



**Australian Government**  
**Attorney-General's Department**

Our ref: FOI22/043; CM22/3292

6 June 2022

Dominic Manganaro

By email: [foi+request-8537-1daa91c5@righttoknow.org.au](mailto:foi+request-8537-1daa91c5@righttoknow.org.au)

Dear Mr Manganaro

**Freedom of Information Request FOI22/043 – Decision letter**

The purpose of this letter is to give you a decision about your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) which you submitted to the Attorney-General's Department (the department).

**Your request**

On 2 March 2022 you requested access to:

*'Legal advice provided by the Attorney-General's Department to the Federal Government related to both the closure and the subsequent re-opening of Australia's International borders from the period between March 2020 until January 2022.'*

*'Specifically any legal advice provided by the Attorney-General's Department to the Federal Government related to the Western Australian state border closures from the period between March 2020 until January 2022.'*

On 24 March 2022, the department wrote to you, informing you that the scope of your request in its current terms was too broad, and captured a very large number of documents. The department invited you to narrow the scope of the request in order to assist the department's processing of your request.

In response to the department's consultation, you revised the terms of your request to the following:

*'The final documents and email chains, excluding any drafts or duplicate documents/attachments/ email chains/ministerial briefings etc, that were created by the Attorney-General's Department in March 2020 containing formal legal advice that was subsequently relied upon by the Federal Government for the closure of Australia's International borders in March 2020.'*

On 30 March 2022, the department formally consulted with you under section 24AB. The department wrote to you advising that the preliminary search of the department's holdings indicates the department holds more than 300 documents potentially relevant to your revised request. Also, the department stated that the material would likely attract a number of exemptions under the FOI Act and may also contain material that is not subject to the FOI Act.

On 31 March 2022, in response to the section 24AB notice, you proposed the following terms:

*'In March 2020 the Federal Government announced their decision to close the Australian International Border. I am simply asking for the definitive legal advice (a single report or memorandum or email will suffice) provided by the Australian Attorney-General's Department that the Australian Government relied upon to finalise this decision.'*

On 3 May 2022, the department acknowledged your request and under section 15AA of the FOI Act, the department requested an extension of a further 30 days to process your request. On that day, you agreed to the extension.

A decision in relation to your request is due on 6 June 2022.

### **My decision**

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to freedom of information requests made to the department.

I have identified 10 documents that fall within the scope of your revised request. I did this by making inquiries of staff likely to be able to identify relevant documents and arranging for comprehensive searches of relevant departmental electronic and hard copy holdings.

In making my decision regarding access to the relevant documents, I have taken the following material into account:

- the terms of your request
- the content of the documents identified as within scope of your request
- the provisions of the FOI Act, and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

I have decided to:

- Refuse access in full to all documents, including attachments, on the basis that the material they contain is variously:
  - exempt from the operation of the FOI Act pursuant to section 7(2)
  - irrelevant to your request under section 22(1) of the FOI Act, and
  - exempt pursuant to sections 34(1)(d), 34(3), 42(1), 47C(1) and 47E(d) of the FOI Act.

### **Additional information**

Your review rights under the FOI Act are set out at **Attachment A** to this letter.

The schedule of documents at **Attachment B** sets out brief information about each document within the scope of your request and my decision in relation to access to each of those documents.

The statement of reasons at **Attachment C** sets out the reasons for my decision to refuse access to certain material to which you have requested access.

### Questions about this decision

If you wish to discuss this decision, the FOI case officer for this matter is Fiona, who can be reached on (02) 6141 6666 or by email to [foi@ag.gov.au](mailto:foi@ag.gov.au).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'D. Lewis'.

David Lewis  
General Counsel (Constitutional)  
Office of Constitutional Law

### Attachments

- Attachment A: Review rights
- Attachment B: Schedule of documents
- Attachment C: Statement of reasons



**Australian Government**  
**Attorney-General's Department**

**Attachment A - FOI Review rights**

If you are dissatisfied with the decision of the Attorney-General's Department (the department), you may apply for internal review or Information Commissioner review of the decision.

The department encourages applicants to consider seeking internal review as a first step as it may provide a more rapid resolution of your concerns.

