



**Australian Government**

**Department of Health**

Department Reference: FOI 3275 IR

Ms Raphella Crosby

Via email: [foi+request-8016-28bba8d5@righttoknow.org.au](mailto:foi+request-8016-28bba8d5@righttoknow.org.au)

Dear Ms Crosby

**NOTICE OF DECISION - INTERNAL REVIEW**

I refer to your correspondence of 15 December 2021 requesting an internal review of the decision of 14 December 2021 (original decision) by the Department of Health (the department) in relation to your request for access under the *Freedom of Information Act 1982* (the FOI Act).

On 26 October 2021, you requested access to the following documents:

*A list of all applications for MRFF funding over the past 5 years for migraine, including whether they were successful or unsuccessful.*

On 15 December 2021, a decision was issued, exempting all data in full from disclosure under the FOI Act.

On 15 December 2021, you requested an internal review of the original decision.

**Submissions**

In your request for an internal review, you raised concern with the department decision not to provide you with a list of applications, as it is your view this information is not commercial information.

**Internal Review Decision**

I am authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI requests, including requests for internal review.

I am writing to notify you of my decision in response to your request for internal review.

I have decided to affirm the original decision of 14 December 2021. My reasons for this decision are set out further at Attachment B.

The report captured by your request identifies four applications. The data includes the names of applicants applying for MRFF funding.

I have decided to refuse access to this information on the basis that it is exempt from disclosure under sections 45, 47E and 47G of the FOI Act. The reasons for my decision are set out further at Attachment A.

### **Your FOI review rights**

If you are dissatisfied with my decision, under section 54L of the FOI Act, you may apply to the Office of the Australian Information Commissioner (OAIC) for review of my decision by the Information Commissioner (IC).

In accordance with subsection 54S(1) of the Act, an IC review application in relation to a decision covered by subsection 54L(2) (access refusal decisions) must be made in writing within 60 days after the day you are notified of this internal review decision.

More information about IC review is available on the OAIC website at:

<https://www.oaic.gov.au/freedom-of-information/reviews/>

The OAIC can be contacted by:

Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

Phone: 1300 363 992

### **Complaints**

If you are dissatisfied with actions taken by the department, you may also make a complaint.

#### Complaint to the department

Complaints to the department are covered by the department's privacy policy. A form for lodging a complaint directly to the department is available on the department's website:

<https://www.health.gov.au/about-us/contact-us/complaints>

#### Complaint to the IC

Information about making a complaint to the IC about action taken by the department is available on the OAIC website:

<https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>

**Relevant provisions of the FOI Act**

The FOI Act and the *Privacy Act 1988* (Cth) (the Privacy Act), including the provisions referred to in this letter, can be accessed from the Federal Register of Legislation website:

<https://www.legislation.gov.au/Series/C2004A02562>

<https://www.legislation.gov.au/Details/C2021C00452>

**Contacts**

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

Yours sincerely

A handwritten signature in blue ink, appearing to read 'P. Gould', with a stylized flourish at the end.

Phillip Gould  
First Assistant Secretary  
Health Economics and Research Division

28 April 2022

## ATTACHMENT A

### REASONS FOR DECISION – FOI 3275 IR

#### Material taken into account

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

- the scope of your request
- the content of the documents sought
- advice from departmental officers with responsibility for matters relating to the documents sought
- the department's original decision, including the statement of reasons
- your request for internal review
- the relevant provisions of the FOI Act, and
- guidelines issued by the OAIC under section 93A of the FOI Act (the FOI Guidelines).

#### Finding of facts and reasons for decision

My findings of fact and reasons for deciding to exempt the relevant document are set out below.

#### Section 45 – Materials obtained in confidence

Section 45 of the FOI Act provides that a document is exempt if 'its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.'

Paragraph 5.155 of the FOI Guidelines states:

The exemption is available where a person who provided the confidential information would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure.

