



**Australian Government**  
**Department of Employment  
and Workplace Relations**

Our Ref LEX 302

Mr Justin Warren

By email: [foi+request-8955-c14b3ef3@righttoknow.org.au](mailto:foi+request-8955-c14b3ef3@righttoknow.org.au)

Dear Mr Warren

**Your Freedom of Information request - decision**

I refer to your request, received by the former Department of Education, Skills and Employment on 28 May 2022, for access under the *Freedom of Information Act 1982* (FOI Act) to the following documents:

- *The business case document(s) (or equivalent) for the Points Based Activation System (<https://www.dese.gov.au/new-employment-services-model/resources/points-based-activation-system>), including any attachments. I request only the final version of the document(s) that were submitted for approval of the proposal.*

- *Documents constituting a risk register or equivalent documentation describing the risks from the proposal, risk ratings, proposed treatments and mitigations, etc. Where multiple versions of such documents exist (such as drafts) I only request two versions (if they are different):*

- 1. the version current when the proposal was submitted for approval, and*
- 2. the version current on 27 May 2022 at 9am Australia/Melbourne time.*

- *Documents, including emails, containing the submission of the proposal for consideration and approval.*

- *Meeting minutes or equivalent that document approval of the proposal.*

**Transfer of request**

As advised on 8 July 2022, due to recent machinery of government changes, from 1 July 2022, the former Department of Education, Skills and Employment became the Department of Education and a newly created department, the Department of Employment and Workplace Relations (department) assumed responsibility for the skills and employment portfolios. As the subject matter of your request is more closely connected with the department's functions, the department has accepted a full transfer of your request pursuant to section 16 of the FOI Act.

## My decision

The department holds 17 documents that fall within the scope of your FOI request.

I have decided to:

- grant you **access in full** to three documents (documents 1-3);
- grant you **access in part** to seven documents (documents 4 and 12-17) with some of the content removed; and
- **refuse access** in full to seven documents (documents 5-11).

I have decided that certain documents or parts of documents that you have requested are exempt under the FOI Act because they contain:

- Cabinet-related material (paragraphs 34(1)(a), 34(1)(d) and subsection 34(2));
- material which is subject to legal professional privilege (section 42 exemption);
- deliberative matter, the disclosure of which would be unreasonable and contrary to the public interest (section 47C conditional exemption); and
- material which, if released, would or could reasonably be expected to, have a substantial adverse effect on the operations of the department (subsection 47E(d) conditional exemption).

A schedule of the documents and the reasons for my decision are set out at **Attachment A**.

## Charge

On 16 June 2022, you were informed of the preliminary assessment of the charge payable to process your request in the amount of \$370.00. On 1 July 2022, the department received payment of a deposit of \$92.50.

I have assessed the charge under regulation 10 of the *Freedom of Information (Charges) Regulations 2019* and the cost of processing your request exceeded the amount estimated. Accordingly, I have fixed the charge under this provision.

## How we will send your documents

Documents 1-3 are **attached**.

We will send you documents 4 and 12-17 once you have paid us \$277.50, which is the balance of the outstanding charges for processing your request.

Payment can be made by credit card by completing the attached credit card authorisation and sending a scanned copy to [foi@dewr.gov.au](mailto:foi@dewr.gov.au).

If you are unable to pay by credit card, please contact us on the above email.

**You can ask for a review of my 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 by the department or an external review by the Australian Information Commissioner.

You can find information about your rights of review under the FOI Act, as well as information about how to make a complaint at **Attachment B**.

**Further assistance**

If you have any questions, please email [foi@dewr.gov.au](mailto:foi@dewr.gov.au).

Yours sincerely

*Claudia*

Claudia  
Authorised decision maker  
Department of Education, Skills and Employment

