



Australian Government

Department of Health and Aged Care

FOI reference: FOI- 3875

JH (Right to know)
foi+request-9182-84f8fb39@righttoknow.org.au

Dear JH

Decision on your Freedom of Information Request

I refer to your request received on 26 July 2022 to the Department of Health and Aged Care (the department), seeking access under the *Freedom of Information Act 1982* (Cth) (FOI Act) to:

Incoming government briefs provided from the Department to its respective Ministers since 21 May 2022.

I am authorised under subsection 23(1) of the FOI Act to make decisions in relation to Freedom of Information requests. I am writing to notify you of my decision on your request.

FOI decision

I have identified one document that is relevant to your request. This document was in the possession of the department when your request was received.

I have decided to give access to the document in part, subject to the deletion of exempt material under section 47C and 47E of the FOI Act.

My reasons for not providing access to material that has been deleted from the documents are set out in **ATTACHMENT A**.

Legislative provisions

The FOI Act, including the provisions referred to in my decision, are available on the Federal Register of Legislation website: www.legislation.gov.au/Series/C2004A02562

Your review rights

I have set out your review rights at **ATTACHMENT B**.

Publication

Where I have decided to release documents to you, the department may also publish the released material on its Disclosure Log. The department will not publish personal or business affairs information where it would be unreasonable to do so.

For your reference the department's Disclosure Log can be found at:
www.health.gov.au/resources/foi-disclosure-log

Contacts

If you require clarification of any matters discussed in this letter you can contact the FOI Unit on (02) 6289 1666 or at FOI@health.gov.au

Yours sincerely



Jodie Grieve

Acting First Assistant Secretary
People, Communication & Parliamentary Division

1 August 2022

REASONS FOR DECISION
FOI- 3875

1. Material taken into account

In making my decision, I had regard to the following:

- the FOI Act
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act
- the terms of your FOI request as outlined above
- the content of the documents sought
- advice from departmental officers with responsibility for matters relating to the documents sought

2. Finding of facts and reasons for decision

My findings of fact and reasons for deciding that the exemptions identified in the schedule of documents apply to the relevant document are set out below.

3. Section 22 - deletion of irrelevant and/or exempt material

Section 22 of the FOI Act applies to documents containing exempt material (subparagraph (1)(a)(i)) and irrelevant information (subparagraph (1)(a)(ii)) and allows an agency to delete such material from a document.

The documents contain the names and telephone numbers of Department of Health employees. When your request was acknowledged, we notified you that this material would be considered irrelevant to the scope of your request unless you told us that you were seeking access to that material. On the basis that you did not notify us otherwise, this information has been deleted under section 22 of the FOI Act as outlined above.

As I have decided that some of the information in the documents released to you is exempt from disclosure, I have prepared an edited copy of the document(s) by deleting the exempt information from the documents under section 22 of the FOI Act as outlined above.

4. Section 47C - Deliberative processes

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure 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 an agency or a Minister or the Government of the Commonwealth.

Deliberative process

Paragraph 6.58 of the FOI Guidelines states that deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

Paragraph 6.59 of the FOI Guidelines states that the '*deliberative process*' generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – such as the process of reflecting upon the wisdom and expediency of a proposal, a particular decision or a course of action.

Deliberative matter

Paragraph 6.63 of the FOI Guidelines states that '*deliberative matter*' is a shorthand term for 'opinion, advice and recommendation' and 'consultation and deliberation' that is recorded or reflected in a document. There is no reason generally to limit the ordinary meanings given to the words 'opinion, advice or recommendation, consultation or deliberation'.

The document contains advice, opinions and recommendations prepared or recorded in the course of, or for the purposes of, the deliberative processes involved in the functions of the department.

In the Administrative Appeals Tribunal decision of *Wood; Secretary, Department of the Prime Minister & Cabinet and (Freedom of Information)* [2015] AATA 945, Forgie DP explained that the words 'opinion', 'advice' and 'recommendation' all involve consideration, followed by the formation of a view either about a certain subject or about a course of action and the subsequent transmission of that view.

