



Australian Government

**Department of Infrastructure, Transport,
Regional Development and Communications**

Ray Willing
Via email: foi+request-7669-36c97a08@righttoknow.org.au

FOI reference number: IR22-020

Dear Ray,

Internal Review Decision made under the *Freedom of Information Act 1982* – Varied decision

I refer to your request to the Department of Infrastructure, Transport, Regional Development and Communications (**the department**) received on 8 August 2021 for access to documents under the *Freedom of Information Act 1982* (**the FOI Act**). You requested the following documents:

all details you have with Coffs Harbour City Council concerning the financing of and the proposed design of a Whale Trail to be located at Woolgoolga NSW.

On 7 October 2021, you were provided with an FOI access decision letter and documents released to you under FOI. Documents subject to your request were provided to you in part with redactions for exempt material and irrelevant information pursuant to the FOI Act.

On 11 October 2021, you sought review of the original FOI decision made by Meghan Hibbert (Assistant Secretary – Regional Programs Branch) providing access in part to documents relevant to your request.

Authority

I am an officer authorised by the Secretary to make decisions about access to documents in the possession of the department in accordance with subsection 23(1) of the FOI Act.

Documents subject to this request

Upon commencement of this review I requested the relevant line area undertake a further search for potentially relevant documents in relation to the financial and design aspects of the Whale Trail to be located at Woolgoolga NSW. I am of the view that two (2) further documents are in scope of the request. These documents are outlined in the attached schedule and I have decided to release these further documents in full.

Decision

I have made a decision to vary the original decision of Ms Hibbert and have decided to release further information, in part, contained in the documents relevant to your request.

The documents set out in the attached schedule, together with applicable exemption provisions. Where I have decided to grant access in part, I have provided access to an edited copy of the documents, modified by deletions in accordance with subsection 22(2) of the FOI Act.

Reasons for decision

In accordance with paragraph 26(1)(a) of the FOI Act, the findings on any material question of fact, referring to the material on which those findings were based and the reasons for my decision to grant further partial access, thereby varying the original FOI decision, follows.

I have taken the following material into account in making my decision:

- the content of the documents that fall within the scope of your request;
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**the FOI Guidelines**);
- sections 3, 11 and 11A of the FOI Act which give the Australian community a legally enforceable right to obtain access to information held by the Government of the Commonwealth;
- comments of a third party potentially affected by the release of the documents; and
- the following provisions of the FOI Act:
 - *section 47C – deliberative matter*
 - *section 47F – personal privacy*
 - *section 22 – irrelevant material*

Statement of reasons

I have decided to grant further partial access to the documents within the scope of your request, subject to the following exemptions in accordance with the FOI Act:

Section 47C (Deliberative matter)

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure 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 an agency, a Minister or the Government of the Commonwealth.

The Office of the Information Commissioner FOI Guidelines (FOI Guidelines) state that:

For each of the conditional exemptions, the harm threshold that must be reached is specified in the provision. The various harm thresholds vary in both the extent of the harm that disclosure would cause and the extent to which the decision maker must be satisfied that the harm would result. The only exception is the deliberative processes exemption (section 47C), which does not include any requirement of harm: the threshold requirement is that the document includes deliberative matter.

Further part 6.58 of the FOI Guidelines explains that:

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.

I agree that the document listed as exempt under section 47C of the FOI Act comprises information which is the form of internal deliberations, assessments and opinions regarding the assessment of the Woolgoolga Whale Trail Community Development Grant.

The information redacted in accordance with this exemption consists of internal departmental analysis, comments and assessments which contain preliminary thinking work and options related to the project. The documents were formulated for further consideration and refinement and are deliberative in nature.

The analysis and commentary provided in this document was designed for internal consumption only and if disclosed through FOI would enable other grant proponents to gain an insight into how the department assesses grant applications especially in relation to matters such as risk assessments.

