



Mr Mark R. Diamond

(by email: foi+request-759-57b39a5a@righttoknow.org.au)

Dear Mr Diamond

Freedom of Information Request

I refer to your Freedom of Information (FOI) request of 3 September 2014 in which you requested access to "a copy of the report of the Capability Review of DEEWR".

Background

In your request, you stated the following:

- *I understand from a conversation with one of the officers of the APSC that a Capability Review of the Department of Education, Employment and Workplace Relations (DEEWR) was conducted at some time in the last few years. The report is not listed on your website at <http://www.apsc.gov.au/projects/capability-reviews> where other reports are available.*

For reasons explained below, the information you have received is not entirely correct.

The Advisory Group on Reform of Australian Government Administration recommended in its report *Ahead of the Game* that the Australian Public Service Commission (the Commission) develop options on agency capability reviews for Government consideration¹. In response to this recommendation, the Commission did, in fact, develop options for consideration by Government.

In developing different options, the Commission undertook a review of DEEWR's organisational capabilities for the purposes of evaluating a model approach to such reviews. The report on this review was a capability review in a general sense, but it was not a Capability Review report under the Capability Review Program (CR Program) that was subsequently established.

The DEEWR review was conducted, in part, for evaluation purposes. The review model and review standards followed under the present CR Program are different to the model and standards used for the DEEWR review. Although the DEEWR review report was not a report under the present CR Program, I have construed your request as referring to this report.

Decision

This letter sets out my decision with respect to the document you have requested. I am an authorised decision-maker under section 23 of the *Freedom of Information Act 1982* (the FOI Act).

¹ Recommendation 8.1

I have identified a document relevant to your request. Specifically, I have identified the DEEWR review report referred to above.

I have decided that the document you have requested is exempt from disclosure under the FOI Act. My reasons for this decision are set out at **Attachment A**.

Review rights

You are entitled to seek review of this decision. Your rights are set out at **Attachment B** to this letter.

Contacts

If you require clarification of any of the matters discussed in this letter please contact the Commission's FOI coordinator by email at foi@apsc.gov.au or by telephone on 02 6202 3735.

Yours sincerely



Ian Fitzgerald
Chief Human Capital Officer
Authorised FOI decision maker
3 October 2014

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 to which you sought access;
- advice from Australian Public Service Commission (the Commission) employees with responsibility for matters concerning the document you have requested;
- advice from the Department of the Prime Minister and Cabinet;
- the relevant provisions of the FOI Act;
- FOI guidelines issued by Australian Information Commissioner and published on the website of the Office of the Australian Information Commissioner (OAIC); and
- FOI guidelines published by the Department of the Prime Minister and Cabinet.

Section 34 – Cabinet documents

Paragraph 34(1)(a) of the FOI Act provides that a document is an exempt document if both of the following are satisfied:

- i. it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted; and
- ii. it was brought into existence for the dominant purpose of submission for consideration by the Cabinet.

A copy of section 34 is provided at **Attachment C**.

Taking into account advice from the Department of the Prime Minister and Cabinet, I have formed the view that the DEEWR review report was proposed to be submitted to Cabinet and that the report was brought into existence for the dominant purpose of submission for consideration by Cabinet.

Subsections 34(4) to 34(6) of the FOI Act specify several exceptions to the exemption of section 34. I am satisfied that none of these exceptions apply to the report to which the exemption of paragraph 34(1)(a) applies.

Taking the above into account, I am satisfied that the DEEWR review report is exempt from disclosure under section 34 of the FOI Act.

Section 47C – deliberative material

Section 47C of the FOI Act provides that a document is conditionally exempt from disclosure if it would disclose certain matter of a deliberative nature. A copy of section 47C is provided at **Attachment C**.

Essentially, deliberative matter is content that is in the nature of, or relating to:

- an opinion, advice or recommendation that has been obtained, prepared or recorded; or
- a consultation or deliberation that has taken place;

in the course of, or for the purposes of, a deliberative process of the agency, a Minister or the Government of the Commonwealth.

