Guidelines explain that, at common law, determining whether a communication is privileged requires a consideration of the following:
- whether there is a legal adviser-client relationship
 - whether the communication was for the purpose of giving or receiving legal advice or for use in connection with actual or anticipated litigation legal advice or for use in connection with actual or anticipated litigation
 - whether the advice given is independent
 - whether the advice given is confidential.¹
14. For LPP to apply to a communication there must be a true lawyer-client relationship between the legal adviser and the agency. It is well established that an independent legal adviser-client relationship can exist between a lawyer employed by the government and a government agency.² Whether such a relationship exists in a particular case is a question of fact.³
15. The documents marked as partially exempt under this provision contain email legal advice from an external agency. I confirm that there is a legal adviser-client relationship in relation to this matter, the communications were for the purpose of giving or receiving legal advice. The advice given is independent and the advice given is confidential.
16. Accordingly, I have decided that parts of the documents meet the criteria for exemption and are exempt in part in accordance with section 42(1) of the FOI Act.

¹ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s93A of the Freedom of Information Act 1982* (2010), [5.118].

² *Guidelines* [5.120].

³ *Guidelines* [5.120].

Conditional Exemptions

17. Where a document is assessed as conditionally exempt, the agency or minister must give access to it unless in the circumstances access would, on balance, be contrary to the public interest (s11A(5)). The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making.

Personal privacy (section 47F)

18. 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).
19. Documents marked partially exempt under this provision contain personal information, including names, phone numbers, email addresses, physical signatures and other particulars of individuals. This information is not public knowledge and I see no public purpose in disclosing the personal information. I do not consider it appropriate to disclose personal information where it is not otherwise available. If this information were disclosed there is a reasonable expectation that these details could be subject to misuse, contrary to the wishes of the individuals.
20. Accordingly, I have decided that parts of 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:

21. 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.
22. 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;
 - (c) disclosure would promote effective oversight of public expenditure; and
 - (d) disclosure would allow a person to access his or her personal information.
23. I agree that disclosure would promote the objects of the FOI Act. However I do not consider that the information would inform debate on a matter of public importance, nor would it promote effective oversight of public expenditure and the information contained within the documents does not relate to the applicant, and as such, disclosure would not allow the applicant access to their personal information.
24. 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 prejudice an agency's ability to obtain similar information in the future.

25. As set out in section 11B(4) of the FOI Act, 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 in confidence in the Commonwealth Government;
 - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the documents was (or is) of high seniority in the agency to which the request for access to the document was made; or
 - (d) access to the document could result in confusion or unnecessary debate.
26. I am satisfied that no irrelevant factor has been considered, as set out in section 11B(4) of the FOI Act.
27. 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.

Irrelevant material

28. Where the giving of access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access, section 22(1) of the FOI Act provides that it is possible for an agency to prepare an edited copy of the document, modified by deletions. Where this section applies, section 11A provides that access to the edited copy is required to be given. Accordingly, the documents which are listed as containing irrelevant material, in accordance with this provision in Schedule 1, have been modified by deletions (to remove irrelevant material).
29. In this case I consider irrelevant material to be names of departmental employees below Senior Executive Service (SES) level which I consider irrelevant and outside the scope of your request.

Access to documents

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

Your rights of review

31. If you disagree with your FOI decision, you can ask for the decision to be reviewed. There are two ways you can ask for review of a decision: internal review by the department, and external review by the Office of the Australian Information Commissioner (OAIC).

Internal Review

32. You can ask the department to review its decision in relation to access to documents. There is no charge for internal review. You must apply within 30 days of being notified of the decision, unless the department extends the application time. You should contact the department if you wish to seek an extension. The department must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed. The review will be carried out by a different departmental officer, usually someone at a more senior level. You must apply in writing and you can lodge your application in one of the following ways:

Post: FOI Coordinator

Department of Infrastructure, Transport, Cities and Regional Development
GPO Box 594, Canberra ACT 2601
Fax: (02) 6275 1347
Email: FOI@infrastructure.gov.au

Information Commissioner Review

33. The OAIC is an independent office that can review the decisions of agencies and ministers under the FOI Act and investigates complaints about agency actions.
34. You can ask the OAIC to review the department's decision. You do not need to seek an internal review from the department before seeking a review from the OAIC. However, going through the department's internal review process gives us the opportunity to reconsider the initial decision and your needs may be met more quickly without undergoing an external review process.
35. The OAIC's review is free. You must apply to the OAIC within 60 days of being given notice of the decision. You can ask the OAIC for an extension of time to apply, and this may be granted if it considers it is reasonable in the circumstances.
36. You must apply in writing and you can lodge your application 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

More information about your review rights under the FOI Act is available in Fact Sheet 12 published by the OAIC: www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-fact-sheets/foi-factsheet-12-your-review-rights.

Contacts

37. If you wish to discuss this decision, please contact the department's FOI coordinator on (02) 6274 6495 or via email at FOI@infrastructure.gov.au.



Alex Foulds
Executive Director
Territories Division
18 November 2019



Australian Government
Department of Infrastructure, Transport,
Cities and Regional Development

FOI
Schedule 1

Schedule of documents

Applicant:

Mark Morris

Decision date:

November 2019

FOI reference number:

20-026

Documents:

Documents regarding fishing laws on Christmas and Cocos Islands

Document reference	Date of document	Author	Recipient	Document description	Decision	Exemption provision
1	13 November 2018	WA Department of Primary Industries and Regional Development (DPIRD)	Department	Email – Update on Fisheries State legislation	Release in part	s47F
2	20 February 2018	Department	Minister	Brief – New Fishing Rules on Christmas and Cocos Islands	Release in part	s47F
3	10 December 2018	DPIRD	Department	Email – Re: Fisheries Legislation	Release in part	s47F
4	11 December 2018	DPIRD	Department	Email – Christmas Island applied Laws Amendment	Release in part	s42 and 47F
5	11 January 2019	DPIRD	Department	Email – Christmas Island applied Laws Amendment	Release in part	s42 and 47F
6	March 2019	Department	Minister	Brief	Release in part	s47F
7	July 2019	Department	Minister	Brief	Release in part	s47F
8	8 July 2019	Department	DPIRD	Email – Fisheries Ordinance Update	Release in part	s47F
9	19 August 2019	Department	Department	Email – Fish Management Ordinance	Release in part	s47F
10	22 August 2019	Department	Department	Email: Fishing Ordinances TPs	Release in part	s47F
11	22 August 2019	Administrator	Department	Community consultation extended on proposals to change fishing rules	Release in part	s47F
12	31 August 2019	Department	Department	Email – CCC letter to Minister	Release in part	s47F

13	9 September 2019	Administrator	Department	Information sessions on proposal to change Cocos (Keeling) Island fishing rules	Release in part	s47F
14	17 September 2019	Department	Department	Email – IOT Fish Rules – Community Consultation	Release in part	s47F
15	17 September 2019	Department	Department	Email: Urgent - Fisheries briefing for Snowden	Release in part	s47F
16	17 September 2019	Department	Department	Email: Urgent - Fisheries briefing for Snowden	Release in part	s47F
17	17 September 2019	Department	Department	Email: IOT Fish rules – Community Consultation	Release in part	s47F
18	18 September 2019	Department	Department	Email: Urgent Advice Fisheries	Release in part	s47F
19	23 September 2019	Department	Department	Email: First draft fishing rules FAQ	Release in part	s47F
20	23 September 2019	Department	Department	Email: First draft fishing rules FAQ	Release in part	s47F
21	23 September 2019	Department	Department	Email: First draft fishing rules FAQ	Release in part	s47F