



10 August 2020

Our reference: LEX 57102

Mr Justin Warren
Right to Know

Only by email: foi+request-6477-c092094b@righttoknow.org.au

Dear Mr Warren

Decision on your Freedom of Information Request

I refer to your request dated 10 June 2020, to the Commonwealth Ombudsman, for access under the *Freedom of Information Act 1982* (the **FOI Act**) to the following document:

I request a copy of the Executive Minute to the Minister for Social Services (copy to the Minister for Human Services), 12 February 2015 (Document 0.6) as referred to in footnote 8 on page 5 of the Commonwealth Ombudsman's report into Centrelink's automated debt raising and recovery system, dated April 2017.

On 22 July 2020, the Commonwealth Ombudsman transferred your request to Services Australia under section 16 of the FOI Act.

My decision

Services Australia holds one document that relates to your request.

I have decided to refuse access to the document:

- as the document, in full, was brought into existence for the dominant purpose of briefing a Minister on a document to be submitted to the Cabinet (section 34(1)(c) of the FOI Act);
- as parts of the document detail Services Australia's methods or procedures for detecting breaches of the law, the disclosure of which may prejudice the effectiveness of these methods in the future (section 37(2)(b) of the FOI Act); and
- as parts of the material would be privileged from production in legal proceedings on the ground of legal professional privilege (section 42 of the FOI Act).

Please see the schedule at **Attachment A** to this letter for the reasons for my decision, including the relevant sections of the FOI Act.

You can ask for a review of our 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 from within Services Australia, or an external review by the Office of the Australian Information Commissioner. You do not have to pay for reviews of decisions. See **Attachment B** for more information about how to arrange a review.

Further assistance

If you have any questions please email FOI.LEGAL.TEAM@servicesaustralia.gov.au.

Yours sincerely

Alana

Authorised FOI Decision Maker
Freedom of Information Team
Employment Law and FOI Branch | Legal Services Division
Services Australia

SCHEDULE OF DOCUMENTS FOR RELEASE**WARREN, Justin (Right to Know) - LEX 57102**

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
1.	-	-	Brief	Exempt in full	s 34(1)(c) s 37(2)(b) s 42	Whole document exempt under section 34 of the FOI Act. Parts of the document exempt under section 37(2)(b) of the FOI Act. Parts of the document exempt under section 42 of the FOI Act.

REASONS FOR DECISION

What you requested

I request a copy of the Executive Minute to the Minister for Social Services (copy to the Minister for Human Services), 12 February 2015 (Document 0.6) as referred to in footnote 8 on page 5 of the Commonwealth Ombudsman's report into Centrelink's automated debt raising and recovery system, dated April 2017.

What I took into account

In reaching my decision I took into account:

- your request dated 10 July 2020;
- the document that falls within the scope of your request;
- consultation with the Department of the Prime Minister and Cabinet regarding the application of section 34 of the FOI Act (**Cabinet exemption**);
- relevant case law (as cited below);
- the Cabinet Handbook issued by the Department of the Prime Minister and Cabinet, 12th Edition;
- consultations with Services Australia officers about:
 - the nature of the document; and
 - Services Australia's operating environment and functions;
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the **Guidelines**); and
- the FOI Act.

Reasons for my decisions

I am authorised to make decisions under section 23(1) of the FOI Act.

I have decided that the document you requested is exempt under the FOI Act. My findings of fact and reasons for deciding that exemptions apply to that document are discussed below.

Section 34 of the FOI Act - Cabinet documents

I have applied the exemption in section 34(1)(c) to the document, in full.

Section 34(1) of the FOI Act provides that:

A document is an exempt document if:

- (a) both of the following are satisfied:
 - (i) it has been submitted to Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;

- (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or
- (b) it is an official record of the Cabinet; or
- (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or
- (d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

Also relevant to this decision, section 34(3) provides:

A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

Paragraph 5.55 of the Guidelines states:

The Cabinet exemption in s 34 of the FOI Act is designed to protect the confidentiality of the Cabinet process and to ensure that the principle of collective ministerial responsibility (fundamental to the Cabinet system) is not undermined. Like the other exemptions in Division 2 of Part IV, this exemption is not subject to the public interest test. The public interest is implicit in the purpose of the exemption itself.

