

**Australian Government****Department of the Prime Minister and Cabinet****ONE NATIONAL CIRCUIT
BARTON**

FOI/2019/065

FREEDOM OF INFORMATION ACT 1982 (Cth)**REQUEST BY: Mr John Smith****DECISION BY: Will Story
First Assistant Secretary
APS Reform**

Mr John Smith

By Email: foi+request-6218-615d6cf6@righttoknow.org.au

Dear Mr Smith

I refer to your email of 12 March 2020 in which you made a request to the Department of the Prime Minister and Cabinet (the Department) under the *Freedom of Information Act 1982* (the FOI Act) in the following terms:

I wish to obtain of all documents that meet the following description:

Final reports delivered by the consulting firm McKinsey & Company, to the department since 18 September 2013. Please narrow this request to documents stored in either a word document or PDF format.

All documents stored in a powerpoint document format, given to the department by McKinsey; since 18 September 2013.

On 2 April 2020, the Department issued you with a Practical Refusal Consultation Notice (PRCN), on the basis that processing the initial request would substantially and unreasonably divert the resources of the Department from its other operations. The PRCN invited you to revise the scope of the initial request. On the same day, you responded as follows:

I agree to narrow my request in the following manner:

Please only return finalised reports & powerpoint presentations from McKinsey that are associated with the following commonwealth tender IDs: CN3575896,

CN3586760-A1, CN3586760. Draft/working documents are unnecessary and outside the scope of my request.

Please only include documents that are stored within the department's electronic records system, or that are stored as attachments within an SES staff member's email inbox.

Identical documents are unnecessary to include in this FOI request; as are any draft or interim documents. I am interested in final documents (what is called in the consulting jargon a 'deliverable') , and final powerpoint presentations (such as those given when pitching for a tender, or at the end of a tender) only.

On 14 April 2020, the Department advised you that the processing period had been extended for a further 30 days for the purpose of undertaking a third party consultation, in accordance with section 15(6) of the FOI Act.

Authorised decision-maker

I am authorised to make this decision, in accordance with arrangements approved by the Department's Secretary (the Secretary) under section 23 of the FOI Act.

Decision

The Department's searches of its relevant electronic and paper records identified three documents within the scope of the revised request.

I have decided to:

- grant access, in part, to Document 1, on the basis it contains information that is:
 - exempt from disclosure under sections 45 (confidential information) and 47 of the FOI Act (trade secrets or commercially valuable information); and
 - conditional exempt under sections 47F(1) (personal information) and 47G(1) (business information) of the FOI Act, and its disclosure would be contrary to the public interest;
- refuse access, in full, to Document 2, on the basis it contains information that is:
 - exempt from disclosure under sections 45 and 47 of the FOI Act; and
 - conditionally exempt under sections 47C (deliberative material), 47F(1) and 47G(1) of the FOI Act, and its disclosure would be contrary to the public interest; and
- grant access in full to Document 3, on the basis that it has already been published.

Further information is set out in the schedule at [Attachment A](#).

In making my decision, I have had regard to the following material:

- the FOI request;
- the documents identified as relevant to the FOI request;
- submissions from the third party that was consulted in relation to this request;
- the FOI Act; and
- the guidelines issued by the Australian Information Commissioner under section 93A of the *Freedom of Information Act 1982* (the **FOI Guidelines**).

Reasons for decision

Section 45(1) of the FOI Act provides that a document is an exempt document if its disclosure would found an action by a person (other than an agency or the Commonwealth) for breach of confidence.

The FOI Guidelines state that the exemption is available where the person who provided the confidential information would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure.

The FOI Guidelines state that in order 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:

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

I consider that parts of Documents 1 and 2 contain information which, if disclosed, would found an action for breach of confidence (**confidential information**).

The confidential information was communicated and received on the basis of a mutual understanding of confidence. The requested documents containing that confidential information was expressly marked as private and confidential, and/or conveyed to the Department in circumstances that were recognised as private and confidential.

