



Decision and Statement of reasons issued under the *Freedom of Information Act 1982*

Decision and reason for decision of Joanna (Position Number 62329542) Information Access Officer, Information Access Unit, Department of Veterans' Affairs

Applicant: Verity Pane

Decision date: 16 March 2022

FOI reference number: LEX 47465

Sent by email: foi+request-8307-e416de0c@righttoknow.org.au

Dear Verity Pane,

Freedom of Information Request: LEX 47465

Decision

1. The Department of Veterans' Affairs (the **department**) has undertaken a reasonable search of its records and has identified forty five (45) documents relevant to your request.
2. I have made a decision to refuse access to the documents pursuant to section 34 of the *Freedom of Information Act 1982* (Cth) (**FOI Act**).
3. The documents that I have chosen to refuse access to, are set out in **Schedule 1**, together with applicable exemption provisions.

Authority to make decision

4. I, Joanna (Position Number 62329542), Information Access Officer, Information Access Unit, 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

5. On 14 January 2022, you made a request for access to documents in the possession of the department. Your request was as follows:

On 22 November 2021 the Department issued a FOI decision and statement of reasons for FOI reference number LEX 45443.

Paragraph 21 of that decision stated that the FOI had captured 238 documents, which the Department had already taken 25 hours to search and collate ("Searching and collating documents has taken 25 hours"), and that it would take 10 hours to prepare a schedule of documents listing those 238 documents.

...

As a FOI is for documents I apply for the first page of each of those 238 documents, but exclude any of the 238 documents that is just an email or draft or duplicate as irrelevant to the scope of this FOI.

6. In your application, you also stated the following:

Now the Department could consider and assess each first page of these less than 238 individual documents already collated by the Department, but as I only desire the document schedule itself, the Department could significantly reduce the time required to process this FOI by producing such a document schedule under s 17, and it would not be necessary to assess and consider anything but the title/subject of these less than 238 individual documents (given emails and drafts and duplicates are excluded). That saves everyone time and effort.

7. As an extension of time was applied to process your request in accordance with section 15AB of the FOI Act, a decision on your request is due by 16 March 2022.
8. 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*.

Material taken into account

9. In accordance with section 26(1)(a) of the FOI Act, my findings on any material question of fact, the material on which those findings were based and the reasons for my decision to refuse access to the documents follows.
10. I have taken the following material into account in making my decision:
- the terms of your request;
 - the types of information and documents that are in the department's possession;
 - the content of the document that fall within the scope of your request;
 - the availability of information relevant to your request, insofar as it determines the practicality and ease in which the department can create a document under section 17 of the FOI Act;

- 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. I also considered the following provisions of the FOI Act relevant to my decision:
 - Section 11B Public interest exemption – factors
 - Section 15 Request for Access
 - Section 34 Cabinet documents; and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**).

11. A full extract of all FOI Act provisions used to make my decision are provided in **Schedule 2**.

Searches undertaken

12. In your request you identified the documents that come within the scope of your application as being the 238 documents referred to in paragraph 21 of a decision dated 22 November 2021, which has the reference LEX 45443. I have considered the content of that decision generally and paragraph 21 specifically. The documents referred to in paragraph 21 of the decision are stored on the department's Protected Network database, Fortress. Fortress is a secure ICT environment and is deliberately separate and isolated from the department's other databases, because it stores documents which contain "Protected" information (such as Cabinet material).
13. Searches were undertaken on Fortress to identify the documents within the scope of your application. 240 pages were identified as the first page of the documents that were considered in LEX 45443. However, one hundred and eighty four (184) of these pages were emails. Further, eleven (11) of these pages were documents in a draft version or were marked as a 'draft'. As you have indicated that emails and draft documents are not within the scope of the request, these documents are not considered to be within the scope of your request.
14. As such, I have located forty five (45) documents that come within the scope of your request.

Reasons for decision

15. I have decided to **refuse access** to the documents within the scope of your request in accordance with the following exemptions in the FOI Act:

Cabinet documents (section 34)

16. Section 34 of the FOI Act states the following

- (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.*

...

