



Australian Government

Department of Health

Department Reference: FOI 1677

Ms Lea England

Via email : foi+request-6319-d0a3edd5@righttoknow.org.au

Dear Ms England

NOTICE OF DECISION

I refer to your request of 28 April 2020 to the Department of Health (department) seeking access under the *Freedom of Information Act 1982 (Cth)* (FOI Act) to:

“Copy of the Literature Review for the “Australian Government Department of Health Clinical Pathway for Debilitating Symptom Complexes Attributed to Ticks (DSCATT)”. Refer to DoH correspondence Ref No: MC20-001341 dated 23/04/2020. “The clinical pathway project is a critical piece of work underpinned by a literature review of the current evidence.” The literature review is requested”

I am authorised under section 23(1) of the FOI Act to make decisions in relation to Freedom of Information requests. I am writing to notify you of my decision on your request.

Decision

I have identified 1 documents falling within the terms of your request. The documents are set out in the schedule at Attachment A.

I have decided to refuse access to the document.

My reasons for this decision are set out at Attachment B.

Charges

The department notified of your liability to pay a charge of \$111.08 on 6 May 2020. You paid the charges in full on 8 May 2020.

Third Party Consultation

You were informed on 30 April 2020 that consultation with a third party would be necessary. A contention was put to me that the document should be exempt. My decision has been to refuse access to that material.

Review rights

If you are dissatisfied with my decision, you may apply for an internal review or Australian Information Commissioner (Information Commissioner) review of the decision.

Internal review

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 notice (or such further period as the department allows). Where possible please provide reasons why you consider review of the decision is necessary. The internal review will be carried out by another officer of this department within 30 days. An application for an internal review should be addressed to:

Email: FOI@health.gov.au

OR

Mail: FOI Unit (MDP 516)
Department of Health
GPO Box 9848
CANBERRA ACT 2601

Information Commissioner Review

Under section 54L of the FOI Act, you may apply to the Information Commissioner to review my decision. An application for review must be made in writing within 60 days of this notice (if you do not request an internal review).

The Australian Information Commissioner can be contacted by:

Email: enquiries@oaic.gov.au

Phone: 1300 363 992

More about the Information Commissioner review is available on the Office of the Australian Information Commissioner (OAIC) website at

<https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>

You may also make a complaint to the Information Commissioner about action taken by the department in relation to your application. Further information can be obtained from the OAIC website.

Relevant provisions

The FOI Act, including the provisions referred to in this letter, can be accessed from the Federal Register of Legislation website:

<https://www.legislation.gov.au/Details/C2020C00110>

Publication

You should be aware that where I have decided to release documents to you, the department may also publish the released material on its Disclosure Log. The department will however, not publish information (such as personal or business information) where it would be unreasonable to do so.

For your reference the department's Disclosure Log can be found at:

<https://www.health.gov.au/resources/foi-disclosure-log>

Contacts

If you require clarification of any of the matters discussed in this letter, you should contact Freedom of Information Unit on (02)6289 1666 or at FOI@health.gov.au.

Yours sincerely



Dr Rebecca Newton
A/g Assistant Secretary
Health Protection Policy Branch

12 May 2020

SCHEDULE OF DOCUMENTS - FOI-1677

ATTACHMENT A

Document no.	Date	Size	Description	Decision on access ¹	Exemption
1	31 May 2019	234	Draft Literature Review - DSCATT Clinical Pathway	E	s 47C - Whole s 47G - Whole

¹ E = Exempt, R = Release, RI = Release with irrelevant information removed, RE = Release with exempt information removed.

ATTACHMENT B

REASONS FOR DECISION

Material taken into account

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

- the terms of your request;
- the content of the documents sought;
- advice from departmental officers with responsibility for matters relating to the documents sought;
- submissions from third parties
- the relevant provisions of the FOI Act; and
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

Finding of facts and reasons for decision

My findings of fact and reasons for deciding that the exemptions identified in the schedule of documents apply to the relevant documents or parts of documents are set out below.

Section 47C - deliberative matter

Section 47C of the FOI Act conditionally exempts a document if its disclosure would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendations obtained, prepared or recorded, or consultation or deliberation which has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency, or a Minister of the Government of the Commonwealth.

The term 'deliberative matter' in section 47C(1) of the FOI Act excludes operational information or purely factual information (section 47C(2)).

