



13 September 2022

Our reference: LEX 69186

Mr Justin Warren

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

Dear Mr Warren

Freedom of Information Request – Internal Review Decision

I refer to your correspondence, received by Services Australia (the Agency) on 14 August 2022, seeking an internal review of the decision made by the Agency on 11 August 2022 in relation to your request for access to documents under the *Freedom of Information Act 1982* (FOI Act).

Background

On 11 April 2022, you requested access under 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).

On 11 August 2022, the Agency decided to grant you part access to four documents with some of the content removed.

Summary of my internal review decision

I am authorised to make decisions under s 23(1) of the FOI Act, including internal review decisions under s 54C of the FOI Act.

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

Having reviewed the documents in question, I am satisfied that parts of each of the documents falling within the scope of your request (Documents 1 – 4) are exempt under the FOI Act. Accordingly, I have decided to grant you **part access** to each of these four documents.

Please refer to **Attachment A** for further information regarding the reasons for my decision.

How we will send your documents to you

The documents are attached.

I note the following pages have no content once exempt and out of scope information has been redacted and therefore those pages are blank and not provided:

- 2 – 4 (inclusive)
- 9
- 19
- 23 – 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)

You can ask for a review of our decision

If you disagree with any part of the decision, you can ask for a review by 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

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



SCHEDULE OF DOCUMENTS FOR RELEASE
WARREN, Justin - LEX 69186

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) s 47F(1) s 22	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). Out of scope material deleted under s 22.
2.	18-30	Various	Emails relating to LEX 34896	Release in part	s 42 s 47C s 47E(d) s 47F(1) s 22	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). Out of scope material deleted under s 22.

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) s 22	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). 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) s22	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). Out of scope material deleted under s 22.



REASONS FOR DECISION

What you requested

On 11 April 2022, you requested access under 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)
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(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).

On 11 August 2022, the Agency advised you it had decided to grant you part access to four documents with some of the content removed.

On 14 August 2022, you requested an internal review of the original decision, providing written submissions in which you contended:

s 22 claim over staff details

A great many identifying details have been withheld without an exemption claim being made. At no time have I indicated that I consider such details to be irrelevant. I have consistently maintained in other dealings with the Agency that I consider all such details to be within scope. Absent my agreement on specific instances, I consider all staff names in the documents are within scope and are not irrelevant to my request.

As the FOI Guidelines relevantly explain, at [3.54]:

There have been instances of agencies using s 22 to delete the names of government officials below the Senior Executive Service (SES) rank on the basis that those names are irrelevant to the scope of an FOI request. There is no apparent logical basis for treating the names of SES officials as being within the scope of a request, but other officials as being irrelevant to the request. Without further explanation as to why the names of government officials are irrelevant to the scope of an applicant's request, it is unlikely that the application of s 22 is appropriately justified.

If the department believes it can provide sufficient evidence that staff details should be exempted from disclosure, it should do so. Otherwise, the details should be disclosed.

s 47C deliberative material

Opinions about me as a person constitute personal information and are not exempt from disclosure as they are "content that is merely descriptive" and thus not deliberative matter.

The frankness and candour argument against disclosure has been dealt with and dismissed on many occasions and is specifically discussed in the FOI Guidelines at [6.79]-[6.85]. The decision maker has not provided evidence that any of the multiple situations

here are special nor specific. It is unlikely that all of the many s 47C exemptions claimed meet the standard required.

s 47E(d) substantial adverse effect on operations The claim that publication of “statistics and discretionary decision making process[sic] and procedural information” 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” is a bold one. Insufficient evidence or argument has been provided that this adverse outcome could reasonably be expected.

If the mere knowledge of the process and procedure for making decisions would enable customers to circumvent them, they are not very robust. Hiding the department’s poorly designed processes from public scrutiny may be in the department’s narrow, private interest, but it is not in the public interest. It is in the public interest that such feeble processes and procedures should be examined so that they can be strengthened.

I note you did not make any submissions in relation to the application of ss 42 (legal professional privilege) and 47F(1) (personal information) of the FOI Act in the original decision.

What I took into account

In reaching my decision, I took into account:

- your original FOI request dated 11 April 2022
- your internal review request dated 14 August 2022
- the material 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 and the Agency’s operating environment and functions
- guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (Guidelines), and
- the FOI Act.

Reasons for my decisions

I am authorised to make decisions under s 23(1) of the FOI Act, including internal review decisions under s 54C of the FOI Act.

I have decided parts of Documents 1 – 4 are exempt under s 42 of the FOI Act and conditionally exempt under ss 47C, 47E(d) and 47F(1) of the FOI Act and disclosure of this material would, on balance, be contrary to the public interest.