- (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.*

17. The information within the scope of your request is information that was brought into existence for the dominant purpose of briefing a Minister on a document to which section 34(1)(a) applies, namely a document that has been submitted to or was brought into existence for a Cabinet submission.
18. In these circumstances, I have considered the context of the documents and the purpose of their creation. The documents considered in your application are documents which were prepared by the department in preparation of a New Policy Proposal (**NPP**).
19. Ministerial briefings on proposed NPPs are intrinsically linked to in the Cabinet process. NPPs are proposals that intent to change a current policy position or decision, or introduces a new policy position or decision, and are either adopted or rejected by Cabinet. NPPs must be:
 - a. Approved by the relevant responsible portfolio Minister, and
 - b. Brought to the Expenditure Review Committee, which is a committee of the Cabinet, and the Cabinet for Budget approval, and are considered part of the Cabinet process.¹
20. The sensitive, Cabinet nature of the documents is also supported by the fact that the documents are marked with a "Sensitive: Cabinet" marker. Whilst this marker does not, on its own, reflect the sensitivity of the material, it supports the Cabinet nature of the document.
21. Additionally, as mentioned above, the documents within the scope of your application were saved on the department's secure environment database, Fortress. Access to the database requires high-level Commonwealth protective security clearance. The information is not located or saved in the department's general databases, such as TRIM, which a wider range of staff have access to. The fact that the information is saved in this database reinforces the sensitive nature of the material and I have taken this into consideration.

¹ *Re Gothe-Snap; Chief Executive Officer, Services Australia [2021] AATA 2710 at [26].*

22. Given the above, I am satisfied that disclosure of the information could reasonably be expected to have a detrimental effect on Cabinet processes, and therefore the information within the scope of your application is exempt under section 34(1)(c) of the FOI Act. As section 34 of the FOI Act is not a conditional exemption, I am not required to consider a public interest test.

Your rights of review

23. If you are dissatisfied with my decision, you may apply for internal review or request the Office of the Australian Information Commissioner (**OAIC**) review my decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

24. Under section 54 of the FOI Act, you may apply in writing to the department for an Internal Review of my decision. The Internal Review application must be made within 30 days of the date of this letter. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.
25. You can make your application for Internal Review in one of the following ways:

Post: Information Access Unit
Department of Veterans' Affairs
GPO Box 9998, Brisbane QLD 4001

Email: Information.Access@dva.gov.au

OAIC review

26. Under section 54L of the FOI Act, you may apply to the OAIC to review my decision. An application for review by OAIC must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

Online: www.oaic.gov.au

Post: Director of FOI Dispute Resolution
Office of the Australian Information Commissioner
GPO Box 5218, Sydney NSW 2001

Facsimile: (02) 9284 9666

Phone: 1300 363 992

Email: FOIDR@oaic.gov.au

27. More information about your review rights under the FOI Act is available in Fact Sheet 12 published by the OAIC: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>

Contact us

28. If you wish to discuss this decision, please do not hesitate to contact the Information Access Unit using the following details:

Online: <https://www.dva.gov.au/about-us/overview/reporting/freedom-information/access-information>

Post: Information Access Unit
Department of Veterans' Affairs
GPO Box 9998, Brisbane QLD 4001

Email: Information.Access@dva.gov.au

Yours sincerely,

Joanna (Position Number 62329542)

Information Access Officer

Information Access Unit

16 March 2022



Schedule of documents

Applicant: Verity Pane
Decision date: 16 March 2022
FOI reference number: LEX 47465

