



11 August 2022

Our reference: LEX 67435

Mr Justin Warren

Only by email: foi+request-8731-e1ea04e9@righttoknow.org.au

Dear Mr Warren,

Decision on your Freedom of Information Request

I refer to your request, dated and 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:

Emails relating to the following FOI requests (excluding attachments, correspondence from external third parties, documents you have already received and correspondence to or from the AAT and/or OAIC relating to your FOI requests):

- 2017, https://www.righttoknow.org.au/request/copy_of_public_interest_certific (Your reference: LEX 27960)
- 2018, https://www.righttoknow.org.au/request/decision_making_criteria_for_pot (Your reference: LEX 34896)
- 2019, https://www.righttoknow.org.au/request/copy_of_privacy_impact_assessmen (Your reference: LEX 46187)
- 2020, https://www.righttoknow.org.au/request/copy_of_executive_minute_to_the (Your reference: LEX 55424).

My decision

The Agency holds 4 documents (totalling 171 pages) that relate to your request.

I have decided to grant you **part access** to 4 documents with some of the content removed.

I have decided that parts of documents, that you have requested are exempt under the FOI Act, including:

- material subject to legal professional privilege (section 42)
- deliberative matter, the disclosure of which would be contrary to the public interest (section 47C)
- operational information, the disclosure of which would, or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Agency, and

- personal information of third parties, the disclosure of which would be unreasonable and contrary to the public interest (section 47F(1) conditional exemption).

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

How we will send your documents to you

The documents are attached.

Please note that pages:

- 3 – 4 (inclusive)
- 9
- 19
- 22 – 27 (inclusive)
- 30 – 33 (inclusive)
- 36 – 40 (inclusive)
- 42 – 55 (inclusive)
- 58 – 63 (inclusive)
- 66 – 70 (inclusive)
- 72 – 138 (inclusive)
- 142 – 150 (inclusive)
- 152 – 156 (inclusive), and
- 158 – 171 (inclusive)

have no content once exempt and out of scope information has been redacted and therefore those pages are blank and not provided.

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

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



SCHEDULE OF DOCUMENTS FOR RELEASE
WARREN, Justin - LEX 67435

Doc No.	Pages	Date	Description	Decision	FOI Act Exemption	Comments
1.	1-17	Various	Emails relating to LEX 27960	Release in part	s 42 s 47C s 47E(d)	Legally privileged information deleted under s 42. Deliberative material deleted under s 47C. Information which would have a substantial adverse effect on the operations of the Agency deleted under s 47E(d). Staff details deleted under s 22 (out of scope).
2.	18-30	Various	Emails relating to LEX 34896	Release in part	s 42 s 47C s 47E(d)	Legally privileged information deleted under s 42. Deliberative material deleted under s 47C. Information which would have a substantial adverse effect on the operations of the Agency deleted under s 47E(d). Staff details deleted under s 22 (out of scope).

Doc No.	Pages	Date	Description	Decision	FOI Act Exemption	Comments
3.	31-141	Various	Emails relating to LEX 46187	Release in part	s 42 s 47C s 47E(d) s 47F(1)	Legally privileged information deleted under s 42. Deliberative material deleted under s 47C. Information which would have a substantial adverse effect on the operations of the Agency deleted under s 47E(d). Third party personal information deleted under s 47F(1). Staff details deleted under s 22 (out of scope). Out of scope material deleted under s 22.
4.	142 -171	Various	Emails relating to LEX 55424	Release in part	s 42 s 47C s 47E(d) s 47F(1)	Legally privileged information deleted under s 42. Deliberative material deleted under s 47C. Information which would have a substantial adverse effect on the operations of the Agency deleted under s 47E(d). Third party personal information deleted under s 47F(1). Staff details deleted under s 22 (out of scope). Out of scope material deleted under s 22.



