



10 June 2022

Our reference: LEX 67434

Mr Justin Warren

Only by email: foi+request-8727-7a1a207b@righttoknow.org.au

Dear Mr Warren

Decision on your Freedom of Information Request

I refer to your request received by Services Australia (the agency) on 11 April 2022 for access under the *Freedom of Information Act 1982* (the FOI Act) to the following documents:

I request a copy of the Privacy Impact Assessment reference number 43996 titled "Document Lodgement Machine Learning System Pilots" as listed on the department's Privacy Impact Assessment Register: <https://www.servicesaustralia.gov.au/privacy-impact-assessment-register>.

My decision

The agency holds one document (totalling 31 pages) that relates to your request.

I have decided to **refuse access** to this document.

I have decided that the document you have requested is exempt in its entirety because it contains:

- material subject to legal professional privilege (section 42 of the FOI Act)
- commercially valuable information (section 47(1)(b) of the FOI Act), and
- deliberative matter, the disclosure of which would be contrary to the public interest (section 47C of the FOI Act).

Please see **Attachment A** to this letter for a detailed document schedule and the reasons for my decision, including the relevant sections of the FOI Act.

You can ask for a review of our decision

If you disagree with any part of the decision you can ask for a review. There are two ways you can do this. You can ask for an internal review from within the agency, or an external review by the Office of the Australian Information Commissioner.

See **Attachment B** for more information about how to request a review.

Further assistance

If you have any questions please email FOI.LEGAL.TEAM@servicesaustralia.gov.au.

Yours sincerely

Leanne
Authorised FOI Decision Maker
Freedom of Information Team
Information Access Branch | Legal Services Division
Services Australia



Attachment A

DOCUMENT SCHEDULE**WARREN, Justin (Right to Know) - LEX 67434**

Doc No.	Pages	Date	Description	Decision	FOI Act Exemption	Comments
1.	1-31	20 December 2021	Privacy Impact Assessment: Document Lodgement Machine Learning System Pilots	Exempt in full	s 42 s 47(1)(b) s 47C	Material subject to legal professional privilege Commercially valuable information Deliberative material



REASONS FOR DECISION

What you requested

I request a copy of the Privacy Impact Assessment reference number 43996 titled "Document Lodgement Machine Learning System Pilots" as listed on the department's Privacy Impact Assessment Register: <https://www.servicesaustralia.gov.au/privacy-impact-assessment-register>.

What I took into account

In reaching my decision I took into account:

- your FOI request dated 11 April 2022
- the document falling within the scope of your request
- consultation with third parties about documents which contain information concerning them
- whether release of the material is in the public interest
- consultations with agency officers about:
 - the nature of the documents
 - the agency's operating environment and functions
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines), and
- the FOI Act.

Reasons for my decisions

I am authorised to make decisions under section 23(1) of the FOI Act.

I have decided that the document that you requested is exempt in its entirety under section 42, section 47(1)(b) and section 47C of the FOI Act. My findings of fact and reasons for deciding that the exemption applies to the document are discussed below.

Legal professional privilege

I have applied the exemption in section 42 of the FOI Act to the document in full.

This section of the FOI Act allows the agency to exempt a document from disclosure if it is subject to legal professional privilege (LPP).

The FOI Act does not define LPP.

Courts have held that deciding whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation

- whether the advice given is independent
- whether the advice given is confidential.

The document you have requested contains legal advice provided to the agency by an external law firm for the purpose of obtaining professional legal advice on specific matters. I am satisfied that privilege in these communications has not been waived as the document has not been distributed further than is reasonably necessary for internal operational purposes. I am also satisfied that the substance of the legal advice contained within the document has not been used in any way which is inconsistent with maintaining the confidentiality of the advice.

Further, I am satisfied the agency's ability to obtain legal advice on issues would be substantially prejudiced if this document were to be made publicly available through FOI processes. In my view, real harm is likely to result from release of the document as doing so would waive privilege and disclose the particular legal provider's approach to the interpretation, analysis and application of legislation administered by the agency. Consequently, the agency's ability to obtain comprehensive legal advice in the future would be substantially prejudiced if external law firms become aware that the agency is expressly waiving privilege in documents by making its legal advice publicly available via FOI processes.

For the reasons set out above, I am satisfied that the document is exempt under section 42 of the FOI Act.