***Internal review***

Under section 54 of the *Freedom of Information Act 1982* (FOI Act), applications for internal review must be made in writing within 30 days of the date of the decision letter, and be lodged in one of the following ways:

email: [foi@ag.gov.au](mailto:foi@ag.gov.au)

post: Freedom of Information and Privacy Section  
Strategy and Governance Branch  
Attorney-General's Department  
3-5 National Circuit BARTON ACT 2600

An officer of the department other than the officer who made the original decision will complete the internal review within 30 days of receipt of your request.

Providing reasons you believe internal review of the decision is necessary will facilitate the completion of the internal review.

***Information Commissioner review***

Under section 54L of the FOI Act, 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 the decision letter, and be lodged in one of the following ways:

online: [https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)

email: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

post: GPO Box 5218 Sydney NSW 2001

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Attachment B – Schedule of documents – Freedom of Information Request FOI22/043



Australian Government  
 Attorney-General's Department

Document no.	Date	Description	Access decision	Exemption/s applied
1	11/03/2020	Department email	Refuse access	Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies
2	26/03/2020	Department email	Refuse access	Section 22(1): Irrelevant material Section 7(2): Exemption of certain persons and bodies Section 42(1): Documents subject to legal professional privilege
3	04/03/2020	Department email and attachment	Refuse access	Section 22(1): Irrelevant material Section 34(3): Cabinet document Section 42(1): Documents subject to legal professional privilege Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies
4	11/03/2020	Department email and attachments	Refuse access	Section 22(1): Irrelevant material Section 7(2): Exemption of certain persons and bodies Section 34(1)(d): Cabinet documents Section 34(3): Cabinet document Section 42(1): Documents subject to legal professional privilege Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies
5	11/03/2020	Department email and attachment	Refuse access	Section 22(1): Irrelevant material Section 34(1)(d): Cabinet documents Section 34(3): Cabinet document Section 42(1): Documents subject to legal professional privilege Section 47C(1): Public interest conditional exemption -

Document no.	Date	Description	Access decision	Exemption/s applied
				Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies
6	9/3/2020	Department document	Refuse access	Section 34(1)(d): Cabinet documents
7	25/03/2020	Department email and attachments	Refuse access	Section 22(1): Irrelevant material Section 42(1): Documents subject to legal professional privilege Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies
8	17/03/2022	Department email and attachments	Refuse access	Section 22(1): Irrelevant material Section 7(2): Exemption of certain persons and bodies
9	16/03/2022	Department email and attachments	Refuse access	Section 22(1): Irrelevant material Section 7(2): Exemption of certain persons and bodies Section 34(1)(d): Cabinet documents Section 34(3): Cabinet document Section 42(1): Documents subject to legal professional privilege Section 47C(1): Public interest conditional exemption - Deliberative processes Section 47E(d): Public interest conditional exemption - Certain operations of agencies
10	17/03/2022	Department email	Refuse access	Section 22(1): Irrelevant material Section 7(2): Exemption of certain persons and bodies Section 42(1): Documents subject to legal professional privilege Section 47E(d): Public interest conditional exemption - Certain operations of agencies



### Attachment C – Statement of reasons – FOI22/043

This document, when read in conjunction with the schedule of documents at **Attachment B**, provides information about the reasons I have decided not to disclose certain material to you in response to your request for documents under the *Freedom of Information Act 1982* (FOI Act).

#### ***Section 22: Access to edited copies with exempt or irrelevant matter deleted***

Section 22 of the FOI Act provides that if an agency decides to give access to a document that would disclose information that would reasonably be regarded as irrelevant to the request, and it is possible for the agency to prepare a copy (an *edited copy*) of the document, modified by deletions, the agency must prepare the edited copy and give the applicant access to it.

