



Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI/2020/065/IR

FREEDOM OF INFORMATION ACT 1982 (Cth)

REQUEST BY: Mr John Smith

DECISION BY: John Reid
First Assistant Secretary
Government Division

Mr John Smith

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

Dear Mr Smith

I refer to your email, dated 16 May 2020, seeking internal review of the decision (the **primary decision**), made on 14 May 2020 by Will Story, acting First Assistant Secretary, APS Reform, Department of the Prime Minister and Cabinet (the **Department**), in relation to your request, made under the *Freedom of Information Act 1982* (the **FOI Act**) on 12 March 2020 and revised on 2 April 2020 following a practical refusal consultation process, in the following terms:

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.

The primary decision identified three documents in scope of the request (the **requested documents**) and 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
 - conditionally 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.

Under section 54(2) of the FOI Act, an applicant is entitled to apply for an internal review of a decision refusing to give access to a document in accordance with a request.

In your request for internal review of the primary decision, you indicated that:

I disagree that the public interest test has not been met. The document should be disclosed in spite of it being a 'conditionally exempt document'.

There is a clear and strong public interest in Australians having full view of the deliberative inputs that lead to decisions and recommendations. So much the more so, when the documents relate to nation-wide reforms of the public service. It is hard to imagine a stronger public interest than full transparency regarding this critical reform.

Deliberative process considerations ought to be accorded less weight when the decision/recommendation that the deliberative process pertains to, has already concluded. It is my understanding that the deliberative process came to an end, with the delivery of the 'Independent review of the APS' report.

The assertion that the ability of the Commonwealth to obtain advice from consultancies in the future, is not well founded. The Commonwealth would simply be able to accept open tenders from consultancies that are willing to have their documents subject to the ordinary processes of the FOI act. I am sure that given the sums involved, there are many firms that would be willing to provision consultancy services of just as good a quality as McKinsey; even if they had to do so under the knowledge that their advice may be visible through FOI.

I do argue then that the decision maker's reasons, are not well-founded reasons for the decision being against the public interest.

"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 addition, these reasons that the conditionally exempt release would be against the public interest; are prohibited reasons that the decision maker was obligated not to take into account. They are reasons that assert a 'loss of confidence in the Commonwealth Government', albeit a loss of confidence in the Cth government by either McKinsey, or another imagined future consultancy firm.

As the decision maker has included a s11B(4) prohibited reason in their decision to withhold release of the documents, I request that the documents be released in full; excepting for redactions where necessary to protect the privacy of natural persons (where such privacy is in the public interest).

In a follow-up email you sent to the Department on 18 May 2020, you indicated that:

In furtherance of my argument that the decision should be overturned, I note the following:

McKinsey routinely has 'confidential & proprietary documents' returned through FOI requests to Commonwealth agencies. This can be seen for example, through the outcome of a recent request to the NDIA. The outcome of that request returned a large, confidential & proprietary document of McKinsey, with little redaction. (e.g. here: https://www.righttoknow.org.au/request/mckinsey_3#incoming-17295)

Other consultancies also frequently have their confidential & proprietary documents returned through FOI, especially when those documents regard matters of interest to the public.

The argument that full transparency astoward the documents McKinsey supplied to the agency for the purpose of the agency's eventual report; would result in a 'chilling effect' upon the department's ability to procure consultancy services is therefore absurd.

Authorised decision maker

Section 54C(2) of the FOI Act provides that an agency must arrange for a person (other than the person who made the original decision) to review the decision. I am authorised to make this decision in accordance with arrangements approved by the Department's Secretary under section 23 of the FOI Act.

Internal review decision

As Document 3 was released in full, this internal review request relates to Documents 1 and 2.

I have decided to vary the primary decision in relation to Documents 1 and 2.

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
 - conditionally 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; and
- grant access, in part, 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.

Further information is set out in the attached Schedule at Attachment A.

The practical effect of my internal review decision is to release additional information contained in Documents 1 and 2, which were previously exempted from release.

The documents being released to you under this internal review decision are **attached**.

In reaching my internal review decision, I have had regard to:

- the terms of your FOI request;
- the documents relevant to the FOI request;
- the primary decision;
- your request for internal review;
- 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 FOI Act*' (the **FOI Guidelines**).

Reasons

I have carefully reviewed Documents 1 and 2, your submissions in support of your request for internal review, and the comments from the third party that was consulted in relation to this request. I have decided that parts of Documents 1 and 2 are appropriate for release.

In relation to the remainder of the material within Documents 1 and 2, I am satisfied with the primary decision findings and reasons underpinning those findings (namely, that they are exempt from release). Accordingly, I adopt and affirm those findings and reasons as my own for the purposes of this internal review. I have therefore affirmed the primary decision over those parts of Documents 1 and 2.

Further, in your request for internal review, you contended that the primary decision-maker had taken into account reasons that were prohibited under section 11B(4) of the FOI Act for the purposes of the public interest test, on the basis that they equate to an assertion of "*a loss of confidence in the Commonwealth Government*".

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.

I do not agree with your contention, on the basis that the factors against disclosure which were considered by the primary decision-maker are of a different nature and do not relate to the

argument that “access to the document could result in embarrassment to the Commonwealth Government, or cause a loss in confidence in the Commonwealth Government”. The factors considered by the primary decision-maker are the relevant factors from the list set out in paragraph 6.22 of the FOI Guidelines, which provides:

6.22 A non-exhaustive list of factors against disclosure is provided below.

...

- h. could reasonably be expected to prejudice an agency’s ability to obtain confidential information*
- i. could reasonably be expected to prejudice an agency’s ability to obtain similar information in the future*
- j. could reasonably be expected to prejudice the competitive commercial activities of an agency*
- k. could reasonably be expected to harm the interests of an individual or group of individuals*

...

Accordingly, I am satisfied that the factors against disclosure considered by the primary decision-maker are relevant and appropriate, and have adopted those as my own for the purposes of this internal review decision.

Publication of the documents

Under section 11C of the FOI Act, the Department will make arrangements to publish the documents released to you as part of my internal review decision on the Department’s FOI Disclosure Log.

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/>.

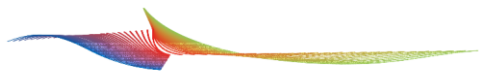
Complaint rights

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

Yours sincerely



John Reid
First Assistant Secretary
Government Division
15 June 2020



FOI REQUEST: FOI/2020/065/IR
SCHEDULE OF DOCUMENTS

FOI

Document	Description	Primary Decision	Internal Review 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	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	Exempt in part 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)	Not in scope of internal review