Application of section 34 to your request

Was the document brought into existence for the dominant purpose of briefing a Minister on a document to which section 34(1)(a) applies?

The decision of the former Australian Information Commissioner in *Nick Xenophon and the Department of Defence* [2016] AICmr 14 makes clear that, when determining whether a document falls within the exemption in section 34(1)(c) of the FOI Act, 'the question of dominant purpose will be a question of fact in each case'.

The requested document is a ministerial briefing document prepared by Services Australia (then the Department of Human Services) to the then Minister for Social Services, and the then Minister for Human Services. The brief relates to Services Australia's approach to protecting the integrity of the welfare system, and provides options to strengthen those arrangements. The material in the brief formed the basis of a New Policy Proposal (**NPP**) package submitted to Cabinet for consideration.

Without disclosing Cabinet information and the exact contents of the requested document (as this would make this document (the decision) an exempt document as per sections 26(2) and 34(3) of the FOI Act), I am satisfied that the ministerial brief was created for the dominant purpose of briefing a Minister on a document to which section 34(1)(a) applies. This is based on the contents of the document, as well as the timing of events, such as when the requested document was created and when a submission was put to Cabinet.

In accordance with paragraph 133 of the Cabinet Handbook, I consulted with the Department of the Prime Minister and Cabinet (**DPMC**) regarding the document. DPMC confirmed that section 34(1)(c) is applicable to the document.

In *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301 and subsequent Australian Information Commissioner decisions (including *Philip Morris Limited and Department of Finance* [2014] AICmr 27 and *Wood and Department of Prime*

Minister and Cabinet [2014] AICmr 150), it has been recognised that documents can disclose Cabinet deliberations, even where the document precedes the Cabinet meeting at which the relevant matter was discussed.

Similarly, in this case, the document preceded Cabinet's deliberation on the implementation of Taskforce Integrity and other strategies to target fraud and non-compliance. However, as the document contains the business case, options and advice that were subsequently deliberated on by Cabinet, I am satisfied that disclosure of the document would therefore reveal Cabinet deliberations.

Therefore, as the document was brought into existence for the dominant purpose of briefing the then Ministers on a document to which the exemption in section 34(1)(a) applies, I am satisfied that the document meets the criterion in section 34(1)(c) of the FOI Act.

Has the Cabinet deliberation or decision been officially disclosed?

Section 34(3) of the FOI Act provides:

A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

Section 34(6) of the FOI Act provides that, in a document to which section 34(1) applies, information is not exempt if it is purely factual material unless:

- (a) the disclosure of the information would reveal a Cabinet deliberation or decision; and
- (b) the existence of the deliberation or decision has not been officially disclosed.

'Deliberation' is explained in paragraph 5.75 of the Guidelines as meaning:

...active debate in Cabinet, or its weighing up of alternatives, with a view to reaching a decision on a matter (but not necessarily arriving at one). In *Re Toomer*, Deputy President Forge analysed earlier consideration of 'deliberation' and concluded:

Taking its [Cabinet's] deliberations first, this means that information that is in documentary form and that discloses that Cabinet has considered or discussed a matter, exchanged information about a matter or discussed strategies. In short, its deliberations are its thinking processes, be they directed to gathering information, analysing information or discussing strategies. They remain its deliberations whether or not a decision is reached. [Cabinet's] decisions are its conclusions as to the courses of action that it adopts be they conclusions as to its final strategy on a matter or its conclusions as to the manner in which a matter is to proceed.

The term 'officially disclosed' is not defined in the FOI Act. The Guidelines state at paragraph 5.78:

This can refer to disclosure by oral as well as written statement - for example, an oral announcement by a minister about a Cabinet decision. The disclosure may be a general public disclosure (for example, a statement in a consultation paper published on a Departmental website) or a disclosure to a limited audience on the understanding that it is not a confidential communication. The disclosure must be

‘official’ — for example, authorised by Cabinet or made by a person (such as a minister) acting within the scope of their role or functions.

In the 2015-16 Federal Budget handed down on 12 May 2015, the government announced the *Strengthening the Integrity of Welfare Payments* Budget measure. Budget Paper No. 1, Statement 1, states:

The Government will also increase its capability to detect, investigate and deter suspected welfare fraud and non-compliance which will return around \$1.5 billion to the budget.

