



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

Decision and reason for decision of Dylan (Position Number 6221 2985), Information Law Section, Legal Services and Audit Branch, Department of Veterans' Affairs

Applicant: Janet Baker

Decision date: 26 November 2019

FOI reference number: FOI 31753

Sent by: foi+request-5831-76528157@righttoknow.org.au

Dear Ms Baker

Freedom of Information Request: FOI 31753

Decision

1. The Department of Veterans' Affairs (**Department**) has undertaken a reasonable search of its records and has identified two (2) documents relevant to your request.
2. I have made a decision to release those two (2) documents in part.
3. The documents that I have chosen to grant partial access 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, Dylan (Position Number 62212985), Information Access Officer, 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 3 November 2019, you made a request for access to documents in the possession of the Department. Your request sought access to:

...I am requesting a copy of the agreement between APOD and the department to facilitate the veteran covenant discount system. If data is shared at all between the two parties please provide a copy of the privacy statement of acknowledgment that you will provide this information to a third party...

6. As no extensions of time have been applied to process your request, a decision on your request is due by 3 December 2019.
7. I have decided not to impose a charge in relation to this request, in accordance with Regulation 8 of the *Freedom of Information (Charges) Regulations 2019*.

Material taken into account

8. 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.
9. I have taken the following material into account in making my decision:
- the terms of your request dated 3 November 2019
 - 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
 - Correspondence and discussion with the relevant Business Area of the Department
 - 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 45 Documents communicated in confidence; and
 - Section 47 Documents disclosing trade secrets or commercially valuable information,

- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**)
- Consideration of the material publicly available on the Department of Finance's website.

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

Reasons for decision

11. I have decided to **grant access** to documents within the scope of your request, subject to the following exemptions in accordance with the FOI Act:

Documents containing material obtained in confidence (section 45)

12. Section 45 of the FOI Act provides that a document is an exempt document if its disclosure under the Act would found an action by a person for a breach of confidence. The FOI Guidelines provide that, To found an action for breach of confidence (which means section 45 would apply), the following five criteria must be satisfied in relation to the information:

- (a) it must be specifically identified;
- (b) it must have the necessary quality of confidentiality;
- (c) it must have been communicated and received on the basis of a mutual understanding of confidence;
- (d) it must have been disclosed or threatened to be disclosed, without authority; and
- (e) unauthorised disclosure of the information has or will cause detriment.

13. Other than the standard Commonwealth contracting information, the contract between APOD and the Department was exchanged on the basis of confidentiality and there has been no authority provided to release this information.

Documents disclosing trade secrets or commercially valuable information (section 47)

14. Section 47 of the FOI Act provides that a document is an exempt document if its disclosure would disclose:

- (a) trade secrets; or
 - (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.
15. The information in the contract between APOD and the Department contains information of commercial value, particularly the requirements of the agreement which set out how the services will be (or are being) implemented and pricing information. This is of commercial value to both APOD and the Department and reflects the results of the limited tender.
16. The contract has only recently commenced and the information in it is current.
17. The disclosure of the commercially valuable information would diminish its value as it would enable future tenders to ascertain the cost paid for the work being undertaken by APOD, conferring a competitive advantage on future tenderers.

Access to documents

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

Information Publication Scheme

19. 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. I am of the view that details of your request should be made available on the Department's disclosure log. As such details of your request will be published by the Department on its disclosure log, which can be accessed at <http://www.dva.gov.au/about-dva/freedom-information/foi-disclosure-log>.
20. Please note that the Department does not publish details of FOI applicants, it is only details of the FOI request and the documents released in response to the request.

Your rights of review

21. If you are dissatisfied with my decision, you may apply for internal review or request the Office of the Australian Information Commissioner (**OAIC**) review my decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

22. Under section 54 of the FOI Act, you may apply in writing to the Department for an Internal Review of my decision. The Internal Review application must be made within 30 days of the date of this letter. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.
23. You can make your application for Internal Review in one of the following ways:

Post: Legal Services and Audit Branch, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601

Facsimile: (02) 6289 6337

Email: Information.Law@dva.gov.au

OAIC review

24. 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

25. 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

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

Post: Legal Services and Audit Branch, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601

Facsimile: (02) 6289 6337

Email: Information.Law@dva.gov.au

Yours sincerely,

Dylan (Position Number 62212985)

Information Access Officer

Information Law Section | Legal Services and Audit Branch

26 November 2019



Schedule of documents

Applicant: Janet Baker

Decision date: 26 November 2019

FOI reference number: FOI 31753

Doc No.	Date of document	Document description	Pages	Decision	Exemption provision
1	12 July 2019	Commonwealth Contract – Services between the Department and APOD	20	Part Access	s45; s47(b)
2	N.D.	Consent for the Department to share certain information with APOD	1	Full Access	N/A



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).

45 Documents containing material obtained in confidence

- (1) A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency, the Commonwealth or Norfolk Island), for breach of confidence.
- (2) Subsection (1) does not apply to a document to which subsection 47C(1) (deliberative processes) applies (or would apply, but for subsection 47C(2) or (3)), that is prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority or Norfolk Island authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure of the document would constitute a breach of confidence owed to a person or body other than:
 - (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or
 - (b) an agency, the Commonwealth or Norfolk Island.

47 Documents disclosing trade secrets or commercially valuable information

- (1) A document is an exempt document if its disclosure under this Act would disclose:
 - (a) trade secrets; or
 - (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

- (2) Subsection (1) does not have effect in relation to a request by a person for access to a document:
 - (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
 - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
 - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (3) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.