



13 July 2022

Our reference: LEX 68319

Mr Justin Warren

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

Dear Mr Warren,

Freedom of Information Request – Internal Review Decision

I refer to your correspondence dated 13 June 2022, seeking an internal review of the decision made by Services Australia (the agency) under the *Freedom of Information Act 1982* (the FOI Act) on 10 June 2022 (the original decision).

Background

On 11 April 2022, you requested access under the FOI Act to the following:

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>.

Summary of my internal review decision

Consistent with the requirements of section 54C(2) of the FOI Act, I have made a 'fresh' decision.

Having regard to the document, I am satisfied it 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 detailed reasons for my decision, including relevant sections of the FOI Act.

You can ask for a review of my decision

If you disagree with any part of my decision you can ask for an external review by the Office of the Australian Information Commissioner review. 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

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



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

On 11 April 2022, you made a request under the FOI Act for access to the following:

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>.

On 10 June 2022, the agency provided you with the original decision, refusing access in full to the requested document.

On 13 June 2022, you requested an internal review of the original decision. You made the following submissions in support of your request:

I am writing to request an internal review of Services Australia's handling of my FOI request 'Privacy Impact Assessment ref 43996 Document Lodgement Machine Learning System Pilots'.

The OAIC expects an entity to consider conducting a PIA and publishing the final report whenever an entity proposes to engage in an activity or function involving the handling of personal information. (see <https://www.oaic.gov.au/about-us/our-regulatory-approach/guide-to-privacy-regulatory-action/chapter-8-directing-a-privacy-impact-assessment> at [8.5]).

The OAIC strongly encourages the publication of PIA reports. Where there are difficulties making the full PIA available, the OAIC encourages the release of a summary or edited version. (see <https://www.oaic.gov.au/privacy/guidance-and-advice/guide-to-undertaking-privacy-impact-assessments> section 9).

It is surprising that the PIA report for this project has been provided in a form that is not readily publishable by Services Australia, and that no summary or edited version exists. I therefore seek an internal review of the decision to exempt the document in full rather than to provide an edited version of the document with certain sections redacted.

A full history of my FOI request and all correspondence is available on the Internet at this address:

https://www.righttoknow.org.au/request/privacy_impact_assessment_ref_43

Feedback on the agency's publication of Privacy Impact Assessments

I consider that your internal review request contains feedback on the agency's publication of privacy impact assessment documents. This aspect of your submission is outside of the scope of this internal review as it does not relate specifically to the application of the FOI Act in relation to the original decision. I have forwarded your feedback to the agency's Programmes branch who are responsible for the management and publication of privacy impact assessment documents, for their consideration.

I have considered your internal review request to be limited to contesting the original decision which found the document was exempt in full from disclosure under the FOI Act 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).

What I took into account

In reaching my decision I took into account:

- your original request dated 11 April 2022
- your internal review request dated 13 June 2022
- the document falling within the scope of your request
- consultation with third parties about documents which contain information concerning them
- whether the release of material is in the public interest
- consultations with agency officers about:
 - the nature of the documents
 - searches for documents undertaken within the agency, and
 - 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, including internal review decisions under section 54C of the FOI Act.

I have decided the document you requested is exempt in full under the FOI Act. My findings of fact and reasons for deciding the exemptions apply 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.

Section 42 of the FOI Act provides:

- (1) 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.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

(3) A document is not an exempt document under subsection (1) by reason only that:

- a) The document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
- b) The information is operational information of an agency.

Paragraphs 5.128 and 5.129 of the Guidelines provide the following guidance in relation to the application of section 42:

LPP applies to some but not all communications between legal advisers and clients. The underlying policy basis for LPP is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative. The information in a document is relevant and may assist in determining the purpose of the communication, but the information in itself is not determinative.

At common law, determining 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 contains professional legal advice provided to the agency by external lawyers for the purpose of informing decision making on privacy relevant to the specified pilots.

There is no information available to me which suggests the privilege has been waived, expressly or otherwise. I am satisfied that privilege in this document has not been waived as the document has not been distributed further than is reasonably necessary for internal operational purposes. I am also satisfied the substance of the legal advice contained within the document has not been used in any way which is inconsistent with the maintenance of 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 the document is exempt in full under section 42 of the FOI Act.

Commercially Valuable Information

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

Section 47(1) of the FOI Act provides:

A document is an exempt document if its disclosure under this Act would disclose:

- (a) trade secrets; or
- (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

Paragraph 5.204 of the Guidelines provides:

To be exempt under s 47(1)(b) a document must satisfy two criteria:

- the document must contain information that has a commercial value either to an agency or to another person or body
- the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.

And further, paragraph 5.205 of the Guidelines provides:

It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The 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 information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property. The following factors may assist in deciding in a particular case whether information has commercial value:

- whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value
- whether the information confers a competitive advantage on the agency or person to whom it relates — for example, if it lowers the cost of production or allows access to markets not available to competitors
- whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information
- whether the information is still current or out of date (out of date information may no longer have any value), and
- whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price.

The document falling within scope of your request reveal the legal service provider's methodology and approach to conducting Privacy Impact Assessments (PIA), including the mapping of information flows, analysis of privacy and secrecy compliance issues, legal reasoning, and the formulation of recommendations and risk mitigation strategies.

Additionally, the document reveals the relevant law firm's approach to the interpretation, analysis and application of secrecy provisions under legislation administered by the agency, and the interaction of these secrecy obligations with the agency's privacy obligations.

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

- is not be publicly available or well 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 which offer similar services), and
- if disclosed, would or could reasonably be expected to give potential competitors an unfair advantage (including by adopting the same or similar PIA approach and legal reasoning), when offering and undertaking PIA services in the future, which 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 destroyed or diminished if the information was disclosed.

Accordingly I am satisfied the document is exempt under section 47(1)(b) of the FOI Act.

Deliberative Material

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 for the purpose of undertaking a PIA. Furthermore, I am satisfied the document is not operational information, nor could it be classified as such, nor does it constitute purely factual information, and to the extent it may, it is intertwined with the deliberative material and not reasonably practicable to separate.

There is no exemption, as outlined in subsection 47C(3) that applies to this material as:

- the document is not a report on scientific or technical matters
- the agency is not a body prescribed by the regulations, and
- the material is not a record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function

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

Public interest considerations

Access to conditionally exempt material must be given unless I am satisfied it would not be in the public interest to do so.

I consider the disclosure of the material would generally promote the objects of the FOI Act, and facilitate access to government information and process generally, which is in the public interest.

However, I also consider disclosure could reasonably be expected to prejudice the agency's ability to obtain comprehensive legal advice in the future and would destroy or diminish the provider's PIA methodology and approach, ultimately impeding the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. The agency takes its responsibilities in regards to privacy seriously, and obtaining the requisite advice necessitates a frank exchange of views for the agency to base decisions upon. Release of material will significantly inhibit the exchange of views, thereby diminishing the agency's capacity to understand the impacts that programs may have, impacting its overall operations.

As such, I find the public interest factor in favour of disclosing the material is outweighed by the public interest factors 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 section 54L of the FOI Act, you can apply for a review of an internal review FOI decision by the Australian Information Commissioner.

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.

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

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.