Under paragraph 5.195 of the FOI Guidelines, to found an action for breach of confidence, the following five criteria must be satisfied in relation to the information:

- the information must be specifically identified
- the information must have the necessary quality of confidentiality
- the information must have been communicated and received on the basis of a mutual understanding of confidence
- the information must have been disclosed or threatened to be disclosed, without authority, and
- unauthorised disclosure of the information has or will cause detriment.

Addressing the above criteria, I am satisfied that the document created by the department for the purposes of responding to your request:

- contains information that is specifically identified and confidential in nature
- that was communicated on the basis that it would remain confidential and not be shared with third parties
- in circumstances where there is a mutual understanding of confidence between the department and the third parties concerned
- the relevant third parties have not authorised disclosure of the relevant information, and
- disclosure will cause detriment to the third parties.

I have also had regard to section 12.2 of the Grant Opportunity Guidelines under the heading 'How we use your information'. In particular, the application material, including assessment committee discussion of application material, is provided to and received by the National Health and Medical Research Council (NHMRC) in confidence. Applications are then considered in a confidential peer review process.

As noted above, the affected third parties have not consented to the confidential information in their applications being disclosed to the public. I am satisfied that doing so will cause detriment to those third parties, the NHMRC and the department. I consider that disclosure of this information would also undermine industry confidence in the confidentiality of the third parties' interactions with the NHMRC and the department.

Disclosure of the relevant document would be inconsistent with the department's confidentiality obligations and would find an action for breach of confidence. The document is therefore exempt from disclosure in full under section 45 of the FOI Act. Section 45 of the FOI Act is not a conditional exemption and is not subject to an application of the public interest test under subsection 11A(5) of the FOI Act.

### **Section 47G – business information**

Subsection 47G(1)(a) of the FOI Act relevantly provides that a document may be conditionally exempt if it discloses information concerning the business, commercial or financial affairs of an organisation or undertaking, where the disclosure:

- would, or could reasonably be expected to, unreasonably affect ... adversely ... those lawful affairs, or
- could reasonably be expected to prejudice the supply of information to the Commonwealth, Norfolk Island or an agency.

The applications contain information relating to the business affairs of a third party. Release of this information could reasonably be expected to unreasonably affect that third party's lawful business affairs.

Paragraph 5.16 of the FOI Guidelines explains that the test 'would, or could reasonably be expected' requires the decision maker to assess the likelihood of the

predicted or forecast event, effect or damage occurring after disclosure of a document. The word 'could' is less stringent than 'would' and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring, or could occur in the future.

The FOI Guidelines further explain that the term 'unreasonably' implies a need to balance public and private interest factors to decide whether disclosure is unreasonable (paragraph 6.187). The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect (paragraph 6.188).

#### *Test of reasonableness*

In determining whether disclosure of this information would, or could reasonably be expected to, adversely affect the lawful business affairs of the third party, I have had regard to the following factors:

- the extent to which the information is well known
- whether the organisation or undertaking is known to be associated with the matters dealt with in the document
- the availability of the information from publicly accessible sources, and
- any other matters I consider relevant.

Against these four factors, I found that:

- the business information is not well known
- the third parties are not known to be associated with the matters dealt with in the document, and
- the information about the third parties is not readily accessible from publicly available sources.

The operation of the business information exemption depends on the effect of disclosure, rather than the precise nature of the information itself. In this case, I am satisfied that the effect of disclosing this information would have an adverse effect on the business affairs of the third party. On this basis, it is my view this document is conditionally exempt in full under subsection 47G(1)(a) of the FOI Act.

#### *Public interest test*

As section 47G of the FOI Act is a conditional exemption, I have considered whether release of the relevant material would be contrary to the public interest.

Under subsection 11B(3) of the FOI Act, 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 by providing the Australian community with access to information held by the Commonwealth Government
- inform debate on matters of public importance, 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:

- disclosure of the information is likely to cause significant harm to the business interests of the third party, including their commercial interests and dealings.
- It is in the public interest to protect commercially sensitive information, which was provided to the Commonwealth by the third party on the basis that it would not be made publicly available.
- the business information within the document is not in the public domain and is not available from publicly accessible sources.
- as the information is not widely available, the third party who owns the information would have a reasonable expectation that their confidential business information would not be disseminated to the public without authorisation.