| Document reference | Document description | Page number | Decision | Exemption provision |
|---------------------------|---------------------------------------|--------------------|-----------------|----------------------------|
| 1. | Cabinet document | 1 | Withheld | S 34 |
| 2. | Cabinet document | 2 | Withheld | S 34 |
| 3. | Cabinet document | 3 | Withheld | S 34 |
| 4. | Cabinet submission – Attachment | 4 | Withheld | S 34 |
| 5. | Cabinet document | 5 | Withheld | S 34 |
| 6. | Cabinet submission – Attachment | 6 | Withheld | S 34 |
| 7. | Cabinet submission – Attachment | 7 | Withheld | S 34 |
| 8. | Cabinet submission – Attachment | 8 | Withheld | S 34 |
| 9. | Cabinet submission – Attachment | 9 | Withheld | S 34 |
| 10. | Cabinet submission – Attachment | 10 | Withheld | S 34 |
| 11. | Cabinet submission – Attachment | 11 | Withheld | S 34 |
| 12. | Cabinet submission – Attachment | 12 | Withheld | S 34 |
| 13. | Cabinet submission – Attachment | 13 | Withheld | S 34 |
| 14. | Cabinet submission | 14 | Withheld | S 34 |
| 15. | Cabinet submission | 15 | Withheld | S 34 |
| 16. | Cabinet submission | 16 | Withheld | S 34 |
| 17. | Cabinet submission – Attachment | 17 | Withheld | S 34 |
| 18. | Cabinet submission – Attachment | 18 | Withheld | S 34 |
| 19. | Cabinet document | 19 | Withheld | S 34 |
| 20. | Cabinet submission – Attachment | 20 | Withheld | S 34 |
| 21. | Cabinet submission | 21 | Withheld | S 34 |
| 22. | Cabinet submission – Attachment | 22 | Withheld | S 34 |
| 23. | Cabinet document | 23 | Withheld | S 34 |
| 24. | Cabinet submission – Attachment | 24 | Withheld | S 34 |
| 25. | Cabinet submission – Attachment | 25 | Withheld | S 34 |
| 26. | Cabinet document | 26 | Withheld | S 34 |
| 27. | Cabinet submission – Attachment | 27 | Withheld | S 34 |
| 28. | Cabinet submission – Other department | 28 | Withheld | S 34 |
| 29. | Cabinet submission – Other department | 29 | Withheld | S 34 |
| 30. | Cabinet submission – Other department | 30 | Withheld | S 34 |
| 31. | Cabinet submission – Other department | 31 | Withheld | S 34 |
| 32. | Cabinet submission – Other department | 32 | Withheld | S 34 |
| 33. | Cabinet submission – Other department | 33 | Withheld | S 34 |
| 34. | Cabinet submission – Other department | 34 | Withheld | S 34 |
| 35. | Cabinet submission – Other department | 35 | Withheld | S 34 |
| 36. | Cabinet submission response overview | 36 | Withheld | S 34 |
| 37. | Cabinet submission | 37 | Withheld | S 34 |
| 38. | Cabinet submission – Attachment | 38 | Withheld | S 34 |
| 39. | Cabinet submission – Attachment | 39 | Withheld | S 34 |
| 40. | Cabinet submission – Attachment | 40 | Withheld | S 34 |
| 41. | Cabinet submission – Attachment | 41 | Withheld | S 34 |
| 42. | Cabinet document | 42 | Withheld | S 34 |
| 43. | Cabinet submission – Attachment | 43 | Withheld | S 34 |
| 44. | Cabinet submission – Other department | 44 | Withheld | S 34 |
| 45. | Cabinet document | 45 | Withheld | S 34 |



Schedule of relevant provisions in the FOI Act

3 Objects—general

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:
 - (a) requiring agencies to publish the information; and
 - (b) providing for a right of access to documents.
- (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
 - (a) increasing public participation in Government processes, with a view to promoting better informed decision-making;
 - (b) increasing scrutiny, discussion, comment and review of the Government's activities.
- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

11 Right of access

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
 - (a) a document of an agency, other than an exempt document; or
 - (b) an official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
 - (a) any reasons the person gives for seeking access; or
 - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

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;
 - (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.

15 Requests for access (as related to the requirements for requests)

Persons may request access

- (1) Subject to section 15A, a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document.

Requirements for request

- (2) The request must:
- (a) be in writing; and
 - (aa) state that the request is an application for the purposes of this Act; and
 - (b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and
 - (c) give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication).
- (2A) The request must be sent to the agency or Minister. The request may be sent in any of the following ways:
- (a) delivery to an officer of the agency, or a member of the staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory;
 - (b) postage by pre-paid post to an address mentioned in paragraph (a);
 - (c) sending by electronic communication to an electronic address specified by the agency or Minister.

23 Decisions to be made by authorised persons

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.
- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

26 Reasons and other particulars of decisions to be given

- (1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:
- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
 - (aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and

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

- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
- (c) give to the applicant appropriate information concerning:

- (i) his or her rights with respect to review of the decision;
 - (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
 - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.
- (1A) Section 13 of the Administrative Decisions (Judicial Review) Act 1977 does not apply to a decision referred to in subsection (1).
- (2) 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.
(see section 11A).

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.