Further, I am of the view that, if released the sensitive business information provided by the applicant for the purposes of the grant application could be misused many result in damage to that entity. For this exemption to apply the deliberative process must relate to the functions of an agency, minister or the government of the Commonwealth. I can confirm the deliberative material relates to the functions of the department, in particular the material consists of internal comments about the status and progress of the Woolgoolga Whale Trail project.

Accordingly, I have decided the document marked as exempt under section 47C of the FOI Act meets the criteria for conditional exemption. Where a document is assessed as conditionally exempt, access must be given subject to the public interest test in accordance with subsection 11A(5) of the FOI Act.

Application of the public interest test:

Subsection 11A(5) of the FOI Act provides that an agency 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 would, on balance, be contrary to the public interest.

In order to assess whether release of the exempt material would be contrary to the public interest, I considered the following factors which favour disclosure:

- a) disclosure would promote the objects of the FOI Act;
- b) disclosure would inform debate on a matter of public importance;
- c) disclosure would promote effective oversight of public expenditure; and
- d) disclosure would allow a person to access his or her own personal information.

I agree that disclosure would promote the objects of the FOI Act, may assist in a limited way to inform debate on a matter of public importance and may provide limited oversight of public expenditure.

I do not consider the information exempt under section 47C relates to the personal information of the applicant. This public interest consideration is therefore irrelevant in this instance.

I also considered the following factors which do not favour disclosure:

- a) disclosure 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 an agency, a Minister or the Government of the Commonwealth;
- b) disclosure could reasonably be expected to impact the effective and efficient management of the Community Development Grants program in the future and would prejudice future assessments.

As set out in subsection 11B(4) of the FOI Act, 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 in confidence in the Commonwealth Government;
- b) access to the document could result in any person misinterpreting or misunderstanding the document;
- c) 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

- d) access to the document could result in confusion or unnecessary debate.

I am satisfied that no irrelevant factor in subsection 11B(4) of the FOI Act has been considered. On balance, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure. I am satisfied that the public interest is to withhold the exempt material.

Section 47F – Personal privacy

Section 47F of the FOI Act provides that a document is conditionally exempt if its release would involve the unreasonable disclosure of personal information about any person (including a deceased person).

‘Personal information’ is defined under section 4 of the FOI Act as having the same meaning as in the *Privacy Act 1988* (Privacy Act). Subsection 6(1) of the Privacy Act defines ‘personal information’ as:

‘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 material form or not.’*

I agree with the original decision maker with regard to all redactions made under s47F. The documents marked as partially exempt under this provision contain personal information including names, phone numbers, bank details and other personal particulars of departmental employees and Coffs Harbour City Council. This information is not in the public domain, these individuals are not known to be associated with this type of work and I see no public purpose in disclosing this information. I do not consider it appropriate to disclose personal information where it is not otherwise publicly available. If this information was disclosed there is a reasonable expectation that these details could be subject to misuse, contrary to the wishes of the individuals. The individuals that provided the information to the department were also not aware it would be disclosed further and were of the view it should not be disclosed through FOI.

Accordingly, I have decided that the documents which are listed as exempt in accordance with this provision in the schedule meet the criteria for conditional exemption. Where a document is assessed as conditionally exempt, access must be given subject to the public interest test in accordance with subsection 11A(5) of the FOI Act.

Application of the public interest test:

Subsection 11A(5) of the FOI Act provides that an agency 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 would, on balance, be contrary to the public interest.

In order to assess whether release of the exempt material would be contrary to the public interest, I considered the following factors which favour disclosure:

- a) disclosure would promote the objects of the FOI Act;
- b) disclosure would inform debate on a matter of public importance;
- c) disclosure would promote effective oversight of public expenditure; and
- d) disclosure would allow a person to access his or her personal information.

I agree that disclosure would promote the objects of the FOI Act. I do not consider the personal information exempted in accordance with section 47F of the FOI Act if disclosed, would inform debate on a matter of public importance, or provide effective oversight of public expenditure. Further, the personal information redacted from the documents is not the applicant’s own personal information so that public interest consideration is not relevant in this circumstance.