Commercially valuable information

I have also applied the exemption in section 47(1)(b) of the FOI Act to the document in its entirety.

This section of the FOI Act allows the agency to redact material from a document if its disclosure would reveal trade secrets or destroy or diminish commercially valuable information. Commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved.

The document falling within scope of your request reveals the legal service provider's methodology and analysis approach which has been developed and refined over a number of years, involving investment and significant time and effort, and which is informed by the legal service provider's knowledge and experience producing Privacy Impact Assessments (PIA) and its privacy work for the agency.

The FOI Act does not restrict the use or further dissemination of material released in response to an FOI request. In this case, the information of the legal service provider's PIA methodology and approach:

- is not publicly available or widely known
- has an intrinsic commercial value which a genuine arms'-length buyer would be prepared to pay for, particularly by potential competitors (including other law firms, consultants and consultancy firms offering similar services), and
- if disclosed, would or could reasonably be expected to give potential competitors an unfair advantage, and would undermine the legal service provider's commercial position.

I am satisfied the commercial value of the legal service provider's PIA methodology and approach would be, or could reasonably be expected to be, destroyed or diminished if the document was disclosed.

For the reasons set out above, I am satisfied the document is exempt under section 47(1)(b) of the FOI Act.

Deliberative matter

Section 47C of the FOI Act provides a document is conditionally exempt if it would disclose deliberative matter. Deliberative matter is an opinion, advice or recommendation, or a consultation or deliberation that has taken place in the course of, or for the purposes of, the deliberative processes of an agency. Material which is operational or purely factual information is not deliberative matter. The deliberative exemption also does not apply to reports of scientific or technical experts, reports of a body or organisation prescribed by the regulations, or a formal statement of reasons.

I am satisfied the document contains deliberative matter, being advice and recommendations, which have been prepared by the agency's legal services provider. I am also satisfied the document is not operational information or purely factual information, and otherwise not of a kind specifically excluded by the FOI Act.

Accordingly, I find that the document is also conditionally exempt, in full, under section 47C(1) of the FOI Act.

I consider the disclosure of the material may generally promote the objects of the FOI Act, which is in the public interest. However, I also consider disclosure is likely to prejudice the agency's ability to obtain comprehensive legal advice, which would in turn compromise the agency's capacity to deliberate on the options available to mitigate privacy risks associated with the implementation of new projects.

As such, I find that any public interest in favour of disclosing the material is outweighed by the public interest against disclosure.

Summary of my decision

In conclusion, I have decided the document is exempt, in full, under sections 42, 47(1)(b) and 47C of the FOI Act, and disclosure of conditionally exempt material would be contrary to the public interest for the purposes of section 11A(5) of the FOI Act.



Attachment B

INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Asking for a full explanation of a Freedom of Information decision

Before you ask for a formal review of a FOI decision, you can contact us to discuss your request. We will explain the decision to you. This gives you a chance to correct misunderstandings.

Asking for a formal review of an Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982 (FOI Act)* gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by:

1. an Internal Review Officer in Services Australia (the **agency**); and/or
2. the Australian Information Commissioner.

Note 1: There are no fees for these reviews.

Applying for an internal review by an Internal Review Officer

If you apply for internal review, a different decision maker to the agency delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be:

- made in writing
- made within 30 days of receiving this letter
- sent to the address at the top of the first page of this letter.

Note 2: You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

If you do not receive a decision from an Internal Review Officer in the agency within 30 days of applying, you can ask the Australian Information Commissioner for a review of the original FOI decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can **lodge your application**:

Online: www.oaic.gov.au
Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001
Email: enquiries@oaic.gov.au

Note 3: The Office of the Australian Information Commissioner generally prefers FOI applicants to seek internal review before applying for external review by the Australian Information Commissioner.

Important:

- If you are applying online, the application form the 'Merits Review Form' is available at www.oaic.gov.au.
- If you have one, you should include with your application a copy of the Services Australia decision on your FOI request
- Include your contact details
- Set out your reasons for objecting to the agency's decision.

Complaints to the Australian Information Commissioner and Commonwealth Ombudsman

Australian Information Commissioner

You may complain to the Australian Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Australian Information Commissioner must be made in writing. The Australian Information Commissioner's contact details are:

Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may also complain to the Commonwealth Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Commonwealth Ombudsman may be made in person, by telephone or in writing. The Commonwealth Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.