



Australian Government
**Department of Employment,
Skills, Small and Family Business**

Our Ref LEX 39115

Jeremy Cooper-Stout
Right to Know

By email: foi+request-5969-cfad8fae@righttoknow.org.au

Dear Mr Cooper-Stout

Your Freedom of Information request - decision

I refer to your revised request, processed by the Department of Employment, Skills, Small and Family Business (the department), for access under the *Freedom of Information Act 1982* (FOI Act) to the following documents:

- (1) Any document setting out the Position Description of the National Careers Ambassador;
- (2) Any document setting out the Key Performance Indicators of the National Careers Ambassador;

On 5 December 2019, the department provided information relating to the appointment of Mr Scott Cam as the National Careers Ambassador at the Senate Education and Employment Legislation Committee at its Supplementary Estimates Hearing. Since the Hearing, information about Mr Cam's appointment as National Careers Ambassador and the role of Ambassador was shared in the Senate on 13 December 2019 - [https://www.aph.gov.au/Parliamentary Business/Senate Estimates](https://www.aph.gov.au/Parliamentary_Business/Senate_Estimates) refers.¹

My decision

I am authorised to make decisions under section 23(1) of the FOI Act. The department holds two documents (six pages) that fall within the scope of your request. Having considered these documents, I have decided to refuse access in full to both documents.

¹ Question on notice no. 118 (portfolio question number SQ19-001440), 2019-20 Supplementary budget estimates.

I have decided that these documents and parts of them are exempt under the FOI Act because:

- some relate to Cabinet (section 34 exemption)
- some documents are exempt on confidentiality grounds (section 45 exemption)
- various documents contain information which is conditionally exempt under section 47C (deliberative material), 47E(d) (information the disclosure of which would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency, 47F (personal information the disclosure of which would be unreasonable), or 47G (business information, the disclosure of which would unreasonably affect the business or professional affairs of individuals or organisations), and disclosure of this information would be contrary to the public interest (section 11A(5)).

On 13 December 2019, the department acknowledged your request and advised you that it would not include the surnames and contact details of department employees in the documents unless you told us otherwise. You did not contact the department about this. These details have therefore been removed under section 22 of the FOI Act. Additionally, information that does not relate to the position description and the key performance indicators for the role of the National Careers Ambassador has also been removed under section 22 of the FOI Act.

A schedule of the documents is at **Attachment A**. The reasons for my decision are at **Attachment B**.

Charge

Given the small number of documents within the terms of the request, the department decided not to impose a charge for the processing the request.

You can ask for a review of my decision

If you disagree with any part of the decision, you can ask for a review. There are two ways you can do this. You can ask for an internal review by the department or an external review by the Australian Information Commissioner.

You can find information about your rights of review under the FOI Act, as well as information about how to make a complaint at **Attachment B**.

Further assistance

If you have any questions, please email foi@employment.gov.au.

Yours sincerely



Mel

Authorised Decision Maker
Corporate Legal

30 January 2020

SCHEDULE OF DOCUMENTS – Jeremy Cooper-Stout

Number	Pages	Date	Description	Decision	Comments
1.	1-3	1 July 2019	Brief	Refuse access	Information relating to cabinet removed under section 34(1)(c) of the FOI Act. Deliberative material removed under section 47C of the FOI Act. Information adversely affecting agency operations removed under section 47E(d) of the FOI Act. Pages 1-3: Irrelevant information, being information that does not

					<p>Business information removed under section 47G of the FOI Act.</p> <p>Pages 1-7, 9-11: Irrelevant information, being information that does not relate to the position description and the key performance indicators for the role of the National Careers Ambassador has been removed under section 22 of the FOI Act.</p>
--	--	--	--	--	---

REASONS FOR DECISION

What you requested

- (1) Any document setting out the Position Description of the National Careers Ambassador;
- (2) Any document setting out the Key Performance Indicators of the National Careers Ambassador;
- (3) Work products of the National Careers Ambassador since his appointment in October 2019.

On 18 December 2019, the department wrote to you notifying you that the work products of the National Careers Ambassador was publicly available. Given this, the department advised you that it would consider part 3 of your request as withdrawn, unless you advised the department otherwise by 19 December 2019. No response was received from you and the revised scope of your request was as follows:

- (1) Any document setting out the Position Description of the National Careers Ambassador;
- (2) Any document setting out the Key Performance Indicators of the National Careers Ambassador;

What I took into account

In reaching my decision, I took into account:

- your original request dated 1 December 2019;
- other correspondence with you;
- the documents that fall within the scope of your request;
- consultation with third parties about documents which contain information concerning them;
- consultations with departmental officers about the nature of the documents and the operating environment and functions of the department;
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines);
- the *Freedom of Information (Charges) Regulations 2019*;
- the FOI Act.

