



Australian Government
Department of Social Services

Our ref: FOI 2122-029

Decision date: 2 November 2021

Applicant: Jane McDonough

By email: foi+request-7903-60d3153c@righttoknow.org.au

Dear Ms McDonough

Freedom of Information request FOI 2122-029

I refer to your correspondence received by the Department of Social Services (the Department) on 28 September 2021, in which you requested access via Right To Know, under the Commonwealth *Freedom of Information Act 1982* (FOI Act) to:

“...any briefings to/from the Chief Operating Officer regarding the historical underpayments of Research Administration Officers and Public Affairs Officers within the Department.”

Decision

The Department has undertaken a reasonable search of its records and has identified six (6) documents relevant to your request.

I have made a decision to grant access in part to the six (6) documents.

The documents that I have chosen to grant access in part to are set out in **Appendix 1**, 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 section 22(2) of the FOI Act.

A full extract of all FOI Act provisions used to make my decision is provided at **Attachment B**.

Authority to make decision

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



Summary

On 5 October 2021, the Department acknowledged your request and sought your agreement to removal of non-Senior Executive Service (non-SES) staff names under section 22 of the FOI Act on the basis that they did not appear relevant to your request. As no response was received, the Department has treated this information as relevant to your request.

On 20 October 2021, the Department contacted you to seek clarification of the scope of your request, asking you to confirm whether the scope of your request was intended to include any additional material that may accompany a brief, or only the brief itself. On 25 October 2021 you confirmed that this additional information is relevant to your request.

On 25 October 2021, the Department sought your agreement to a 10-day extension of time under section 15AA of the FOI Act, in order to obtain final clearances from internal stakeholders and finalise your matter for release.

You responded on 26 October 2021 advising that you agreed to a 5-day extension of time. A decision on your request is therefore due on 2 November 2021.

I have decided not to impose a charge in relation to this request, in accordance with Regulation 8 of the *Freedom of Information (Charges) Regulations 2019*.

Statement of reasons for decision

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

Section 42 of the FOI Act - Documents subject to legal professional privilege

Section 42 of the FOI Act provides that 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 (LPP). The FOI Guidelines provide that, at common law, determining whether a communication is privileged requires a consideration of:



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

Legal professional privilege attaches to a confidential communication between lawyer and client, made or generated for the dominant purpose of the lawyer providing legal advice, or for the dominant purpose of use in existing or anticipated litigation, provided the privilege has not been waived (section 42(2)).

The documents the subject of your request contain a memorandum of advice written by an external law firm, for the express purpose of giving legal advice to the Department. I am therefore satisfied that the dominant purpose for the generation of this documentation was to provide the Department with legal advice.

Further, it is apparent that a legal advisor-client relationship existed between the Department and this external law firm.

Consistent with the ordinary solicitor-client retainer, this advice was provided confidentially and is marked as such within the memorandum, and privilege has not been waived.

As section 42 of the FOI Act is not a conditional exemption, I am not required to consider a public interest test.

Section 47E of the FOI Act - Public interest conditional exemptions--certain operations of agencies

Section 47E of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, do any of the following:

- a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;*
- b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;*



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- c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;*
- d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

Parts of the documents the subject of your request contain the direct contact details of Departmental staff. I am not aware that these details are already known to you, nor are they publically available.

The Department provides programs and services to support families and children; housing support; seniors; communities and vulnerable people; disability and carers; women's safety and mental health among others. It is important that the Department retains effective oversight and management of its resources, and to this end specific channels of communication have been established for members of the public to contact the Department. This enables the agency to provide members of the public with contact points who are well informed and trained to assist them, and can manage and direct their queries appropriately.

The Department has a responsibility to ensure the mental health and wellbeing of its staff, in addition to their physical wellbeing. Not all staff are trained in customer service, nor can the agency assume that all staff are comfortable engaging with members outside of their organisation. Relevantly, there have been instances of staff being harassed and verbally abused following release of their contact details. To this end, specific channels of communication have been put in place, to enable the Department to effectively manage its resources and protect the wellbeing of its staff. It is reasonable to expect that if these channels of communication were bypassed, the Department would experience a diversion of its resources, and in addition the management functions of the agency would be detrimentally impacted, including its ability to retain staff.

Also contained within the documents is the report of an external company which was engaged by the Department to undertake a review. This report was provided in accordance with the terms of engagement entered into between the Department and a third party, and is confidential in nature. Further, the third party's engagement with the Department on this issue is not public, and they are not generally known to be associated with the matters in this document. As such, disclosure of the report would be detrimental to the Department's relationship with this third party, and may also



compromise the agency's ability to retain similar services from third party businesses in future.

Additionally, parts of the document contain email exchanges between Departmental officers, seeking consultation on proposed wording and providing figures in relation to affected staff. Although I consider that it is operational information, the information provided in this correspondence has not been formally cleared, and is also not known to me to be available publically. In addition, release could enable identification of the affected individuals involved.

Accordingly, I have decided that the parts of the documents listed as exempt in accordance with this provision in **Appendix 1**, meet the criteria for this conditional exemption. Where a document is assessed as conditionally exempt, access must be given subject to the public interest test in accordance with section 11A(5) of the FOI Act.