Deliberative matter does not include operational information (as defined by section 8A of the FOI Act) or purely (i.e. merely) factual information. Moreover, subsection 47C(3) provides that the conditional exemption does not apply to certain reports and records.

The DEEWR review report comprises a mixture of opinion, advice and recommendations. Moreover, the report is the outcome of consultations that were undertaken with DEEWR by the review team. I am satisfied that the report comprises deliberative matter within the meaning of section 47C of the FOI Act.

As noted at paragraph 6.62 of the Australian Information Commissioner's FOI guidelines:

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.

The conditional exemption of section 47C applies in relation to certain documents connected with the deliberative processes of an agency, a Minister or the Government of the Commonwealth. In my view, the DEEWR review report was prepared for the purposes of the deliberative processes of all three of these entities. Namely, the DEEWR review report was prepared in the course of, or for the purposes of, the deliberative processes of:

- the Australian Public Service Commission;
- the Minister assisting the Prime Minister for the Public Service (the Minister); and
- the Government of the Commonwealth.

The Commission has a number of roles and responsibilities in relation to public sector employment generally, and in relation to the Australian Public Service (APS) in particular. These activities involve developing and implementing policies about a range of subjects connected with public sector employment matters.

The Advisory Group on Reform of Australian Government Administration recommended in its report *Ahead of the Game* that the Commission develop options on agency capability reviews for Government consideration. The DEEWR review was conducted as part of the Commission's response to this recommendation. In my view, the DEEWR review report was prepared in the

course of the Commission's deliberative functions of considering and evaluating different options and making recommendations to the Minister.

The DEEWR review report was also prepared in the course of the Minister's and the Cabinet's deliberative functions. The Minister's deliberative functions include considering and evaluating different options, recommendations and reports received by the Minister. In some cases, the Minister may submit options for consideration by Cabinet.

As I have explained above, the DEEWR review report was brought into existence for the dominant purpose of submission for consideration by the Cabinet. Therefore, in addition to being prepared in the course of the Commission's and the Minister's deliberative processes, the report can also be said to have been prepared in the course of, and for the purposes of, the deliberative processes of Cabinet. At each of these levels, the process of weighing up and evaluating competing arguments and considerations for an ongoing Capability Review program is a deliberative process.

The exemption of section 47C does not apply to purely factual material. The Australian Information Commissioner's guidelines note that where it is difficult to separate purely factual material from deliberative matter, both elements may be conditionally exempt. Moreover, guidelines issued by the Department of the Prime Minister and Cabinet indicate that "*where a document contains factual material that is related to the provision of policy advice and elaborates its context or likely impact it may potentially come within the deliberative document exemption*". I have taken each of these into account in deciding which material is covered by the conditional exemption of section 47C. To the extent that the report may contain factual material, it is not severable from the deliberative matter and I have formed the view that it would not be appropriate to provide access to those parts.

For the reasons above, I have decided that the document you have requested is conditionally exempt from release under section 47C of the FOI Act.

Section 11A – the public interest

Subsection 11A(5) of the FOI Act provides that an agency must give access to a document if it is conditionally exempt unless (in the circumstances) access to the document would, on balance, be contrary to the public interest. I have found that certain material is conditionally exempt on the grounds of section 47C of the FOI Act. Subsection 11B(3) lists certain factors as favouring access to a document in the public interest. These factors include whether access to the document would:

- promote the objects of this Act (including all the matters set out in sections 3 and 3A);
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure.

Subsection 11A(4) of the FOI Act lists factors that are irrelevant to determining whether access would be in the public interest. I have not taken these factors into account.

Factors in favour of disclosure

In considering whether access to the document you have requested would, on balance, be contrary to the public interest, I have identified the following factors, in addition to those listed under subsection 11B(3), as being in favour of providing access:

- disclosure would promote transparency in the way the Commission develops a range of policies and guidance relating to public sector employment matters;
- disclosure would inform the community of the Commission's operations in its dealings with Government and other agencies; and
- disclosure would enhance the understanding of DEEWR's organisational capabilities.