In deciding to delete material which would reasonably be regarded as irrelevant to a request, the FOI Guidelines issued by the Office of the Australian Information Commissioner (OAIC) (the Guidelines) provide at paragraph 3.95 that:

*It is important for agencies to keep in mind that the implicit purpose of s 22 is to facilitate access to information promptly and at the lowest reasonable cost through the deletion of material that can readily be deleted, and that an applicant has either agreed or is likely to agree that the material is irrelevant.*

When the department acknowledged your request by email on 3 May 2022, you were advised the following information would be regarded as irrelevant to your request:

- personal information of junior officers of the Attorney-General's Department (the department) or other government authorities
- duplicate documents
- draft documents, and
- incomplete email chains within the scope of the FOI request.

As there is no record available to me to indicate you disagreed with this approach, I have decided to regard the above categories of information as irrelevant to your request and, where relevant, have deleted this material under section 22 of the FOI Act.

#### ***Section 7(2): Exemption of certain persons or bodies***

Section 7(2) of the FOI Act provides that:

*(2) The persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them.*

Division 1 of Part II of Schedule 2 lists the department as exempt from the operation of the FOI Act in relation to:

*(b) documents in respect of activities undertaken by the Australian Government Solicitor.*

I am satisfied the documents identified in the schedule as attracting section 7(2) are documents in respect of the activities of the Australian Government Solicitor. As such, these documents are not subject to the FOI Act.

### Exemptions

An agency or minister is not required to give access to a document or part of a document that is exempt from disclosure under Division 2 of Part IV of the FOI Act. Exempt documents in Division 2 of Part IV are:

- documents subject to the Cabinet exemption (section 34), and
- documents subject to legal professional privilege (section 42).

These exemptions are not subject to an overriding public interest test. Accordingly, where a document meets the criteria to establish a particular exemption, it is exempt and the decision-maker is not required to weigh competing public interests to determine if the document should be released.

Brief information about each of the exemptions I have applied when making a decision about disclosure of each of the documents to which you have requested access is set out below. Additional information about each of these exemptions can be obtained from the Guidelines.

#### **Section 34: Cabinet documents**

Section 34(1) of the FOI Act states 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.*

Section 34(3) of the FOI Act states that 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.*

I have decided to apply sections 34(1)(d) and 34(3) to certain documents captured by the terms of your request. My reasons for applying these exemptions are set out below.

#### *Paragraph 34(1)(d)*

Based on the content of the relevant documents, advice provided to me by officers with responsibility for matters to which the documents relate, as well as advice I have received from the Department of the Prime Minister and Cabinet, I am satisfied the documents to which you have sought access were brought into existence for the dominant purpose of Cabinet considerations to which paragraph 34(1) applies. As these are draft documents, I have decided to refuse access to that material under paragraph 34(1)(d) of the FOI Act.

### *Paragraph 34(3)*

Based on my assessment of the relevant documents and advice provided to me by officers with responsibility for matters to which the documents relate, I am satisfied that the content of these documents would reveal a Cabinet deliberation or decision which has not been officially disclosed. Accordingly, I have decided that this information is exempt pursuant to subsection 34(3) of the FOI Act.

### **Section 42: Documents subject to legal professional privilege (LPP)**

Section 42 of the FOI Act relevantly 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.*

I am satisfied that, with respect to the relevant material:

- a legal adviser–client relationship exists
- the advice was provided independently
- the communication was for the purpose of giving or receiving legal advice or for use in connection with actual or anticipated litigation, and
- the advice was provided on a confidential basis.

Part 5.136 of the Guidelines states:

*Whether LPP attaches to a document depends on the purpose for which the communication in the document was created. The High Court has confirmed that the common law requires a dominant purpose test rather than a sole purpose test. The communication may have been brought into existence for more than one purpose but will be privileged if the main purpose of its creation was for giving or receiving legal advice or for use in actual or anticipated litigation.*

I consider that the material falling within scope was brought into existence for use in connection with providing advice across a number of legal matters connected to Cabinet. I accept that there was a legal adviser–client relationship between the department and other Commonwealth agencies in relation to the advice contained in the documents, and that the advice was provided independently and on a confidential basis. Further, I am of the view that privilege has not been waived.

Accordingly, I am satisfied that the relevant material is exempt from disclosure under section 42 of the FOI Act.