Application of the public interest test:

Section 11A(5) 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:

- *disclosure would promote the objects of the FOI Act.*

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

- *disclosure would, or could reasonably be expected to, have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;*
- *disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency; and*
- *disclosure could reasonably be expected to prejudice the management function of an agency.*



I am satisfied that no irrelevant factor has been considered, as set out in section 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 47F of the FOI Act - Public interest conditional exemptions--personal privacy

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

Section 4 of the FOI Act provides that personal information has the same meaning as in the *Privacy Act 1988* (**Privacy Act**). Personal information is defined in section 6 of the Privacy Act as:

- *information or an opinion about an identified individual, or an individual who is reasonably identifiable;*
- *whether the information or opinion is true or not;*
- *whether the information or opinion is recorded in a material form or not.*

The elements of 'personal information' are:

- *it relates only to a natural person (not, for example, a company);*
- *it says something about the individual;*
- *it may be in the form of an opinion, it may be true or untrue, and it may form part of a database;*
- *the individual's identity is known or is reasonably ascertainable using the information in the document.*

If information is personal information, it will be conditionally exempt if disclosure would be 'unreasonable'. In considering whether disclosure would be unreasonable, section 47F(2) of the FOI Act requires agencies to have regard to the following:

- *the extent to which the information is well known;*



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- *whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*
- *the availability of the information from publicly accessible sources; and*
- *any other matter I consider relevant.*

Parts of the documents the subject of your request contain the names and contact details of Departmental staff, and in certain other parts third parties. In addition to this, parts of the documents contain details of affected staff members who could reasonably be identified using the information provided.

The personal information of these individuals appears within the documents due to performing their duties as officers of the Department, or as third parties engaged to provide services on behalf of the Department. The information relating to the individuals is not well known, and would only be known to a limited group of people with a 'business need to know'. As this information is only known to a limited group of people, the individuals concerned are not generally known to be associated with the matters discussed in the document. In addition, this information is not available from publicly accessible sources. I am also not aware of such information already being known to you.

The Department is committed to complying with its obligations under the Privacy Act, which sets out standards and obligations that regulate how the Department must handle and manage personal information.

It is firmly in the public interest that the Department uphold the rights of individuals to protect their own privacy, and meets its obligations under the Privacy Act. I consider that non-compliance with the Department's statutory obligations concerning the protection of personal information would be contrary to the public interest, as release of these details would have a detrimental impact on the agency's ability to retain staff and the services of third parties in future. I find that this factor weighs strongly against disclosure.

Accordingly, I have decided that the parts of documents, which are listed as exempt in accordance with this provision in **Appendix 1**, 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 section 11A(5).



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Application of the public interest test:

Section 11A(5) 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:

- disclosure would promote the objects of the FOI Act.

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

- *disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy;*
- *disclosure could reasonably be expected to harm the interests of an individual or group of individuals;*
- *disclosure could reasonably be expected to prejudice the management function of an agency.*

I am satisfied that no irrelevant factor has been considered, as set out in section 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 22 of the FOI Act - Delete exempt or irrelevant material from documents and provide access to edited copies

The Department may refuse access to a document on the grounds that it is exempt. If so, the Department must consider whether it would be reasonably practicable to prepare an edited copy of the document for release, that is, a copy with relevant deletions made under section 22 of the FOI Act. The Department is under the same obligation to consider preparing an edited copy of a document by removing information that would reasonably be regarded as irrelevant to the request.



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As explained above, some of the documents subject to your request contain exempt information. On this basis, I have prepared the documents for release by removing that exempt material in accordance with section 22(1)(a)(i) of the FOI Act.

In addition, parts of the documents contain irrelevant information. I have removed that irrelevant information in accordance with section 22(1)(a)(ii) of the FOI Act and it is so marked within the documents.

The material that has been edited for release, whether due to being exempt or due to being irrelevant, is marked appropriately within the documents and is also set out at **Appendix 1**.

Access to documents

The documents released to you in accordance with the FOI Act are enclosed (**Attachment C**).

Information Publication Scheme

The Information Publication Scheme requires the Department to publish information released in response to individual requests made under the FOI Act, except in specified circumstances.

I am of the view that details of your request should be made available on the Department's FOI Disclosure Log. As such, details of your request will be published on the Department's FOI Disclosure Log which can be accessed at [FOI Disclosure Log | Department of Social Services, Australian Government \(dss.gov.au\)](https://www.dss.gov.au/foi-disclosure-log). Please note that the Department does not publish details of FOI applicants, it only publishes details of the FOI request and the documents released in response to the request.

Your rights of review

Information about your rights to seek a review of this decision are at **Attachment A**. Should you have any enquiries concerning this matter please do not hesitate to contact the FOI team by email at FOI@dss.gov.au.



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Yours sincerely,

M.Blair

Assistant Director

FOI and Cabinet Section

Government and Executive Services Branch

2 November 2021



Appendix 1

Schedule of documents

FOI 2122-029

| Document reference | Date of document | Document description | Pages | Decision | Applicable Provisions |
|---------------------------|-------------------------|---|--------------|-----------------|------------------------------|
| 1 | 23 June 2021 | Departmental email correspondence re Ombudsman Notice | 1-5 | Part Access | s 47E(d) s 47F |
| 2 | 12 August 2021 | Departmental email correspondence regarding Question on Notice | 6-7 | Part Access | s 22 s 47E(d) s 47F |
| 3 | 3 March 2021 | Brief to Secretary through Chief Operating Officer regarding on-call management | 8-28 | Part Access | s 42 s 47E(d) s 47F |
| 4 | 21 June 2021 | Departmental email correspondence to the COO including attachments | 29-42 | Part Access | s 47E(d) s 47F |
| 5 | 24 March 2021 | Departmental email correspondence | 43-46 | Part Access | s 22 s 47E(d) s 47F |
| 6 | 19 March 2021 | Departmental email correspondence including attachments | 47-52 | Part Access | s 47E(d) s 47F |