Whilst paragraph 5.172 of the FOI Guidelines states that it is uncertain whether detriment must be established in order to found an action for breach of confidence, I am satisfied that unauthorised disclosure of that confidential information will cause detriment to one or more persons and entities. Even if the name and details of those persons or entities were removed from the requested documents, the remaining information that is not exempted would result in those persons or entities being identified with precision.

On an objective basis, the nature of the contents, the circumstances relating to the creation of the requested documents, together with the manner in which the confidential information was communicated to the recipients and was received by the Department, all indicate that disclosure of certain parts of the requested documents would found an action by the person who provided the confidential information for breach of confidence.

Further, the relevant third party submits that some of the material is subject to confidentiality obligations to other third parties, and accordingly, any further disclosure would put them in breach of their obligations of confidentiality. They also submitted that maintenance of the confidentiality of the information entrusted to them is of critical importance to their ability to conduct their business, and breach of confidentiality obligations would result not just in legal actions but incalculable damage to their reputation.

I have considered the material in question and the views of the relevant third party, and am satisfied that those parts of Documents 1 and 2 that contain confidential information are exempt from release, in accordance with section 45 of the FOI Act.

Trade secrets or commercially valuable information (section 47 of the FOI Act)

Section 47(1) of the FOI Act provides that a document is exempt if it contains information which, if disclosed, would:

- a) reveal trade secrets; or
- b) reveal other information having a commercial value which would be, or could reasonably be expected to be, destroyed or diminished if disclosed.

Parts of Documents 1 and 2 contain certain information that I consider would reveal trade secrets and/or to hold commercial value.

Paragraph 5.202 of the FOI Guidelines provides that, in order to be exempt under section 47(1)(b) of the FOI Act, a document must satisfy two criteria:

- the document must contain information that has a commercial value either to an agency or to another person or body, and
- the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.

Pursuant to section 27 of the FOI Act, the Department consulted the relevant third party in relation to this request, for the purpose of seeking their views on whether the documents contain their trade secrets and/or commercially valuable information and if so, whether they should be exempt from disclosure.

The relevant third party has submitted that the information contained in parts of the documents contain their commercially valuable information which:

- is their proprietary information;
- comprises the bulk of their intellectual capital, which is the main source of their market value;
- is not in the public domain;
- was provided to the Department in confidence; and
- if disclosed, would prejudice their commercial interests, as it would enable their competitors to gain insight into their work.

I have reviewed the relevant material and agree with the submissions of the relevant third party. Accordingly, I have found that parts of Documents 1 and 2 are exempt from disclosure under section 47 of the FOI Act, on the basis that they contain commercially valuable information which would be, or could reasonably be expected to be, destroyed or diminished if disclosed.

Deliberative material (section 47C of the FOI Act)

Section 47C of the FOI Act provides that:

- (1) 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 6.59 of the FOI Guidelines provides that:

“‘Deliberative process’ generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.”

Document 2 contains material provided by a consulting firm in the course of delivering advisory services to the Department. That material includes options, views, analysis and recommendations in relation to certain strategic issues that were being considered by the Department. To the extent that parts of those documents contain factual information, I consider that it is so intertwined with the deliberative matter and cannot be separated.

Accordingly, I consider that Document 2 meets the definition of “deliberative matter” and therefore is conditionally exempt from release under section 47C of the FOI Act.

Personal information (section 47F(1) of the FOI Act)

Section 47F(1) 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).

‘Personal information’ under the FOI Act has the same meaning as in the *Privacy Act 1988* and means

... 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.

Section 47F(2) of the FOI Act states that in determining whether disclosure of the document would involve the unreasonable disclosure of personal information, an agency must have regard to the following matters:

- the extent to which the information is well known;
- 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;
- the availability of the information from publicly accessible sources; and
- any other matters that the agency or Minister considers relevant.

Paragraph 6.142 of the FOI Guidelines state that key factors for determining whether disclosure is unreasonable include:

- the author of the document is identifiable;
- the documents contain third party personal information;
- release of the documents would cause stress on the third party; and
- no public purpose would be achieved through release.

Parts of Documents 1 and 2 contain the personal information of individuals. The relevant third party has indicated that they do not agree to the disclosure of the personal information contained in the documents.