Budget Paper No. 2, Part 2, states:

The Government will achieve savings of \$1.7 billion over five years by enhancing the Department of Human Services (DHS) fraud prevention and debt recovery capability, and improving assessment processes.

From 1 July 2015 DHS will implement an integrated package of compliance and process improvement initiatives including improved automation and targeted strategies for fraud prevention in areas of high risk.

On 12 May 2015, the Hon Scott Morrison issued a media release stating:

The Government is strengthening the integrity of our welfare system to ensure it remains fair and sustainable so that we can continue to support those who need it most. These measures will return around \$3.5 billion to the Budget.

The 2015-16 Mid-Year Economic and Fiscal Outlook measure entitled *Enhanced Welfare Payment Integrity* provides:

The Government will provide \$29.5 million over four years from 2015-16 to expand debt recovery achieved by the Department of Human Services (DHS). This measure will achieve net underlying cash balance savings of \$157.8 million, reflecting the recovery of existing customer debts.

While these debts would otherwise not have been recovered, write-offs do not impact the fiscal balance and so improvements to debt recovery are not reflected in the expenses associated with this measure.

DHS will focus debt recovery activities on high value debts and those individuals who are identified as having the capacity to pay, for example from those who no longer receive government payments and are now employed.

I am not satisfied that these materials disclose a cabinet deliberation or decision. I find that the 2015-16 Budget Paper statements, the 12 May 2015 media release and the 2015-16 MYEFO measure do not make any definitive announcements about a decision or deliberation of Cabinet, or the Government. Rather, they provide factual information about government initiatives and programs, without reference to a decision or deliberation of the Cabinet having been taken.

I am also satisfied that to the extent the document contains any purely factual material, such material is intertwined and cannot be reasonably extracted from deliberative matters, and disclosure would reveal a Cabinet deliberation, the existence of which has not been officially disclosed.

I am therefore not satisfied that the decision or deliberation of Cabinet has, to date, been officially disclosed such that section 34(3) or 34(6) of the FOI Act applies.

Do any other exceptions to the application of the Cabinet exemption apply to the document?

I have considered the remaining exceptions in sections 34(4) and 34(5) of the FOI Act, and I am satisfied that they do not apply to the document for the following reasons:

- in relation to section 34(4) of the FOI Act – the document is not exempt under section 34(1)(c) or section 34(3) only because it is attached to a document to which subsections 34(1)-(3) of the FOI Act applies; and
- in relation to section 34(5) of the FOI Act – the document is not a document by which a decision of the Cabinet has been officially published.

I have decided that the document is exempt, in full, under the FOI Act because it is a document that was brought into existence for the dominant purpose of briefing a Minister on a document to be submitted to the Cabinet (section 34(1)(c)).

Accordingly, I have decided to not release the document to you.

Section 37(2)(b) of the FOI Act - documents affecting enforcement of law

I have applied the exemption in section 37(2)(b) to parts of the document.

Section 37(2)(b) of the FOI Act provides that:

(2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

(b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures

Paragraph 5.109 of the Guidelines provides:

‘Lawful methods and procedures’ are not confined to criminal investigations and can, for example, extend to taxation investigations. The exemption focuses on an agency’s methods and procedures for dealing with breaches of the law, where disclosure would, or could reasonably be expected to, adversely affect the effectiveness of those methods and procedures.

Paragraph 5.108 of the Guidelines provides that the exemption under section 37(2)(b) of the FOI Act requires that two factors are satisfied. There must be a reasonable expectation that a document will disclose a method or procedure and a reasonable expectation or a real risk of prejudice to the effectiveness of that investigative method or procedure.

In *Community and Public Sector Union and Department of Health (Freedom of Information)* [2017] AICmr 33, the Australian Information Commissioner considered a document which contained details of methods and procedures used by the Department of Health and the Department of Veterans’ Affairs, in relation to investigating and auditing health claims and payments. In that matter, the Australian Information Commissioner held that if the document was disclosed, there would be a reasonable expectation or a real risk of prejudice to the

effectiveness of the auditing and compliance methods and procedures of those agencies. Accordingly, the document was exempt from release under section 37(2)(b) of the FOI Act.

I have found that parts of the document are exempt under section 37(2)(b) of the FOI Act. The document contains methods and procedures for dealing with breaches of social security law. I am satisfied that release of such methods and procedures would reasonably be expected to adversely affect the effectiveness of those methods and procedures.