My findings of fact and reasons for deciding these exemptions apply to that material are discussed below.

Legal professional privilege

In your internal review request, you did not make any submissions regarding the Agency’s decision to exempt parts of the documents under s 42 of the FOI Act. Notwithstanding this, I have considered the applicability of this exemption to the documents sought in making this decision.

Relevantly, the documents sought contain correspondence between the Agency and internal lawyers (from a distinct Legal Service Division) for the purposes of obtaining professional legal advice on specific matters. I am satisfied privilege in these communications has not been waived and the substance of the legal advice contained within the documents has not been used in any way that is inconsistent with the maintenance of the confidentiality of the advice.

For the reasons set out above, I am satisfied parts of the documents sought are exempt under s 42 of the FOI Act.

Deliberative matter

In your internal review request, you submitted the Agency had wrongly concluded the conditional exemption in s 47C of the FOI Act applied to parts of the documents sought. In particular, you submitted:

- opinions about you as a person constitute personal information that is merely descriptive and therefore not deliberative matter, and
- the frankness and candour argument against disclosure has been dealt with and dismissed on many occasions and is specifically discussed in the Guidelines.

I have considered your submissions and determined the documents sought contain deliberative matter as defined in s 47C(1) of the FOI Act. Specifically, parts of the documents sought comprise the exchange and ultimate evaluation of opinions, advice and recommendations between various employees of the Agency (including the Freedom of Information Team, relevant line areas, subject matter experts and internal lawyers) in relation to the various historical FOI requests identified in your current FOI request.

Moreover, I am satisfied the information contained in the relevant parts of the documents sought is not operational information or purely factual information, and is not otherwise of a kind specifically excluded by the FOI Act.

While I accept parts of the documents contain opinions, I do not accept these opinions could be described as merely descriptive opinions about you as a person. Instead, these opinions relate to the application of the FOI Act to your historical FOI requests.

For the reasons set out above, I am satisfied parts of the documents sought are conditionally exempt under s 47C 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 disclosing the conditionally exempt material would promote the objects of the FOI Act and facilitate access to government information and processes generally, both of which are in the public interest. However, I also consider disclosing this material would likely inhibit the full and frank exchange of views between Agency officers in processing requests under the FOI Act, which would, in turn, deny Agency decision-makers a necessary understanding of documents that are subject to FOI requests and diminish their capacity to correctly and appropriately perform their duties under the FOI Act.

You submitted the frankness and candour argument against disclosure had been dealt with and dismissed on many occasions and is specifically discussed in the Guidelines at [6.79]-[6.85]. I accept there have been findings (such as in *Rovere and Secretary, Department of*

Education and Training [2015] AATA 462) to the effect that a frankness and candour claim may not be a factor against disclosure in its own right. However, in light of those findings, the Information Commissioner stated at [6.82] of the Guidelines:

frankness and candour in relation to the s 47C conditional exemption may have some application as one public interest factor against disclosure in combination with other factors, and possibly as the sole factor where the public interest is clearly, heavily weighted against disclosure of a document of a minister, or a document that would affect the effective and efficient functioning of government.

Relevantly, I consider the proper administration of the FOI Act is an important part of the effective and efficient functioning of government. You may recall that Deputy President Forgie made the following comments about the administration of the FOI Act in *Chief Executive Officer, Services Australia and Warren (Freedom of Information)* [2020] AATA 4557:

The whole of the FOI Act is a finely tuned balance between two interests. In one side of the balance is the facilitation and promotion of access to a national resource that is information held by Government, which enables increased public participation in Government processes and increased scrutiny, discussion, comment and review of the Government's activities. In the other is the protection of the national interest, the essential operation of government and the privacy of those who deal with government.

Achieving the required fine balance between the two competing interests of the FOI Act necessitates a frank exchange of views between Agency officers. The Agency decision-maker must then consider all views to establish an understanding of the content of the documents in order to apply (if necessary) the relevant provisions of the FOI Act.

In this instance, I consider the disclosure of the material conditionally exempt under s 47C of the FOI Act would meaningfully inhibit the exchange of views between Agency officers, depriving FOI decision-makers a necessary understanding of documents and diminishing their capacity to correctly and appropriately perform authorised duties under the FOI Act. I also consider this would significantly affect the effective and efficient functioning of government as contemplated by the Guidelines.

Having weighed the factors in favour of disclosure against the factors against disclosure, I am satisfied the public interest in disclosing the material is outweighed by the public interest factors 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.