### **Public interest conditional exemptions**

An agency or minister can refuse access to a document or part of a document that is conditionally exempt from disclosure under Division 3 of Part IV of the FOI Act. Documents relevant to your request which are conditionally exempt under Division 3 relate to the following categories:

- 47C (deliberative processes), and
- 47E (certain operations of agencies).

Brief information about the operation of these conditional exemptions is set out below and further information is provided in the Guidelines available at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions>.

Where a document is assessed as conditionally exempt, it is only exempt from disclosure if disclosure would, on balance, be contrary to the public interest. The public interest test is weighted

in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision-making.

A single public interest test applies to each of the conditional exemptions. This public interest test includes certain factors that *must* be taken into account where relevant, and other factors which *must not* be taken into account. My reasoning in regard to the public interest is set out below.

***Section 47C: Public interest conditional exemption—deliberative processes***

Section 47C of the FOI Act relevantly provides that a document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or a 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.

In applying this exemption, part 6.55 of the Guidelines provide that:

*The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter.*

A ‘deliberative process’ generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision, or a course of action.

I am satisfied that the relevant material is not purely factual and is deliberative matter within the meaning of section 47C(1), being in the nature of and relating to:

- opinion, advice and recommendations, or
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or a Minister.

I consider the release of the conditionally exempt material would disclose the department’s deliberative process in connection with advice provided to Cabinet, as well as the deliberative views of other Commonwealth agencies. Disclosure of such information could reasonably inhibit the department’s and agencies’ ability to share and develop preliminary views on issues in a frank and robust manner in the future.

Accordingly, I have decided that this information is conditionally exempt pursuant to section 47C(1) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in this regard further below.

***Section 47E(d): Public interest conditional exemption—certain operations of agencies; Substantial adverse effect on an agency***

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

- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

I have decided to apply section 47E(d) to some of the documents falling within your request.

In applying this exemption and, in particular, determining whether disclosure would have a substantial adverse effect, the Guidelines include the following:

*Paragraph 5.20: 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’; and*

*Paragraph 6.123: 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.*

Certain documents subject to your request contain email addresses which are used by government entities or officers for internal and operational reasons. I consider that disclosure of this information may result in various communications and inquiries being received by the relevant areas of these entities, which may require a diversion of resources from other duties and compromise the operational effectiveness of those areas. I note that these entities have established channels of communication through which members of the community may submit enquiries and feedback.

Accordingly, I have decided this information is conditionally exempt pursuant to section 47E(d) of the FOI Act.

I have turned my mind to whether disclosure of the information would be contrary to the public interest, and have included my reasoning in this regard further below.

#### ***Section 11A(5): Public interest test***

Access to a conditionally exempt document must generally be given unless doing so would be contrary to the public interest. The Guidelines issued by the OAI provide at paragraph 6.5 that the public interest test is considered to be:

- *something that is of serious concern or benefit to the public, not merely of individual interest*
- *not something of interest to the public, but in the interest of the public*
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

In deciding whether to disclose conditionally exempt material, I have considered the factors favouring access set out in section 11B(3) of the FOI Act. I have not taken into account the irrelevant factors listed under section 11B(4) of the FOI Act.

Of the factors favouring disclosure, I consider that release of the conditionally exempt material identified for your request would promote the objects of the FOI Act, including by:

- informing the community of the Government’s operations, and
- contributing to the administration of justice generally, including procedural fairness.

The FOI Act does not list any specific factors weighing against disclosure. However, I have considered the non-exhaustive list of factors against disclosure in the Guidelines as well as the particular circumstances relevant to the conditionally exempt material.

I consider the release of the conditionally exempt material could be reasonably expected to:

- impair the effectiveness of the Cabinet process by inhibiting the full canvassing of deliberative matters in the development of Cabinet material
- impede the department's ability to undertake its functions, including effective assessment and deliberation on the department's position on particular policy issues
- prejudice the ability of the department to obtain similarly confidential and sensitive information from stakeholders and other agencies in the future, and
- prejudice the department's ability to efficiently manage its incoming communication with the public and agencies in relation to functions of the department.

On balance, I consider the factors against disclosure outweigh the factors favouring access. I am satisfied that providing access to the conditionally exempt material identified for your request would be contrary to the public interest.