I am satisfied that release of parts of the document would facilitate non-compliance by some customers by providing a means of understanding how to circumvent Services Australia's investigative methods and avoid detection in the commission of welfare fraud.

For the reasons set out above, I am satisfied that parts of the document are exempt under section 37(2)(b) of the FOI Act.

Section 42(1) of the FOI Act – Legal Professional Privilege

I have applied the exemption in section 42 of the FOI Act to parts of the document as it contains information that is of such a nature that it would be privileged from production in legal proceedings on the grounds of legal professional privilege (**LPP**).

Section 42 of the FOI Act provides:

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that: the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and (2) the information is operational information of an agency.

In addition to section 42 of the FOI Act, the Guidelines provide the following commentary in relation to this exemption at paragraphs 5.128 and 5.129:

The underlying policy basis for legal professional privilege is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice...

At common law, determining whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship;
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation; and
- whether the advice given is independent; whether the advice given is confidential.

The Guidelines at paragraph 5.135 provides:

For the purpose of the privilege, 'advice' extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context. However, it does

not apply to internal communication that is a routine part of an agency's administrative functions. The communication must relate to activities generally regarded as falling within a lawyer's professional functions.

Did a legal adviser-client relationship exist?

To the extent that the document contains material that is subject to LPP, I am satisfied that a legal adviser-client relationship exists. I am satisfied that there is the necessary level of independence between the creator and the recipient of the legal advice.

Does the document attract privilege?

I am satisfied that the relevant parts of the document were created for the dominant purpose of providing legal advice.

Has privilege been waived?

Section 42(2) of the FOI Act provides that a document is not exempt where privilege is waived.

At the time of this decision, I have no evidence before me to suggest that the contents of the legal advice has been disclosed more broadly than required to brief Cabinet. Accordingly, I am satisfied that legal professional privilege has not been waived in this instance.

The 'real harm' test

Paragraph 5.150 of the Guidelines (which paraphrases the 'Brazil Direction') set out the following:

Agencies are advised not to claim exemption for a document under s 42 unless it is considered that 'real harm' would result from releasing the document...The phrase 'real harm' distinguishes between substantial prejudice to the agency's affairs and mere irritation, embarrassment or inconvenience to the agency.

In reviewing the documents, I am satisfied that Services Australia's ability to detect and pursue breaches of the social security law will be compromised by the disclosure of the material that is subject to LPP. Therefore, I have decided not to release the legal advice as I am satisfied that real harm will flow from its disclosure.

Section 26 of the FOI Act – reasons and other particulars of decisions to be given

Relevantly for this decision section 26(2) provides:

A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

I have not included any matter in this notice that would cause the notice itself to become an exempt document.



INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Asking for a full explanation of a freedom of information (FOI) decision

Before you ask for a formal review of a FOI decision, you can contact us to discuss your request. We will explain the decision to you. This gives you a chance to correct misunderstandings.

Asking for a formal review of an FOI decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982 (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:

1. an Internal Review Officer in Services Australia; and/or
2. the Australian Information Commissioner.

Note 1: There are no fees for these reviews.

Applying for an internal review by an Internal Review Officer

If you apply for internal review, a different decision maker to the Services Australia delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be:

- made in writing
- made within 30 days of receiving this letter
- sent to the address at the top of the first page of this letter.

Note 2: You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

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.

If you do not receive a decision from an Internal Review Officer in Services Australia within 30 days of applying, you can ask the Australian Information Commissioner for a review of the original FOI 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

Note 3: The Office of the Australian Information Commissioner generally prefers FOI applicants to seek internal review before applying for external review by the Australian Information Commissioner.

Important:

- If you are applying online, the application form the 'Merits Review Form' is available at **www.oaic.gov.au**.
- If you have one, you should include with your application a copy of the Services Australia decision on your FOI request
- Include your contact details
- Set out your reasons for objecting to Services Australia's decision.

Complaints to the Australian Information Commissioner and Commonwealth Ombudsman

Australian Information Commissioner

You may complain to the Australian Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Australian Information Commissioner must be made in writing. The Australian Information Commissioner's contact details are:

Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may also complain to the Commonwealth Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Commonwealth Ombudsman may be made in person, by telephone or in writing. The Commonwealth Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.