Operations of the Agency

In your internal review request, you submitted the Agency had wrongly concluded the conditional exemption in s 47E(d) of the FOI Act applied to parts of the documents sought. In particular, you submitted:

- you are not satisfied that the publication of statistics and discretionary decision making processes and procedural information could reasonably be expected to enable customers to circumvent established processes for the purpose of obtaining a material benefit, and
- 'hiding the [Agency's] poorly designed processes from public scrutiny may be in the [Agency's] narrow, private interest, but it is not in the public interest.'

I have considered your submissions and the documents in question. I have determined the documents sought contain material that, if disclosed, could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Agency as contemplated by s 47E(d) of the FOI Act. This material includes statistics, internal positional mailboxes and information regarding decision-making processes.

I acknowledge and agree with your submission to the effect the disclosure of some (and perhaps most) statistics and information regarding decision-making processes is unlikely to have a substantial adverse effect on the proper and efficient conduct of the operations of the Agency. Consistent with this, there are many parts of the documents sought which could be described as statistics or information regarding decision-making processes which I do not consider to be conditionally exempt pursuant to s 47E(d) of the FOI Act.

However, there are other, more limited, parts of the documents which fall within those broad categories I consider would have a substantial adverse effect on the proper and efficient conduct of the operations of the Agency if disclosed. These parts of the documents largely relate to discrete aspects of administrative and decision-making processes which are necessary to facilitate the efficient and effective exercise of the Agency's functions but which, if disclosed, would be vulnerable to circumvention or manipulation.

Further, 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.

Finally, while I have no reason to believe you would misuse any conditionally exempt material in the ways outlined above, 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.

For the reasons set out above, I am satisfied that parts of the documents sought are conditionally exempt under s 47E(d) of the FOI Act.

Public interest considerations

As set out above, 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 disclosing the conditionally exempt material would promote the objects of the FOI Act and facilitate access to government information and processes generally, both of which are in the public interest. However, I also consider disclosing this material would likely prejudice discrete aspects of the Agency's administrative and decision-making processes, which would have a significant adverse effect on the operations of the Agency and, as a consequence, the public more broadly.

Contrary to your submissions, I do not consider this is about 'hiding' poorly designed processes to protect the Agency's own interests. Instead, this conditionally exempt material relates to discrete aspects of administrative and decision-making processes which are necessary to ensure the efficient and effective exercise of the Agency's functions but which, if disclosed would be vulnerable to circumvention or manipulation. The effect of such circumvention or manipulation would be to prejudice the Agency's ability to effectively, efficiently and accurately deliver services to the Australian public.

Having weighed the factors in favour of disclosure against the factors against disclosure, I am satisfied the public interest in disclosing the material is outweighed by the public interest factors 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.

Personal information

In your internal review request, you did not make any submissions to the effect the Agency had wrongly concluded the conditional exemption in s 47F(1) of the FOI Act applied to parts of the documents sought. Notwithstanding this, I have considered the applicability of this exemption to the documents sought in making this decision.

I also note that in your internal review request, you indicated you considered all staff details in the documents to be within scope and were not irrelevant to your FOI request. In light of this comment, I accept the staff details contained in the documents sought are not irrelevant for the purposes of s 22(1)(a)(ii) of the FOI Act.

However, following a review of the documents sought, I have determined these staff details, together with other peoples' names and FOI request details that appear in documents 3 and 4, comprise personal information about people other than yourself.

I also consider disclosure of this personal information would be unreasonable because:

- you do not have the consent from these individuals to the release of their personal information
- the information is private and not freely available in full or in part from publicly accessible sources
- the identity of the individuals concerned are readily apparent or could be easily ascertained, and
- in relation to the staff details, revealing this information is likely to pose a real and unacceptable risk of rendering staff vulnerable to threats and unauthorised contact from members of the public, which could jeopardise their physical safety and compromise their mental health.

For the reasons set out above, I am satisfied parts of the documents sought are conditionally exempt under s 47F(1) of the FOI Act.

Public interest considerations

As set out above, 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 disclosing the conditionally exempt material would promote the objects of the FOI Act and facilitate access to government information and processes generally, both of which are in the public interest. However, I also consider disclosing this material would prejudice the individuals' right to privacy, adversely affect the individuals' interests and personal safety, and prejudice the Agency's ability to attract and retain staff.

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.

Summary of my decision

In conclusion, I have decided to grant you **part access** to four documents.



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 internal review decision

If you still believe a decision is incorrect, the FOI Act gives you the right to apply for a review of the internal review decision. Under s 54M of the FOI Act, you can apply for a review of an FOI decision by the Australian Information Commissioner. There are no fees for this review.

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.