I have reviewed the personal information, and the views of the relevant third party, and I am satisfied that those parts are conditionally exempt from release, under section 47F(1) of the FOI Act, as their disclosure would involve the unreasonable disclosure of personal information.

Business information (section 47G(1) of the FOI Act)

Section 47G(1) of the FOI Act conditionally exempts documents where disclosure would disclose 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), where the disclosure of the information:

- would, or could reasonably be expected to, unreasonably affect the 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, or
- could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

Parts of Documents 1 and 2 contain the business information of one or more entities and individuals. The relevant third party has indicated that they do not agree to the disclosure of the business information contained in the documents.

I have reviewed the parts that contain business information, and the views of the relevant third party, and I am satisfied that those parts are conditionally exempt from release, under section 47G(1) of the FOI Act, as their disclosure would involve the unreasonable disclosure of business information.

Public interest

Section 11A(5) provides that an agency must give an applicant access to a conditionally exempt document unless its disclosure would, on balance, be contrary to the public interest.

In determining whether disclosure would be contrary to the public interest, a decision maker is required to balance the public interest factors in favour of disclosure against the factors against disclosure.

Section 11B(4) of the FOI Act sets out the following factors that the decision-maker must *not* take into account when deciding whether access to the document would be contrary to the public interest:

- access to the document could result in embarrassment to the Commonwealth Government, or cause a loss in confidence in the Commonwealth Government;
- access to the document could result in any person misinterpreting or misunderstanding the document;
- 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
- access to the document could result in confusion or unnecessary debate.

Public interest factors favouring disclosure

I have considered the following factors favour access to the conditionally exempt information:

- access would promote the objects of the Act; and
- access would promote effective oversight of public expenditure.

Public interest factors against disclosure

The FOI Guidelines contain a non-exhaustive list of factors that may apply when considering non-disclosure.

In relation to the material that I consider conditionally exempt under section 47C of the FOI Act, the factors against disclosure of that material are that, in my view, disclosure would, or could reasonably be expected to:

- restrict the free flow of information between the Department and a consulting firm engaged by the Department for sound and effective decision making;
- inhibit the ability of the Department to receive candid and comprehensive advice and information from a consulting firm – thereby diminishing the quality and usefulness of the information and advice provided; and
- curtail the ability of the Department, and the Government more generally, to deliberate and consider strategic issues comprehensively, if such deliberations and considerations are unable to be conducted within an appropriate environment of confidentiality.

In relation to the material that I consider conditionally exempt under sections 47F(1) and 47G(1) of the FOI Act, the factors against disclosure of that material are that, in my view, disclosure would, or could reasonably be expected to:

- prejudice the protection of an individual's right to privacy;
- harm the business interests of an individual or group of individuals; and
- prejudice the Department's ability to obtain confidential information and/or future services from commercial firms.

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

After careful consideration of all relevant factors I have decided that the factors in favour of disclosure are outweighed by the factors against disclosure. Accordingly, I have found that release of the conditionally exempt material contained in the requested documents would, on balance, be contrary to the public interest.

Review rights

Information about your rights of review can be found on the website of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.

Complaint rights

Information about your complaint rights can be found on the web site of the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>.

Yours sincerely

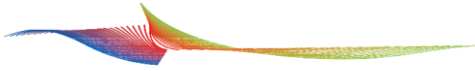
A handwritten signature in blue ink, consisting of stylized initials followed by a long horizontal line.

Will Story

First Assistant Secretary

APS Reform

14 May 2020



FOI REQUEST: FOI/2020/065
SCHEDULE OF DOCUMENTS

FOI

Document	Description	Decision
1	Proposal	Exempt in part under: <ul style="list-style-type: none">• s45 – confidential information• s47 – commercially valuable information• s47F(1) – personal information• s47G(1) – business information
2	Powerpoint presentation	Exempt in full under: <ul style="list-style-type: none">• s45 – confidential information• s47 – commercially valuable information• s47C – deliberative material• s47F(1) – personal information• s47G(1) – business information
3	<i>Independent Review of the APS: Priorities for Change</i> report	Release in full – publicly available at (https://www.apsreview.gov.au/sites/default/files/resources/aps-review-priorities-change.pdf)