11 August 2022

**SCHEDULE OF DOCUMENTS – Justin Warren – LEX 302**

Number	Pages	Date	Description	Decision	Exemption	Comments
1	82	Undated	New Employment Services Model (Regulation Impact Statement)	Grant access in full		
2	2	3 May 2021	Deputy Secretary Smyth letter to Executive Director, Office of Best Practice Regulation	Grant access in full		
3	1	13 June 2022	Office of Best Practice Regulation letter to Deputy Secretary Smyth	Grant access in full		
4	24	28 June 2021	New Employment Services Trial Risk Management Plan 2019-2022	Grant access in part	S 22(1)(a)(ii), 47C, 47E(d)	Irrelevant material Deliberative material Certain operations of agencies information
5	14		Ministerial submission: The PBAS and Workforce Specialists on the NSEM, correspondence to the Prime Minister and attachments A, B and C	Refuse access	S 34(1)(a), 34(1)(d), 34(2), 47C	Cabinet related material  Deliberative matter
6	24		New Policy Proposal – New Employment Services Model	Refuse access	S 34(1)(d), 47C	Cabinet related material  Deliberative matter
7	8	20 May 2021	Employment Steering Committee: Point Based Activation System for the New Employment Services	Refuse access	S 34(2), 47C	Cabinet related material  Deliberative matter

			Model Activation Framework and Appendices A, B and C.			
8	11	24 June 2021	Employment Steering Committee: Point Based Activation System and Attachments A and B.	Refuse access	S 34(2), 47E(d)	Cabinet related material Certain operations of agencies information
9	13	5 August 2021	Employment Steering Committee: Point Based Activation System – Labour Market Credits and Appendices A and B.	Refuse access	S 34(2), 47E(d)	Cabinet related material Certain operations of agencies information
10	37	12 August 2021	Employment Steering Committee: Changes to the Job Plan for the New Employment Services Model (NESM) and Attachments A, B, C, D and E.	Refuse access	S 34(2), 42, 47C, 47E(d)	Cabinet related material Legal advice Deliberative material Certain operations of agencies information
11	7	19 August 2021	Joint Employment Steering Committee: Treatment of personal circumstances in the Points Based Activation System and Attachment A.	Refuse access	S 34(2), 47E(d)	Cabinet related material Certain operations of agencies information
12	3	4 November 2021	Email from FAs to MO – Following up on PBAS matters	Grant access in part	S 42; 47C; 47E(d)	Legal advice Deliberative material

						Certain operations of agencies information
13	4	20 May 2021	Joint Employment Steering Committee meeting minutes	Grant access in part	S22(1)(a)(ii), 47E(d)	Irrelevant material Certain operations of agencies information
14	7	24 June 2021	Employment Steering Committee meeting minutes	Grant access in part	S22(1)(a)(ii), 47E(d)	Irrelevant material Certain operations of agencies information
15	4	5 August 2021	Employment Steering Committee meeting minutes	Grant access in part	S22(1)(a)(ii), 47E(d)	Irrelevant material Certain operations of agencies information
16	4	12 August 2021	Employment Steering Committee meeting minutes	Grant access in part	S22(1)(a)(ii), 47E(d)	Irrelevant material Certain operations of agencies information
17	4	19 August 2021	Joint Employment Steering Committee meeting minutes	Grant access in part	S22(1)(a)(ii), 47E(d)	Irrelevant material Certain operations of agencies information

## REASONS FOR DECISION

### What you requested

- *The business case document(s) (or equivalent) for the Points Based Activation System (<https://www.dese.gov.au/new-employment-services-model/resources/points-based-activation-system>), including any attachments. I request only the final version of the document(s) that were submitted for approval of the proposal.*
- *Documents constituting a risk register or equivalent documentation describing the risks from the proposal, risk ratings, proposed treatments and mitigations, etc. Where multiple versions of such documents exist (such as drafts) I only request two versions (if they are different):*
  3. *the version current when the proposal was submitted for approval, and 2. the version current on 27 May 2022 at 9am Australia/Melbourne time.*
- *Documents, including emails, containing the submission of the proposal for consideration and approval.*
- *Meeting minutes or equivalent that document approval of the proposal.*

On 10 June 2022, the former Department of Education, Skills and Employment acknowledged receipt of your request and stated that it understood your request to be for:

*“The business case document(s) (or equivalent) for the Points Based Activation System (<https://www.dese.gov.au/new-employment-services-model/resources/points-based-activation-system>), including any attachments. I request only the final version of the document(s) that were submitted for approval of the proposal”.*

We have interpreted this as referring to the final version of the documents, including any attachments, that the department submitted for the final approval of the Points Based Activation System as part of the New Employment Services Model.