I also considered the following factors which do not favour disclosure:

- a) disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy;
- b) the personal information is not well known;
- c) the persons to whom the information relates are not known to be (or to have been) associated with the matters dealt with in the documents; and
- d) the information is not available from publicly accessible sources.

As set out in subsection 11B(4) of the FOI Act, 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 in confidence in the Commonwealth Government;
- b) 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;
- c) access to the document could result in any person misinterpreting or misunderstanding the document;
- d) 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
- e) access to the document could result in confusion or unnecessary debate.

I am satisfied that no irrelevant factors have been considered, as set out in subsection 11B(4) of the FOI Act. On balance, I consider the public interest factors against disclosure to be more persuasive than the public interest factors favouring disclosure. I am satisfied that the public interest is to withhold the exempt material.

Section 47G (Business information)

I have made a decision to release information that previously reacted under this provision. I am of the view that the information can be released and will not cause harm to the business interests of the third party that provided it.

Irrelevant material

Where the giving of access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access, subsection 22(1) of the FOI Act provides that it is possible for an agency to prepare an edited copy of the document, modified by deletions. Accordingly, irrelevant material has been redacted from the documents.

Please note that where information appears in a documents that relates to another topic (not the financial or proposed design aspects of the Whale Trail) this information has been removed as it is not considered relevant the scope of your FOI request.

Publication of information in the FOI disclosure log

Section 11C of the FOI Act requires publication of released documents on the department's online FOI disclosure log, subject to certain exceptions, including where publication of personal, business, professional or commercial information would be unreasonable. I have decided that the documents released will be published on the disclosure log.

Your rights of review

You may apply directly to the Office of the Australian Information Commissioner (OAIC) to review my decision. An application for review by the Information Commissioner must be made in writing within **60 days** after the day you are notified of this decision. You can also make a complaint to the Information Commissioner if you have concerns about how the department handled your request. You can find information about requesting a review, making a complaint, and other information about FOI on the OAIC website www.oaic.gov.au or phone the OAIC on 1300 363 992.

Contacts

If you wish to discuss this matter, please contact the department's FOI Coordinator on (02) 6274 7393 or via email at FOI@infrastructure.gov.au

Yours sincerely

Joe Castellino

Joe Castellino
Acting First Assistant Secretary
Regional Development, Local Government & Regional Recovery Division
10 November 2021



Schedule of documents

Applicant: Ray Willing
Decision date: November 2021
FOI reference number: IR FOI 22-020
Scope of request: *Documents relating to Woolgoolga Whale Trail.*

Document reference	Date of document	Document description	Decision	Exemption provision/s	Review Decision	Exemption Provision
1.	24/09/21	Email trail re Additional information	Release in part	s47F, s47G, s22	Varied - Release in part	s47F and s22(irrelevant material removed)
2.	22/07/21	Email trail: CDG0938	Release in part	s47F, s22	Upheld	
3.	11/08/21	Email trail: CDG0938	Release in part	s47F, s22	Upheld	
4.	18/09/19	Request for Information	Release in part	s47F, s22	Upheld	
5.	May 2019	Survey documents	Release in part	s47F	Upheld	
6.	01/11/18	Concept Design Report	Release in full	NA		
7.	15/03/19	Letter from the Hon Michael McCormack MP to Councillor Denise Knight	Release in full (as relevant to request)	s22	Upheld	

8.	22/11/19	Internal Assessment	Exempt in full	s47C	Upheld	
9.	14/01/20	MS19-002233 – Woolgoolga Whale Trail	Release in part	s47F, s22	Upheld	
9.1	14/01/20	Attachment A to MS19-002233	Exempt in full	s47C	Upheld	
9.2	14/01/20	Attachment B to MS19-002233	Release in full	NA		
9.3	14/01/20	Attachment C to MS19-002233	Release in part	s47F	Upheld	
10.	30/03/20	Agreement	Release in part	s47F	Upheld	
New Document 11	Undated	Coffs Harbour City Economic Impact model	Release in full	NA		
New Document 12	19/09/19	Wollgoolga Whale Trail – Order of Cost Estimate	Release in full	NA		