Reasons for my decision

I have decided the two documents (six pages) within scope of your request are exempt in full under the FOI Act. My findings of fact and reasons for deciding that exemptions apply to those documents are discussed below.

Section 34 – Cabinet documents

Section 34(1)(c) of the FOI Act provides that a document is an exempt document, if it was brought into existence for the dominant purpose of briefing a Minister on a document to which section 34(1)(a) of the FOI Act applies. This exemption applies to document 1.

Paragraph 5.61 of the FOI Guidelines relevantly provides:

Any document containing information which, if disclosed, would reveal Cabinet deliberations is exempt unless the deliberation or decision has been officially disclosed. The words 'officially disclosed' are not defined in the FOI Act and should be given their ordinary meaning. A key element is the official character of the disclosure. Disclosure will commonly be as a result of specific authorisation by the Cabinet itself, and may be undertaken by the Prime Minister, the Cabinet Secretary or a responsible minister.

The ordinary meaning of 'officially' carries the notion of being authorised. While I acknowledge that certain disclosures have been made about the National Careers Ambassador's role and activities in Senate Estimates, I do not consider that such disclosures have been authorised or made 'officially' for the purposes of the exception in section 34(3) as discussed above in the FOI Guidelines.

I have therefore decided that the relevant document, as identified in the schedule, is exempt in full under section 34 of the FOI Act.

Section 45 – Documents containing material obtained in confidence

Section 45(1) provides that a document is exempt from disclosure if its disclosure under the FOI Act would found an action for breach of confidence by a person (other than a government agency or the Commonwealth). To found such an action for breach of confidence, the following five criteria must be satisfied in relation to the information:

- the information must be specifically identified;
- the information must have the necessary quality of confidentiality;
- the information must have been communicated and received on the basis of a mutual understanding of confidence;
- the information must have been disclosed, or threatened to be disclosed, without authority; and
- unauthorised disclosure of the information has or will cause detriment.²

Document 2 concern information sought and received from the individual appointed as the National Careers Ambassador, and included in the contract. I find that the relevant information is confidential in nature and was communicated on that basis, and that there was made a mutual understanding of confidence between the department and the person concerned.

² FOI Guidelines para [5.159]

Although some information about the broad role of the National Careers Ambassador has been made available to the public, confidentiality of the relevant document and its contents has been maintained.

The person whose confidence would be breached by disclosure is a private individual and I am satisfied that disclosure of the information would prejudice their present and future interests. I have therefore decided that document 2 is exempt under section 45 of the FOI Act.

Section 47C – Deliberative matter

I have applied the exemption in section 47C(1) of the FOI Act to parts of document 1.

Section 47C(1) of the FOI Act provides that 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” an agency, a Minister or the Government of the Commonwealth.

Paragraph 6.58 of the FOI Guidelines 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 a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its 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 1 consists of a departmental brief concerning the appointment of the National Careers Ambassador. I am satisfied that this document contains deliberative matter for the purposes of section 47C of the FOI Act and is conditionally exempt under section 47C of the FOI Act.

Section 11A(5) of the FOI Act provides that conditionally exempt documents must be disclosed unless it would be contrary to the public interest to do so. My considerations of the public interest as they apply to this conditional exemption are set out at pages 11-12.

Section 47E(d) of the FOI Act – proper and efficient conduct of agency operations

I have applied the conditional exemption in section 47E(d) of the FOI Act to both documents.

Under section 47E(d) of the FOI Act a document is conditionally exempt if its 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.’

Paragraph 6.123 of the FOI Guidelines relevantly provides:

The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

The relevant documents include a briefing to the Minister and the contract with the National Careers Ambassador. Disclosing information contained in the relevant documents would have the effect of inhibiting the provision of comprehensive information to the Minister, and consequently inhibit the Minister from being able to perform her functions effectively and respond in a considered manner. Additionally, the disclosure of the documents could reasonably be expected to lead to a future reluctance by potential candidates to apply for a similar role for fear of exposure of their personal and business affairs through FOI, and adversely impact the Government's ability to recruit and negotiate commercial terms of engagement with potential appointees. Thereby having a substantial adverse effect on the department's functions.

On that basis, in my view release of both documents would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the department and they are conditionally exempt from release under section 47E(d) of the FOI Act. My considerations of the public interest as they apply to this conditional exemption are set out at pages 11-12.

Section 47F of the FOI Act - personal information

I have applied the conditional exemption in section 47F(1) of the FOI Act to document 2.

Section 47F(1) of the FOI Act provides that 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)".