*“Documents constituting a risk register or equivalent documentation describing the risks from the proposal, risk ratings, proposed treatments and mitigations, etc. Where multiple versions of such documents exist (such as drafts) I only request two versions (if they are different): the version current when the proposal was submitted for approval, and 2. the version current on 27 May 2022 at 9am Australia/Melbourne time”.*

*“Documents, including emails, containing the submission of the proposal for consideration and approval”.*

We have interpreted this as referring to documents, including emails, containing the submission of the final proposal for approval of the Points Based Activation System as part of the New Employment Services Model.

*“Meeting minutes or equivalent that document approval of the proposal”.*

We have interpreted this as referring to meeting minutes (or equivalent documents) that document the approval of the department’s final proposal to proceed with the Points Based Activation System as part of the New Employment Services Model.

On 13 June 2022, in your email response to the former Department of Education, Skills and Employment, you stated that “the scope you have identified appears to be accurate based on the information that is publicly available about what the PBAS program is called”.

On 10 June 2022, you were informed that staff names, signatures, position titles, identification numbers and contact details would be treated as irrelevant in accordance with section 22 of the FOI Act unless you advised otherwise. On 13 June 2022, you advised that the scope of your request includes those staff details.

### **What I took into account**

In reaching my decision, I took into account:

- your request dated 28 May 2022
- correspondence with you, including the department’s email correspondence with you regarding the interpretation of the scope of your request
- the documents that fall within the scope of your request
- the Department of Prime Minister and Cabinet Handbook
- consultation with the Department of Prime Minister and Cabinet on documents containing Cabinet-related material
- consultations with departmental officers about the nature of the documents and the operating environment and functions of the department
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines)
- the *Freedom of Information (Charges) Regulations 2019*
- the FOI Act
- the general body of law relevant to my decision, including various decisions of Commissioners of the Office of the Australia Information Commissioner and the Administrative Appeals Tribunal.



## Reasons for my decision

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

I have decided that certain documents and/or parts of documents that you requested are exempt under the FOI Act. My findings of fact and reasons for deciding that an exemption applies to those documents are discussed below.

### Section 22 of the FOI Act: access to edited copies with irrelevant matter deleted

I have decided that some of the documents falling within the scope of your request contain exempt or irrelevant material. In this regard, section 22 of the FOI Act provides that:

#### Scope

- (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
  - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
    - (i) the nature and extent of the modification; and
    - (ii) the resources available to modify the document; and
  - (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

#### Access to edited copy

- (2) The agency or Minister must:
  - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
  - (b) give the applicant access to the edited copy.

In accordance with section 22 of the FOI Act, I have deleted exempt material from the pages identified in the Schedule of Documents and have decided to release the remaining material to you.

## Section 34 of the FOI Act: Cabinet documents

Section 34 of the FOI Act provides that:

(1) A document is an exempt document if:

(a) both of the following are satisfied:

(i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;

(ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or

...

(d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

(2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.

In accordance with paragraph 5.57 of the FOI Guidelines and the Department of Prime Minister and Cabinet Handbook, I have consulted with the Department of the Prime Minister and Cabinet on certain material identified as being exempt under section 34 of the FOI Act. The Department of the Prime Minister and Cabinet has confirmed its support for the exemption of this material, subject to me, as the FOI decision maker, satisfying myself of certain matters as outlined in section 34 of the FOI Act.

In this regard, paragraph 5.64 of the FOI Guidelines provides that, to be exempt under paragraph 34(1)(a) of the FOI Act, a document must have been created for the dominant purpose of being submitted for Cabinet's consideration and must have actually been submitted or have been proposed by a sponsoring Minister to be submitted. Paragraph 5.67 further provides that whether a document has been prepared for the dominant purpose of submission to Cabinet is a question of fact. The relevant time for determining the purpose is the time the document was created.

I have decided that parts of document number five (including attachments) are exempt from release under paragraph 34(1)(a) of the FOI Act. I have considered the purpose and content of the material in question and am satisfied that it was submitted to the Cabinet for its consideration and further, it was created for the dominant purpose of submission for consideration by the Cabinet. Both the departmental line area and the Department of the Prime Minister and Cabinet have confirmed that the material in question was submitted to the Cabinet for its consideration. Accordingly, that material is exempt under paragraph 34(1)(a) of the FOI Act.