Factors against disclosure

I have identified the following factors as weighing against disclosure of the documents you have requested:

- the interest in preserving the effective operation of the Commission's functions and roles in respect of developing policies concerning the Australian Public Service (APS), including matters relating to the capability of APS agencies;
- the interest in preserving the ability of the Commission to effectively advise Government about the Australian Public Service (APS), including matters relating to the capability of APS agencies;
- the interest in appropriately maintaining a confidential relationship between ministers and agencies in circumstances where policy options are being explored and developed;
- the interest in appropriately maintaining the confidentiality of material in circumstances where DEEWR understood the review to be confidential;
- the interest in preserving the efficient and proper functioning of Government – disclosure could have the effect of diminishing the future flow of information between agencies and between the Commission and Government;
- the interest in preserving the confidentiality of Cabinet processes.

On balance, it appears to me that the factors against disclosure are not outweighed by the factors in favour of disclosure.

In reaching this decision, I acknowledge the public interest in matters concerning public sector organisational capability. However, I am not persuaded that this interest is outweighed by the detriments that could reasonably be expected to flow, now and in future, from disclosure of the document you have requested.

Taking these matters into account, I find that it would, on balance, be contrary to the public interest to release the document you have requested.

REVIEW RIGHTS

Internal Review

The *Freedom of Information Act 1982* (FOI Act) gives you a right to apply for an internal review of this decision. The review will be conducted by a different person to the person who made the original decision.

If you wish to seek an internal review of this decision you must apply for the review, in writing, within 30 days of receipt of this letter. No particular form is required for an application for internal review, but to assist the decision-maker you should clearly outline the grounds upon which you consider the decision should be reviewed.

Applications for internal review can be lodged in one of the following ways:

Post: The FOI Coordinator
Australian Public Service Commission
16 Furzer Street
WODEN ACT 2606

Email: foi@apsc.gov.au

Review by the Office of the Australian Information Commissioner

The FOI Act gives you the right to apply directly to the Australian Information Commissioner ('Information Commissioner') for review of certain decisions made under the FOI Act.

If you wish to have the decision reviewed by the Information Commissioner you must apply for the review within 60 days of receipt of this letter. To assist the Information Commissioner, your application should include a copy of this decision and your contact details. You should also clearly set out why you are objecting to the decision.

You can also complain to the Information Commissioner about how an agency handled an FOI request, or about other actions the agency took under the FOI Act.

Applications for review or complaint can be also lodged in one of the following ways:

Post: GPO Box 2999
CANBERRA ACT 2601

Fax: (02) 9284 9666

Email: enquiries@oaic.gov.au

Web: <https://forms.australia.gov.au/forms/oaic/foi-review/>

The Commonwealth Ombudsman

You can 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.

A complaint to the Commonwealth Ombudsman may be made orally or in writing. The Ombudsman may be contacted for the cost of a local call from anywhere in Australia by telephone on 1300 362 072.

Freedom of Information Act 1982

Relevant Provisions

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) 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.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
- (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of *exempt document* in subsection 4(1).

11B Public interest exemptions—factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

34 Cabinet documents

General rules

- (1) A document is an exempt document if:
- (a) both of the following are satisfied:
 - (i) it has been submitted to the 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.
- (2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.
- (3) 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.

Exceptions

- (4) A document is not an exempt document only because it is attached to a document to which subsection (1), (2) or (3) applies.

Note: However, the attachment itself may be an exempt document.

- (5) A document by which a decision of the Cabinet is officially published is not an exempt document.
- (6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because of this section if the information consists of 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.

47C Public interest conditional exemptions—deliberative processes

General rule

- (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; or
 - (d) the Government of Norfolk Island.

Exceptions

- (2) Deliberative matter does not include either of the following:
- (a) operational information (see section 8A);
 - (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

- (3) This section does not apply to any of the following:
- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
 - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
 - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).