



Australian Government
Attorney-General's Department

FOI15/015; 15/1788

6 March 2015

Mr Peter Timmins

By email only: foi+request-891-e12b56f6@righttoknow.org.au

Dear Mr Timmins

Freedom of Information Request no. FOI15/015

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

Summary

I, Petra Gartmann, Assistant Secretary, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

On 28 January 2015 you requested access to documents relating to the functions of the Office of the Australian Information Commissioner from 1 January 2015. Specifically you sought access to:

documents concerning discussions with the Office of Australian Information Commissioner about the conduct of its functions from 1 January 2015, including:

- *proposals put to or received from the Office concerning funding and staffing, and*
- *any agreement or understanding reached on these and related matters*

On 13 February 2015 the Department emailed you requesting you consider an amendment of the scope of your request to *documents created after 30 September 2014*. On 17 February 2015 you consented to revising the scope of your request.

On 24 February 2015 an FOI case manager contacted you requesting an extension of seven days under section 15AA of the FOI Act to complete the processing of your request. On 25 February 2015, you consented to the extension.

I identified twenty-seven (27) documents which fell within the scope of your request. I did this by arranging for comprehensive searches of the Department's electronic records management system. Enquiries were also made of staff who would be likely to be able to identify documents within the scope of your request. Twenty-seven documents were identified.

The attached schedule of documents provides a description of each document that falls within the scope of your request and the access decision for each of those documents.

With regard to the documents you requested (set out in the schedule attached), I have decided to grant access to one document, to grant access to edited versions of twenty-two documents, and to refuse access to the remaining four documents. More information, including my reasons for my decision, is set out below.

Decision and reasons for decision

With regard to the documents identified in the attached schedule, I have decided

- to grant access in full to document 5
- to grant access in part to documents 1, 2, 3, 4, 7, 8, 9, 11, 12, 15, 16, 18, 19, 23, 24, 25, 26 and 27 with irrelevant matter deleted under section 22 and exempt material deleted under section 47C(1) (Public interest conditional exemption – deliberative processes) and section 47F(1) (Public interest conditional exemption – personal privacy)
- to grant access in part to document 10, with irrelevant matter deleted under section 22 and exempt material deleted under section 47F(1) (Public interest conditional exemption – personal privacy)
- to grant access in part to documents 13, 14 and 17, with irrelevant matter deleted under section 22
- to refuse access to document 6 under section 47E (Public interest conditional exemption – certain operations of agencies)
- to refuse access to document 21 under section 47C(1) (Public interest conditional exemption – deliberative processes)
- to refuse access to documents 20 and 22 under section 47C(1) (Public interest conditional exemption – deliberative processes) and section 47E (Public interest conditional exemption – certain operations of agencies).

Material taken into account

I have taken the following material into account in making my decision:

- the content of the documents that fall within the scope of your request
- correspondence between the Department and yourself amending the scope of your request
- the FOI Act (specifically sections 22(1), 47C, 47E and 47F)
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act

The schedule indicates each document to which access is refused. My reasons for refusing access are given below.

Deletion of exempt or irrelevant material (section 22)

Section 22 of the FOI Act provides that:

- (1) *This section applies if:*
 - (a) *an agency or Minister decides:*
 - (i) *to refuse to give access to an exempt document; or*
 - (ii) *that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and*
 - (b) *it is possible for the agency or Minister to prepare a copy (an edited copy) of the document modified by deletions, ensuring that:*
 - (i) *access to the edited copy would be required to be given under section 11A (access to documents on request); and*
 - (ii) *the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and...*

I have decided to apply section 22 of the FOI Act in cases where the information does not fall within the scope of your request (irrelevant information). I have considered all the documents identified in the schedule to determine whether a portion or portions of each document could be released using the procedure envisaged in section 22(1)(b) of the FOI Act.

Section 22 provides that if an agency decides that granting access to a document would disclose information that would be exempt or reasonably be regarded as irrelevant to the request and it is reasonably possible to prepare an edited copy of the document by deleting the irrelevant information, then the department should do so.

Therefore where irrelevant information appears in the documents, I have deleted this irrelevant information in order to allow for the release of the balance of the document.