I have decided that some material contained in documents five and six is exempt from release under paragraph 34(1)(d) of the FOI Act, as identified in the Schedule of Documents. Based on my review of this material, advice provided by departmental officers with responsibility for matters to which the material relates, as well as advice received from the

Department of the Prime Minister and Cabinet, I am satisfied that the material in question was proposed to be submitted to the Cabinet for its consideration and was brought into existence for the dominant purpose of submission for consideration by the Cabinet. As the documents contain draft material to which paragraph 34(1)(a) applies, I have decided to refuse access to it pursuant to paragraph 34(1)(d) of the FOI Act.

I have decided that some material contained in documents five and 7-11 is exempt in full under subsection 34(2) of the FOI Act, as identified in the Schedule of Documents. The material in question consists of extracts of documents which were submitted to the Cabinet for its consideration. Based on my review of these documents, advice provided by departmental officers with responsibility for matters to which the documents relate, as well as advice received from the Department of the Prime Minister and Cabinet, I have decided that the material in question is exempt in full pursuant to subsection 34(2) of the FOI Act.

#### Section 42 – legal professional privilege

Subsection 42(1) of the FOI Act provides that:

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.

Paragraph 5.129 of the FOI Guidelines provides that 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; and
- whether the advice given is confidential.

I have decided that some material contained in documents 10 and 12 is exempt from release pursuant to subsection 42(1) of the FOI Act. The material consists of legal advice which was prepared by legal advisers acting in their professional capacity and pursuant to a legal adviser-client relationship. The legal advice in question was obtained by the department from an external legal firm for the dominant purpose of giving or receiving independent legal advice. Furthermore, I am satisfied that the material in question consists of confidential legal communications which have not been disclosed.

For those reasons, I am satisfied that the relevant material meets the requirements to satisfy a claim of legal professional privilege and is therefore exempt under subsection 42(1) of the FOI Act.

## Section 47C of the FOI Act – Deliberative matter

Subsection 47C(1) of the FOI Act provides that:

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...

The FOI Guidelines state at paragraphs 6.52 to 6.88 that the main requirements of this conditional exemption are that:

- a document contains or relates to ‘deliberative matter’ that was prepared for a ‘deliberative purpose’ (subsection 47C(1));
- a document contains material that is not ‘purely factual’ or non-deliberative (subsection 47C(2)); and
- it would be ‘contrary to the public interest’ to give access at this time (subsection 11A(5)).

At paragraph 6.66, the FOI Guidelines state that material that is not deliberative matter, where not already excluded as operational information, purely factual material or a scientific report would include:

- content that is merely descriptive;
- incidental administrative content;
- procedural or day to day content;
- the decision or conclusion reached at the end of the deliberative process; and
- matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.

Furthermore, at paragraph 6.73, the FOI Guidelines state that ‘purely factual material’ does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.

The material I have identified in the Schedule of Documents as conditionally exempt under subsection 47C(1) of the FOI Act consists of opinions, advice and/or recommendations provided in the course of preparing the risk management plan for the New Employment Services Trial. It includes deliberations and opinions concerning the causes of identified risk events, opinions or recommendations as to risk ratings and the likelihood of identified risks eventuating, and certain risk treatments.

I have also identified material in other documents as conditionally exempt under subsection 47C(1) of the FOI Act, as referenced in the Schedule of Documents, which is closely connected to the Cabinet submission discussed above. This material contains high-level strategic advice on matters which were intended to be submitted to, and deliberated upon by the Cabinet. To the extent that there is information contained in the documents which could be characterised as being purely factual in nature, I consider that such information is so intertwined with the deliberative material that it cannot reasonably be separated. I also consider that this information forms an integral part of the deliberative content and purpose of the documents.

Under subsection 11A(5) of the FOI Act, the department must give you access to this material unless it would be, on balance, contrary to the public interest to do so. I have considered the public interest factors below under the heading 'Public Interest'.

#### Subsection 47E(d) of the FOI Act – Certain operations of agencies

Section 47E of the FOI Act relevantly provides that:

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.

Paragraph 6.123 of the FOI Guidelines provides that with respect to the conditional exemption under subsection 47E(d) of the FOI Act, the predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner.

I have decided to conditionally exempt some material pursuant to subsection 47E(d) of the FOI Act, including material contained in documents 4 and 8-13 as referred to in the Schedule of Documents.