I confirm I have not had regard to any of the irrelevant factors under subsection 11B(4) (as referenced above) of the FOI Act.

On balance, I consider the public interest is more heavily weighted toward upholding the confidentiality of the third party's business information and in ensuring their competitive commercial activities are not compromised or prejudiced in any way. I am satisfied it is in the public interest to withhold the exempt material. This document is therefore exempt in full under subsection 47G(1)(a) and paragraph 31B(b) of the FOI Act.

#### **Section 47E(d) – certain operations of agencies**

Subsection 47E(d) of the FOI Act provides that a document is conditionally exempt if its 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.

Paragraph 6.120 and 6.123 of the FOI Guidelines relevantly provide as follows:

An agency's operations may not be substantially adversely affected if the disclosure would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient.

The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the document reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

As described above, in relation to the test 'would or could reasonably be expected to', paragraphs 5.16 to 5.18 of the FOI Guidelines provide as follows:

The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.

The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

The mere risk, possibility or chance of prejudice does not qualify as a reasonable expectation. There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.

Paragraph 5.20 of the FOI Guidelines provides the term 'substantial adverse effect' broadly means:

... an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'. The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal.

The document created for the purposes of processing your request falls under the department's Health and Medical Research Office Branch (the Branch), which has policy responsibility, on behalf of the Minister for Health and Aged Care, for Commonwealth health and medical research initiatives to improve patient care, improve the efficiency and effectiveness of the health system, and boost economic growth. This includes the implementation and operation of the Medical Research Future Fund (MRFF), the Biomedical Translation Fund and input into Whole-of-Government initiatives to stimulate science and innovation and resulting research translation and commercialisation to improve health and drive economic growth.

The Branch monitors developments, discoveries and new technologies emerging from health and medical research and collaborates across government portfolios, including with the NHMRC, the Department of Industry, Science, Energy and Resources, AusIndustry, the Department of Education, and stakeholders to promote knowledge exchange and translation and evidence-based policy development.

Disclosure of the information in the document can reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the Branch and the important work it does in the health and medical research space, and of the department more broadly.

Further, the proper and efficient conduct of the NHMRC granting process relies on the applicant's and assessor's trust in the robustness and integrity of the granting process. To disclose information that was submitted on the understanding of mutual confidentiality has the potential to destroy or diminish the creditability and

competitiveness of the NHMRC peer review, assessment and funding outcomes. It would also undermine public and research sector confidence in the NHMRC granting process.

A lack of confidence in the integrity of NHMRC processes would reasonably be expected to dissuade researchers from becoming future peer reviewers and have a flow on effect on the attracting of high quality grant applications. On the above basis, I am satisfied it would be the relevant information is conditionally exempt under subsection 47E(d) of the FOI Act.

#### *Public Interest Test*

The exemption in subsection 47E(d) of the FOI Act is a conditional exemption. Pursuant to subsection 11A(5) of the FOI Act, I have applied the public interest test to the document identified as below.

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 by providing the Australian community with access to information held by the Commonwealth Government
- inform debate on matters of public importance, 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 interest in preserving the proper and efficient operations of the Branch and the NHMRC
- the information in the document is not publicly known and is not available from public sources
- disclosure could compromise the ongoing working relationships between the department, NHMRC and relevant stakeholders
- disclosure could reasonably be expected to prejudice the ability of the department and NHMRC to obtain contain confidential information, and
- disclosure could reasonably be expected to prejudice the ability of the department and NHMRC to obtain similar information in the future.

I confirm I have not had regard to any of the irrelevant factors under subsection 11B(4) of the FOI Act.

I am satisfied the public interest factors against disclosure outweigh those in favour of disclosure. Giving access to the information at this time would, on balance, be contrary to the public interest. The information in the document identified is therefore exempt under subsection 31B(b) and subsection 47E(d) of the FOI Act.