I am satisfied that the document contains material that meets the criteria of deliberative matter pursuant to section 47C of the FOI Act, and that this material forms part of a deliberative process. The document sets out the weighing up and evaluation of competing arguments and can be characterised as the thinking process of the department or the process of reflection upon the wisdom and expediency of a particular proposal.

Purely factual material

Paragraphs 6.73 and 6.74 of the FOI Guidelines state that:

6.73 '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.

6.74 Where a decision maker finds it difficult to separate the purely factual material from the deliberative matter, both the elements may be exempt. If the two elements can be separated, the decision maker should consider giving the applicant a copy with deletions under s 22 to provide access to the purely factual material.

I am satisfied that that while the relevant document contains some 'purely factual material', that information is central to the content and purpose of the deliberative processes. Further, I consider that the factual material is inextricably linked to deliberations involved in determining the advice to the Minister, the factual material is central to the content and purpose of the deliberative material, and it would be difficult to separate it. For the reasons outlined above, I have decided that the document is conditionally exempt from disclosure under section 47C of the FOI Act.

Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

5. Documents affecting certain operations of agencies

Section 47E(d) of the FOI Act provides that a document is conditionally exempt if its disclosure would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Paragraph 6.120 of the FOI Guidelines states:

An agency's operations may not be substantially adversely affected if the disclosure would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient. For example, in *Re Scholes and Australian Federal Police* [1996] AATA 347, the AAT found that the disclosure of particular documents could enhance the efficiency of the Australian Federal Police as it could lead to an improvement of its investigation process.

Paragraph 6.123 of the FOI Guidelines states that the predicted effect must bear on the department's 'proper and efficient' operations, that is, the department is undertaking its expected activities in an expected manner. Where disclosure of a document reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

I am satisfied that the document contains information which, if disclosed, would or could reasonably be expected to, have a substantial and an unreasonable effect on the department's proper and efficient operations. These are operational activities that are being undertaken in an expected and lawful manner and would not reveal inefficiencies in the way in which the department conducts those operational activities.

Managing the department's responsibility for delivering affordable, quality health and aged care for all Australians and better sport outcomes is integral to the operations of the department. Any prejudice to the effectiveness of the operational methods and procedures used in undertaking that role would result in a substantial adverse effect on the operations of the department.

Having regard to the above, and having consulted with senior officers within the department, I am satisfied that disclosure of the document would inhibit the department's ability to provide effective and comprehensive incoming government briefs in the future. It is an operational requirement of the department to provide comprehensive briefing to an incoming Minister following appointment. Failure to do

so would impair the Minister's ability to inform Parliament of the actions and policies of the department and the wider portfolio. Further, failure to provide comprehensive briefings would reasonably be expected to interfere with the effectiveness of the relationship between the department and the incoming government, which is central to the proper and efficient functioning of the department and the Australian Government more broadly. For the reasons outlined above, I have decided that the document is conditionally exempt from disclosure under section 47E(d) of the FOI Act.

Where a document is found to be conditionally exempt, the department must give access to that document unless access to the document at this time would, on balance, be contrary to the public interest. I have addressed the public interest considerations below.

6. Disclosure is not in the public interest

As noted above, pursuant to subsection 11A(5) of the FOI Act, the department must give access to conditionally exempt documents unless access to the documents at that time would, on balance, be contrary to the public interest. I have therefore considered whether disclosure of the document would be contrary to the public interest.

Paragraph 6.5 of the FOI Guidelines states:

The public interest test is considered to be:

- something that is of serious concern or benefit to the public, not merely of individual interest
- not something of interest to the public, but in the interest of the public
- not a static concept, where it lies in a particular matter will often depend on a balancing of interests
- necessarily broad and non-specific and
- relates to matters of common concern or relevance to all members of the public, or a substantial section of the public.