I have conditionally exempted certain material under subsection 47E(d) of the FOI Act as it consists of opinions and/or hypotheses on the likely causes of identified risk events, judgments concerning the inherent and residual risk ratings, as well as the likelihood of those risks eventuating. In my view, release of this material could potentially expose certain vulnerabilities, and compromise the department's systems and strategies for managing identified risks, which would have a detrimental effect on the department's proper and efficient operations. If released, the material in question could also be reverse engineered and potentially have an adverse effect on the operations of the department, for example, through the targeted exploitation of identified vulnerabilities.

I have also decided that the names and contact details of certain departmental employees are also conditionally exempt under subsection 47E(d) of the FOI Act. I have conditionally exempted this material as there are established processes in place for members of the public to contact the department, and these processes and mechanisms are publicly available. This enables the department to manage the safety of its employees, as well as the volume of correspondence and communication received by the department. It also ensures that enquiries are directed to, and handled by, staff with the appropriate experience and expertise to respond to those enquiries. These methods include dedicated telephone numbers, email addresses and postal addresses, as well as other online mechanisms.

In my view, the release of this material could reasonably be expected to circumvent the established methods for contacting the department, allowing members of the public to contact certain staff directly, thereby causing disruption to the department's usual operations. Noting that the FOI Act does not control or restrict any subsequent use or dissemination of information released, I consider that such disruptions caused by the release of this information would, or could reasonably be expected to, cause inefficiencies, including potential work health and safety risks to staff. This could reasonably be expected to have an adverse effect on the proper and efficient conduct of some of the department's crucial functions. For those reasons, I have decided that staff names and contact details are conditionally exempt under subsection 47E(d) of the FOI Act.

As required by section 11A(5) of the FOI Act, I have considered the public interest below.

### *Public interest*

Section 11A(5) of the FOI Act provides:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

When weighing the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would:

- promote the objects of the FOI Act
- inform debate on a matter of public importance being the Points Based Activation System
- promote effective oversight of public expenditure
- advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies

In relation to the material that is closely connected to the Cabinet submission, I note that in the Department of Prime Minister and Cabinet Handbook, Cabinet proceedings and documentation must remain confidential so that Ministers can discuss proposals, options and views with complete freedom. I have also considered the extent to which disclosure of the material in question could reasonably be expected to:

- compromise the confidentiality of the Cabinet deliberations and convention of collective Ministerial responsibility
- undermine the ability of the department allow the exploration and development of sensitive policy issues for submission to the Cabinet
- inhibit the department's frankness and candour in providing a full range of strategic options on policy issues
- prejudice the proper and efficient operations of the department, including by revealing certain risks and vulnerabilities that could be deliberately exploited, and bypassing existing mechanisms for contacting the department.

Based on these factors, I have decided that, in this instance, the public interest in disclosing the information 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.

### *Conclusion*

In summary, I am satisfied that the documents or parts of documents, as set out in the Schedule of Documents, are conditionally exempt under subsections 47C and 47E(d) of the FOI Act. Furthermore, I have decided that, on balance, it would be contrary to the public interest to release that material to you. Accordingly, I have deleted the exempt material and released the remaining material to you in accordance with section 22 of the FOI Act.

## YOUR RIGHTS OF REVIEW

### Asking for a formal review of an FOI decision

If you still believe this decision is incorrect, the 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:

- an internal review officer in the department and/or
- the Australian Information Commissioner.

There are no fees for applying for a formal review.

### Applying for an internal review by an internal review officer

If you apply for internal review, a different decision maker to the decision maker who made the original decision will review your request. The internal review decision maker will consider all aspects of the original decision afresh and decide whether the decision should change.

An application for internal review must be made in writing within 30 days of receiving this letter. You can lodge your application by emailing [foi@dewr.gov.au](mailto:foi@dewr.gov.au)

### 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 in one of the following ways:

Online:

[https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)

Email: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

Post: Australian Information Commissioner  
GPO Box 5218  
SYDNEY NSW 2001



## **Complaints to the Australian Information Commissioner**

### *Australian Information Commissioner*

You may complain to the Australian Information Commissioner about action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

A complaint to the Australian Information Commissioner must be made in writing and can be lodged in one of the following ways:

Online:

[https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA\\_1](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1)

Email: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

Post: Australian Information Commissioner  
GPO Box 5218  
SYDNEY NSW 2001