Personal information is information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- whether the information or opinion is true or not; and
- whether the information or opinion is recorded in a material form or not.

I find that the relevant documents contain personal information of the National Careers Ambassador.

Section 47F(2) provides that in determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to:

- (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.

Paragraph 6.138 of the FOI Guidelines says:

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 the personal affairs of an individual who has not consented to the release of their personal information;
- the information is private and not available from publicly-accessible sources; and
- the individual's identity is readily apparent.

While some information about the appointment of the National Careers Ambassador has been made public during Senate Estimates hearings and in response to a question on notice, after considering third party consultation responses in relation to documents covered by your request, I have decided that disclosure of the relevant information in this document would be unreasonable. On this basis, I have decided that the personal information in document 2 is conditionally exempt under section 47F(1) of the FOI Act. My considerations of the public interest as they apply to this conditional exemption are set out at pages 11-12.

Section 47G of the FOI Act – business information

I have applied section 47G of the FOI Act to document 2.

Under section 47G(1) of the FOI Act, a document to the extent it contains information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking (business information) is conditionally exempt if disclosure of that information:

- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; ...

I am satisfied that document 2 contains business information of commercial entities associated with the National Careers Ambassador.

The FOI Guidelines provide guidance on where an unreasonable adverse effect of disclosure will arise. Paragraph 6.187 notes that the public interest, or some aspect of it, is one factors to consider, and in paragraph 6.188 stresses the issue is not the reasonableness of the claim of harm, but “the objective assessment of the expected adverse effect”.

I am satisfied that disclosure of the relevant information would or could be reasonably expected to adversely affect the relevant businesses because the information:

- is of a sensitive commercial nature;
- is not well-known, or available from publicly-accessible sources; and
- disclosure would likely diminish the entity's competitive advantage in the marketplace.

On this basis, I am satisfied that the relevant information is conditionally exempt under section 47G of the FOI Act. My considerations of the public interest as they apply to this conditional exemption are set out below.

Public interest

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 by increasing scrutiny, discussion, comment and review of the Government's activities, particularly the expenditure of taxpayers' money in relation to the appointment of the National Careers Ambassador.

I have also considered public interest factors weighing against disclosure, in particular:

- the prejudice to the department's and Minister's thinking processes in relation to determining an appropriate course of action concerning future appointments of this nature;
- the likely adverse impact on the department being able to conduct its functions efficiently and provide comprehensive information and advice to the Minister or the Secretary;
- the likely adverse impact on the Government's future ability to recruit potential candidates for similar roles and negotiate terms of engagement; and
- the right of individuals to privacy and the right of businesses to protect their competitive advantage and be able to conduct their legitimate commercial affairs without unreasonable Government interference.

I have decided that, on balance, the public interest in disclosing the conditionally exempt material identified above is outweighed by the public interest against disclosure. I have therefore decided

that the relevant documents, as identified in the schedule, are exempt in full or in part under sections 47C, 47E(d), 47F and 47G of the FOI Act.

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

YOUR RIGHTS OF REVIEW

Asking for an explanation of an FOI decision

Before you ask for a formal review of an FOI decision, you can contact us and we will explain the decision to you.

Asking for a formal review of an FOI decision

If you still believe the decision is incorrect, the FOI Act gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by:

- an internal review officer in the department; and/or
- the Australian Information Commissioner.

There are no fees for applying for a formal review.

Applying for an internal review by an internal review officer

If you apply for internal review, a different decision maker to the decision maker who made the original decision will review your request. The internal review officer will consider all aspects of the original decision afresh and decide whether the decision should change.

An application for internal review must be made in writing within 30 days of receiving this letter. You can lodge your application:

Post: The Information Law Team
 Corporate Legal Branch
 Department of Employment, Skills, Small and Family Business
 Location Code: C12MT1-LEGAL
 GPO BOX 9880
 CANBERRA ACT 2601

Email: foi@employment.gov.au

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can lodge your application:

Online: www.oaic.gov.au
Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Email: enquiries@oaic.gov.au

Complaints to the Australian Information Commissioner and the Commonwealth Ombudsman

Australian Information Commissioner

You may complain to the Australian Information Commissioner about action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

A complaint to the Australian Information Commissioner must be made in writing. The contact details of the Australian Information Commissioner are:

Phone: 1300 363 992

Online: www.oaic.gov.au

Commonwealth Ombudsman

If you are not satisfied with the response of the Australian Information Commissioner to your complaint, you may also complain to the Commonwealth Ombudsman about action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

A complaint to the Commonwealth Ombudsman may be made in person, by telephone or in writing. The contact details of the Commonwealth Ombudsman are:

Phone: 1300 362 072

Online: www.ombudsman.gov.au