REASONS FOR DECISION

What you requested

On 11 April 2022, you requested:

[A] copy of all emails sent or received by Services Australia—and as it was previously known the Department of Human Services—regarding Freedom of Information requests filed by myself, Justin Warren using the RightToKnow service.

This will include all email correspondence internally between staff members (or contractors) of the department, and emails sent to or received from external parties.

Include in the scope all attachments to emails.

Include in the scope all FOI requests made prior to 10 April 2022...

On 24 May 2022, I spoke with you about the scope of your request. Following this conversation, on 27 May 2022 you revised your request.

Your revised request was:

Emails relating to the following FOI requests (excluding attachments, correspondence from external third parties, documents you have already received and correspondence to or from the AAT and/or OAIC relating to your FOI requests):

- 2017, https://www.righttoknow.org.au/request/copy_of_public_interest_certific (Your reference: LEX 27960)
- 2018, https://www.righttoknow.org.au/request/decision_making_criteria_for_pot (Your reference: LEX 34896)
- 2019, https://www.righttoknow.org.au/request/copy_of_privacy_impact_assessmen (Your reference: LEX 46187)
- 2020, https://www.righttoknow.org.au/request/copy_of_executive_minute_to_the (Your reference: LEX 55424).

Staff details

Staff details have been redacted in accordance with section 22(1) 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 revised request on 27 May 2022
- other discussions and correspondence with you regarding the scope of your request
- documents falling within the scope of your request
- whether the release of 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 decision

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

I have decided that parts of documents you requested are exempt under the FOI Act. My findings of fact and reasons for deciding the exemptions apply to those documents are discussed below.

Legal professional privilege

I have applied the exemption in section 42 of the FOI Act to parts of the documents.

This section of the FOI Act allows the Agency to redact material from a document if it is subject to legal professional privilege (LPP).

The FOI Act does not define LPP, but instead consideration has been given to the common law concepts of LPP.

At common law, courts have held that deciding whether a communication is privileged requires 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, and
- whether the advice given is confidential.

The documents contain correspondence between Agency employees and government lawyers for the purposes of obtaining legal advice on specific matters, informing decision-making and action in the relevant legal context, and disclosure would reveal how the advice was relied upon. I am satisfied the lawyer was acting in their capacity as a professional legal adviser, the communications relate to activities falling within the lawyer's professional functions, and the agency's Legal Services Division is separate from the agency's business areas, affording the lawyers the necessary independence to support giving legal advice. In each case the person providing the legal advice was a legal practitioner. Therefore, the advice was provided by a professional legal adviser acting with the required level of independence to the client.

I am satisfied that privilege has not been waived as the documents have not been distributed further than is reasonably necessary for the purpose of providing or obtaining legal services. I am also satisfied that the substance of the legal advice contained within the documents 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 these documents were to be made publicly available through FOI

processes. In my view, real harm is likely to result from release of the documents as doing so would waive privilege and disclose the approach to the interpretation, analysis and application of legislation administered by the Agency. Consequently, the Agency's ability to obtain comprehensive and candid internal legal advice in the future would be substantially prejudiced if the Agency waives privilege in documents by making its legal advice publicly available via FOI processes.

For the reasons set out above, I am satisfied the documents are exempt under section 42 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 documents contain deliberative matter, being advice and recommendations, which have been prepared by Agency subject matter experts relevant to your historical FOI requests and internal legal counsel. Furthermore, I am satisfied the material to which the conditional exemption has been applied 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 is not reasonably practicable to separate.

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

- the documents are 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 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 identified material in the documents is deliberative matter of the type captured under section 47C of the FOI Act and is conditionally exempt, in part, under the 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 processes generally which is in the public interest. However, I also consider disclosure could reasonably be expected to inhibit frankness and candour between Agency officers during the processing of FOI requests and prejudice the Agency's ability to obtain legal advice or consider matters comprehensively in the future.

