



Internal review decision made under the *Freedom of Information Act 1982*

Internal review decision and reasons for decision of Brett (Position number 62258141), Information Access Unit, Client Access and Rehabilitation Branch, Department of Veterans' Affairs

Applicant: Ms Verity Pane
Date of primary decision: 16 March 2022
FOI reference number: FOI 47465
Internal review decision date: 12 May 2022
Internal review reference number: IR 49127
Sent by email: foi+request-8307-e416de0c@righttoknow.org.au

Dear Ms Pane,

Freedom of Information Request: FOI 49127

1. The purpose of this letter is to give you a decision about your request for internal review under the *Freedom of Information Act 1982* (FOI Act).
2. I have made a decision to affirm the original decision made by Joanna (Position Number 62329542), Information Access Unit, Client Access and Rehabilitation Branch to **refuse access** to the documents within the scope of your request.

Authority to make this decision

3. I, Brett (Position Number 62258141), Acting Assistant Director, Information Access Unit, am an officer authorised by the Secretary of the Department of Veterans' Affairs (the Department) to review decisions about access to documents in the possession of the Department in accordance with section 54C of the *Freedom of Information Act 1982* (the FOI Act).

Summary

4. 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..."

5. 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..."

6. 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 was due by 16 March 2022.
7. On 16 March 2022, you were provided with a decision relating to access to documents within scope of your request. The decision **refused access** to the documents within the scope of your request in accordance with section 34 of the FOI Act (cabinet material).
8. On 13 April 2022, you requested an internal review of the primary decision. In your request, you specifically noted:

*“...On 23 March 2022 I notified the Department, through Right to Know that Internal Review was required of the access refusal decision made by the Department on 16 March 2022 published on the FOI application page that it referred to
https://www.righttoknow.org.au/request/schedule_of_documents_for_lex_45#outgoing-17015*

*A full history of that specific FOI request and all its correspondence is published on the Internet on Right to Know on a discrete page for that FOI at:
https://www.righttoknow.org.au/request/schedule_of_documents_for_lex_45*

Section 54B of the Freedom of Information Act requires only that an application for internal review must be made within writing and within the prescribed period.

As the Department is well aware that the Internal Review related to the FOI located at that page, which contrary to the Department's claims was made by me, the Department is reasonably aware the clock on this Internal Review commenced on 24 March 2022, despite this unethical and dishonest dealing by the Department.

Decision is therefore due Friday 22 April 2022 and as extensions of time do not apply to Internal Reviews, you better stop wasting your own time with these ridiculous games..."

9. Paragraphs 24 and 25 of the primary decision for LEX 47465 provided to you on 16 March 2022 detail instructions on how you may make a request for an internal review in accordance with section 26 of the FOI Act. While I note your contention above "...On 23 March 2022 I notified the Department, through Right to Know that Internal Review was required..." the department did not receive the request for the internal review of LEX 47465 until 13 April 2022. Accordingly this is the date that the statutory clock for your internal review application commenced.
10. As no extensions of time have been applied to process this internal review, a decision on your request is due by 13 May 2022.
11. The Department has undertaken additional searches of its records and has been unable to identify any further documents that fall within the scope of your request, as set out above.
12. I have decided not to impose a charge in relation to this request, in accordance with regulation 3(1) of the *Freedom of Information (Charges) Regulations 1982*.

Decision

13. I have made a decision to affirm the original decision made by Joanna (Position Number 62329542), Information Access Unit, Client Access and Rehabilitation Branch to **refuse access** to the documents within the scope of your request.

Material taken into account

14. In accordance with Section 26(1)(a) of the FOI Act, the findings on any material question of fact, referring to the material on which those finding were based and the reasons for my decision to refuse access to documents follows.
15. I have taken the following material into account in making my decision:
 - the terms of your primary request;
 - the terms of your request for an internal review;
 - the types of documents that are in the possession of the Department;
 - the content of the documents that fall within the scope of your request;

- 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

- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**);

16. A full extract of all FOI Act provisions used to make my decision are provided in **Schedule 1**.

Reasons for Decision

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

Cabinet documents (section 34)

(1) Section 34 of the FOI Act provides that 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.

18. Having reviewed the material in scope of your request, I am satisfied that the documents were brought into existence for the dominant purpose of briefing a Minister on a document to which section 34(1)(c) applies.
19. I am also satisfied that the documents considered in your application are documents which were prepared by the department in preparation of a New Policy Proposal (**NPP**) and that NPPs are very closely linked to the cabinet process.
20. As explained to you in the original decision, NPPs are proposals that outline an intended change current policy position or decision, or introduce a new policy position or decision. NPPs are then 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
21. I confirm that the documents are also marked "Sensitive: Cabinet". Whilst this marker does not, on its own, reflect the sensitivity of the material and the potential application of section 34 of the FOI Act, it does support my finding that this material is appropriate for exemption under section 34 of the FOI Act.
22. Finally, I am also satisfied that the documents subject to this request were saved on the department's secure environment database, Fortress. I understand that access to this database requires high-level Commonwealth protective security clearance and is where the Department stores sensitive information, including cabinet material.
23. Having conducted a fresh review of your request and the relevant documents, 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.

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

Your rights of review

24. Under section 54L of the FOI Act, if you are dissatisfied with my decision, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner 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: Office of the Australian Information Commissioner
GPO Box 5218, Sydney NSW 2001

Facsimile: (02) 9284 9666

Email: enquiries@oaic.gov.au

In person: Level 3, 175 Pitt Street, Sydney NSW.

25. More information about your review rights under the FOI Act is available in Fact Sheet 12 published by the Office of the Australian Information Commissioner: <http://oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-fact-sheets/foi-factsheet-12-your-review-rights>

Contact us

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

Phone: 1800 838 372

Email: Information.Access@dva.gov.au

Yours Sincerely,

Brett (Position Number 62258141)

Assistant Director a/g

Information Access Unit | Client Access and Rehabilitation Branch

Client Engagement and Support Services Division

11 May 2022



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.

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.