Section 47C of the FOI Act also does not apply to:

- reports of scientific or technical experts;
- reports of a body or organisation established within an agency; or
- records of a final decision given in the exercise of a power of an adjudicative function (section 47C(3)).

Paragraph 6.58 of the FOI Guidelines provides:

"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 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."

In Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information) [20151 AATA 945, the AAT stated the meanings of the words 'opinion', 'advice' and 'recommendation' all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.

Document 1, identified in the Schedule at Attachment A, contains preliminary opinion, advice and recommendations prepared for the purposes of the deliberative processes of the Department. The information in these documents is still being considered by the Department and was obtained to inform policy and future decisions of government.

I am satisfied the release of document 1 would disclose deliberative matter within the meaning of section 47C of the FOI Act and therefore this information is conditionally exempt.

Public Interest

Section 47C of the FOI Act is a conditional exemption. Pursuant to section 11A(5) of the FOI Act, the Department is required to give access to a conditionally exempt document at a particular time unless access to the document at that time would, on balance, be contrary to the public interest.

When weighing up the public interest factors in favour of disclosure, I have taken into account the extent to which disclosure would:

- promote the objects of the FOI Act;
- inform debate on matters of public importance;
- enhance the scrutiny of government decision making; and
- provide the Australian people with access to government information.

However, I have weighed up the above factors against the following factors, indicating access would be contrary to the public interest, including the extent to which disclosure would reasonably be expected to:

- Impair the effectiveness of the decision making process by prematurely exposing the process to scrutiny and not providing for sufficient consideration and expression of opinions by the government. There is a public interest in protecting the decision-making process by keeping advice provided and matters considered confidential to ensure these matters can continue to be freely discussed while the response is still ongoing;
- prejudice the Department's ability to obtain confidential information; and

- inhibit frank and candid advice from departmental officers involved in policy development (See: *Dreamsafe Recycling Pty Ltd and Department of Education, Employment and Workplace Relations* [2013] AICmr 34).

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

I find access to the identified documents at this time would, on balance, be contrary to the public interest. These documents are therefore exempt in full under section 47C and section 31B(b) of the FOI Act.

Section 47G - Business affairs

Section 47G(1)(a) of the FOI Act permits conditional exemption of documents containing information concerning the business, commercial or financial affairs of an organisation if disclosure would or could reasonably be expected to unreasonably affect that organisation in respect of its lawful business, commercial or financial affairs.

I have decided the documents indicated in the Schedule at Attachment A consists of a draft literature review produced in conjunction with a third party. The documents therefore contain information in relation to the business affairs of third parties. The literature review draft, contains information of a commercial value that, if released prior to formal publication could reasonably be expected to be diminished.

Providing you with access to the identified documents would involve the disclosure of information which could unreasonably and adversely affect the business affairs of third parties. Disclosure would reveal specific commercial information about Allen & Clarke. It would also disclose significant intellectual property of the third parties and most likely lead to significant commercial disadvantage and heavy financial loss to a third party. Disclosure would also likely lead to seriously damaging the relationship between the third party and the department. Furthermore, I am satisfied the information in the identified documents is not publicly available.

Accordingly, I am satisfied that document 1 is conditionally exempt in full, under section 47G(1)(a) of the FOI Act.

Public interest test

Section 47G of the FOI Act is a conditional exemption. Pursuant to section 11A(5) of the FOI Act, the department is required to give access to a conditionally exempt document at a particular time unless access to the document at the time would, on balance, be contrary to the public interest.

When weighing up the public interest factors in favour of disclosure, I have taken into account the extent to which disclosure would:

- promote the objects of the FOI Act, particularly in increasing scrutiny, discussion, comment and review of the Government's activities;
- inform debate on a matter of public importance, namely administration of government funding; and
- promote effective oversight of public expenditure.

However, I have weighed up the above factors against the following factors, indicating access would be contrary to the public interest. The interference with the privacy, and the adverse effects on the professional and business affairs, of the third parties and the individuals concerned is, in my view, significant. Further, disclosure could reasonably be expected to

- adversely affect the business affairs of the third parties;
- prejudice the department's ability to obtain confidential information;
- prejudice the department's ability to obtain similar information in the future; and
- harm the interests of an individual or groups of individuals.

I confirm I have not had regard to the irrelevant factors in section 11B(4) of the FOI Act.

Accordingly, I have decided that document 1 is exempt in full under section 31B(b) of the FOI Act.