Factors favouring disclosure

Section 11B of the FOI Act provides that factors favouring access to documents in the public interest include whether access to the documents would do any of the following:

- promote the objects of the FOI Act (including all matters set out in sections 3 and 3A)
- inform debate on a matter of public importance
- promote effective oversight of public expenditure, or
- allow a person to access his or her own personal information.

Having regard to the above, I consider that disclosure of the document at this time:

- would provide access to a document held by an agency of the Commonwealth which would promote the objects of the FOI Act by providing the Australian community with access to information held by the Australian Government
- would inform debate on a matter of public importance
- would provide limited insight into public expenditure, and
- would not allow you access to your own personal information.

Factors weighing against disclosure

I consider that the following public interest factors weigh against disclosure of the conditionally exempt information at this time, on the basis that disclosure:

- could reasonably be expected to prejudice the ability of the department to provide full and frank advice to incoming Ministers 'at a critical juncture in the system of responsible parliamentary government'¹
- could reasonably be expected to prejudice the early developmental stages of forming and communicating opinion, advice and recommendations during deliberative processes by creating an environment in which there is a chilling effect on the open consideration of all options that have potential to be put forward
- could reasonably be expected to prejudice the department's ability to provide similar information in the future as the advice, opinion and recommendations recorded in the documents were given and received with an expectation that the audience would be limited to the Minister, and
- could adversely impact a productive, trusting and effective relationship between a Minister and his or her department.

I consider that any perceived benefit to the public from the disclosure of the information would be outweighed by the benefit to the public of maintaining the confidentiality of that information and refusing access to it.

In making my decision, I have not taken into account any of the irrelevant factors set out in subsection 11B(4) of the FOI Act, which are:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government
- (b) access to the document could result in any person misinterpreting or misunderstanding the document

¹ *Dreyfus and Secretary, Attorney-General's Department* [2015] AATA 962 [117]

(c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made

(d) access to the document could result in confusion or unnecessary debate.

Conclusion

For the reasons set out above, after weighing all public interest factors for and against disclosure, I have decided that, on balance, disclosure of the conditionally exempt information would be contrary to the public interest. I am satisfied that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information.

YOUR REVIEW RIGHTS

If you are dissatisfied with my decision, you may apply for a review.

Internal review

You can request internal review within 30 days of you receiving this decision. An internal review will be conducted by a different officer from the original decision-maker.

No particular form is required to apply for review although it will assist your case to set out the grounds on which you believe that the original decision should be changed.

Applications for internal review can be made by:

Email: FOI@health.gov.au

Mail: FOI Unit (MDP 516)
 Department of Health
 GPO Box 9848
 CANBERRA ACT 2601

If you choose to seek an internal review, you will also have a right to apply for Information Commissioner review (IC review) of the internal review decision once it has been provided to you.

Information Commissioner review or complaint

You also have the right to seek Information Commissioner (IC) review of this decision. For FOI applicants, an application for IC review must be made in writing within 60 days of the decision. For third parties who object to disclosure of their information, an application for IC review must be made in writing within 30 days of the decision.

If you are not satisfied with the way we have handled your FOI request, you can lodge a complaint with the OAIC. However, the OAIC suggests that complaints are made to the agency in the first instance.

While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way your request was processed. It should also identify the Department of Health and Aged Care as the agency about which you are complaining.

You can make an IC review application or make an FOI complaint in one of the following ways:

- online at www.oaic.gov.au/freedom-of-information/reviews-and-complaints/
- via email to foidr@oaic.gov.au
- by mail to GPO Box 5218 Sydney NSW 2001, or
- by fax to 02 9284 9666.

More information about the Information Commissioner reviews and complaints is available on the OAIC website here: www.oaic.gov.au/freedom-of-information/foi-review-process.

Complaint

If you are dissatisfied with action taken by the department, you may also make a complaint directly to the department.

Complaints to the department are covered by the department's privacy policy. A form for lodging a complaint directly to the department is available on the department's website here: www.health.gov.au/about-us/contact-us/complaints