Specifically, disclosure of the section 47C material will destroy or diminish the Agency's methodology and approach to the management of FOI requests and ultimately impede the full and frank disclosure between internal lawyers or subject matter experts and FOI decision makers. Ultimately this would deny the FOI decision maker the necessary understanding of the matter they are considering, diminishing their capacity to correctly and appropriately undertake their obligations and duties in line with the FOI Act.

As such, I find the public interest in disclosing the material to which this conditional exemption has been applied is heavily outweighed by the public interest against disclosure.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.

I have deleted the exempt information in the documents and released the remaining material in accordance with section 22(1) of the FOI Act.

Operations of the Agency

I have applied the exemption in section 47E(d) of the Act to parts of the documents. The information I have found to be conditionally exempt are the Agency's internal positional mailboxes, statistics and information relating to Agency discretionary decision-making processes or procedures.

I note I have not applied this exemption to any positional electronic mailboxes that are publicly available.

The Agency's purpose is to provide high-quality government services and payments to Australians. It is a large, public facing, government organisation with many points of contact designed to facilitate its purpose. The Agency has established channels of communication for customers and members of the public, which have been put in place to ensure the effective management of the significant volume of communication received. Such channels include dedicated and externally published positional mailboxes of different business areas within the Agency. These have been established to ensure correspondence is directed to the correct area and actioned accordingly.

If internal positional mailbox details were to be made publicly available, correspondence received and directed could be mishandled, lost, duplicated or double-handled on account of it not being directed to the most appropriate teams through the publicly available communication channels.

Further, the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act. I note any member of the public may use these internal positional electronic mailboxes to communicate with the Agency. Noting the Agency's interactions with the public number in the hundreds of millions, diverting people from correct channels cannot be appropriately categorised as insubstantial or nominal.

In addition, I consider that release of statistics and discretionary decision making process and procedural information to you, which is not publicly available, would negatively affect the conduct of the operations of the Agency because it would enable customers to circumvent established processes for the purpose of obtaining a material benefit.

This in turn creates a significant risk that the Agency would be unable to correctly service members of the public and compromise the Agency's ability to deliver government payments accurately.

While I have no reason to believe you would misuse the material in question if it were disclosed to you, the FOI Act does not control or restrict use or dissemination of the information once released in response to an FOI request, so I must consider actions any member of the public might take once the information enters the public domain and is available to the world at large.

For the reasons outlined above, I am satisfied the positional mailboxes, statistics and discretionary decision-making processes and procedures are conditionally exempt under section 47E(d) 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 processes generally which is in the public interest. However, I also consider the disclosure of this information would prejudice the Agency's ability to effectively and efficiently deliver government payments and manage contact with the public, and increase the risk of misdirected communications received by the Agency from members of the public, impairing the timely delivery of services and responses to enquires.

As such, I have decided in this instance, the public interest in disclosing the information in the above-mentioned documents is outweighed by the public interest against disclosure.

For the reasons set out above, I am satisfied parts of the documents, as identified in the Schedule, are conditionally exempt under section 47E(d) of the FOI Act.

Unreasonable disclosure of personal information

I have applied the exemption in section 47F(1) of the FOI Act to parts of documents 3 and 4 as identified in the Schedule.

This section of the FOI Act allows the Agency to redact material from a document if its disclosure would result in the unreasonable disclosure of personal information about another person.

Personal information is information or an opinion about an identified individual, or an individual who is reasonably identifiable. It can include a person's name, address and telephone number. I am satisfied documents 3 and 4 contain personal information of other people, namely their names and individual FOI request details.

I am satisfied that the disclosure of the third party personal information would be unreasonable as you do not have the consent of these individuals for the release of their personal information, the information is private and not available publicly, and the identity of the individuals concerned is readily apparent.

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, which is in the public interest. However, I also consider disclosure would prejudice the individuals' right to privacy, adversely affect or harm the individuals' interests and prejudice the Agency's ability to effectively administer FOI obligations.

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

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.



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.

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: 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.