Public interest conditional exemption – deliberative processes (section 47C)

I have decided that documents 1, 2, 3, 4, 8, 9, 10, 11, 12, 16, 18, 20, 21, 22, 25, 26 and 27 attract the exemption in section 47C(1) of the FOI Act as set out in the attached schedule.

I consider that material contained within documents 1, 2, 3, 4, 8, 9, 10, 11, 12, 16, 18, 20, 21, 22, 25, 26 and 27 is conditionally exempt under section 47C(1) of the FOI Act, which states:

- (1) *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 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:*
 - (a) *an agency; or*
 - (b) *a Minister; or*

...

I am satisfied that some of the material in the documents 1, 2, 3, 4, 8, 9, 10, 11, 12, 16 and 27 is opinion, advice or recommendation, prepared in the course of policy deliberations between officers of the Department and the Office of the Australian Information Commissioner. The material I have decided to exempt in documents 1, 2, 3, 4, 8, 9, 10, 11, 12, 16 and 27 is deliberative material prepared by or provided to the Department concerning the formation of policy in anticipation of passage of the *Freedom of Information Amendment (New Arrangements) Bill 2014*.

Documents 18, 20, 21, 22, 25 and 26 constitute the mechanism for deliberation within the Department about policy and the mechanism for providing advice and recommendations to the Attorney-General in regards to that policy. I am satisfied this material contains records of the opinions and recommendations of Departmental staff made in the course of and for the purposes of the deliberative processes involved in the functions of this Department.

I am satisfied the material exempted in documents 1, 2, 3, 4, 8, 9, 10, 11, 12, 16, 18, 20, 21, 22, 25, 26 and 27 falls within the conditional exemption of 'deliberative matter' for the purposes of the FOI Act.

Public interest considerations

Section 11B of the FOI Act lists the public interest factors favouring access. Of these factors, I consider that two factors are relevant to your request:

- promoting the objects of the FOI Act, particularly, increasing scrutiny, discussion, comment and review of the Government's activities,
- informing debate on a matter of public importance.

The FOI Act does not list any specific factors weighing against disclosure. However, I have identified the following factors as relevant:

- disclosure would reasonably be expected to have an adverse effect on the Department's ability to obtain full and uncensored opinions in regards to policy from agencies,
- disclosure would reasonably be expected to obstruct the future development of opinions of public servants from being expressed in advice papers and briefings to the Attorney-General,
- disclosure could reasonably be expected to inhibit the free flow of ideas between the Department and statutory agencies and impact on the level of confidence maintained between the Department and statutory agencies,
- disclosure would reasonably be expected to obstruct the future development of opinions and recommendations of Ministers from being honestly expressed in correspondence to the Prime Minister.

It is important that public servants and elected officials are able to give full and uncensored consideration to opinions, advice and outcomes during the deliberative and policy development process. In my view, the factors against disclosure of the material outweigh the factors in favour of disclosure. I have not taken into account any irrelevant considerations in accordance with section 11B(4) of the FOI Act. Accordingly, I am satisfied that the identified material within documents 1, 2, 3, 4, 8, 9, 10, 11, 12, 16, 18, 25, 26 and 27 and the entirety of documents 20, 21 and 22 is conditionally exempt pursuant to section 47C(1) of the FOI Act and that disclosure would be contrary to the public interest.

Public interest conditional exemption – certain operations of agencies (section 47E)

I have decided that documents 6, 20 and 22 are conditionally exempt under section 47E(d) of the FOI Act, which provides:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

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

I consider that disclosure of the documents could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Department in relation to policy advice. The documents were prepared by the Department for the Attorney-General to provide frank and honest advice on policy matters under consideration by the Department.

If parts of the documents were disclosed, I consider there could reasonably be expected to be a substantial adverse effect on the Department's ability to maintain a good working relationship with the Attorney-General by reducing confidence that the Department can effectively provide advice on sensitive matters that are under deliberation or yet to be finalised. Principal to this is the need to provide frank and honest advice on policy priorities and sensitive matters under consideration by the Department. In addition, the documents contain advice from departmental staff to senior management about matters that are contingent on decisions of Government and/or Parliament. Disclosing that advice at this stage may inhibit the willingness of departmental staff to prepare frank and honest briefing material on sensitive matters in future.

Accordingly, I am satisfied that Documents 6, 20 and 22 contain matter that, if released, could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the Department.

Subsection 11A(5) of the FOI Act provides that a conditionally exempt documents must be disclosed unless its release would be contrary to the public interest. Section 11B of the FOI Act lists the public interest factors favouring access. Of these factors, I consider one to be relevant: promoting the objects of the FOI Act.

Though the FOI Act does not list any specific factors weighing against disclosure, I have identified the following factors against disclosure: disclosure would have a detrimental effect on the policy development process, which requires the ability to explore sensitive issues with a reasonable expectation of confidentiality; and, disclosure may create a risk of future briefing material to senior management or the Attorney-General being tailored to a public audience, resulting in a loss of utility.

I consider that the disclosure of the documents would be against the public interest as their disclosure would compromise the Department's ability to function effectively and efficiently. The disclosure would affect the Department's ability to provide the Attorney-General with confidential and sensitive advice on matters relevant to the work of the Department. For these reasons I consider that disclosing the material in documents 6, 20 and 22 would, on balance, be contrary to the public interest. Under section 11B(4) of the FOI Act, I have ensured that no irrelevant factors have been considered in reaching this decision.

Public interest conditional exemption – personal privacy (section 47F)

Documents 1, 2, 3, 4, 8, 9, 10, 12, 15, 19, 23, 24 and 27 contain material that is conditionally exempt from disclosure under section 47F of the FOI Act. Section 47F states:

(1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

(2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:

- (a) the extent to which the information is well known;*
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*
- (c) the availability of the information from publicly accessible sources;*
- (d) any other matters that the agency or Minister considers relevant.*

The material identified is conditionally exempt under this provision because its release would, in my view, involve the unreasonable disclosure of personal information about certain identified individuals.

The material I have decided to exempt pursuant to section 47F is personal information concerning senior officers of this Department and its portfolio agencies, including mobile telephone numbers, landline telephone numbers, email addresses and details of personal leave. The release of this information would, in my view, involve unreasonable disclosure of personal information about those individuals. In deciding that the disclosure would be unreasonable, I have had regard to the matters listed in subsection 47F(2) and I have determined that this material is not well known and is not publicly available.

Subsection 11A(5) of the FOI Act provides that a conditionally exempt documents must be disclosed unless its release would be contrary to the public interest. Section 11B of the FOI Act lists the public interest factors favouring access. Of these factors, I consider one to be relevant: promoting the objects of the FOI Act.

Though the FOI Act does not list any specific factors weighing against disclosure, I have identified the following factors against disclosure: the specific harm caused by an unreasonable disclosure of personal information which could reasonably be expected to prejudice the protection of an individual's right to privacy.

In my view, the release of the material would breach the individuals' privacy without any significant countervailing benefits. Public interest factors in favour of disclosure, including the right of the public to access government-held information, are outweighed by the importance of maintaining an individual's right to privacy.

Accordingly I have decided that disclosure of the material would be contrary to public interest.

In accordance with subsection 11B(4) of the FOI Act, I have ensured that no irrelevant factors have been considered in reaching this decision. I am satisfied that material in documents 1, 2, 3, 4, 8, 9, 10, 12, 15, 19, 23, 24 and 27 is conditionally exempt under subsection 47F(1) of the FOI Act and that disclosure would be contrary to the public interest.

Your review rights

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the Attorney-General's Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, and be lodged in one of the following ways:

email: foi@ag.gov.au
post: Freedom of Information and Privacy Section
 Office of Corporate Counsel,
 Attorney-General's Department,
 3-5 National Circuit
 Barton, ACT 2600

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

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 this letter, and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review/>
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

Questions about this decision

If you wish to discuss this decision, please contact the Freedom of Information section by phone on (02) 6141 6666 or email at foi@ag.gov.au.

Yours sincerely



per

Petra Gartmann
Assistant Secretary

Attachments

- A. Schedule of documents
- B. Documents 1 – 5, 7 – 19 and 23 – 27