



Australian Government
Department of Finance

Reference: FOI 22/57
Contact: FOI Team
E-mail: foi@finance.gov.au

BE
Right to Know

By email only: foi+request-9226-8303617d@righttoknow.org.au

Dear BE

Freedom of Information Request – FOI 22/57

On 4 August 2022, the Department of Finance (Finance) received your email, in which you sought access under the Commonwealth *Freedom of Information Act 1982* (FOI Act) to the following:

[The] Question Time briefs (however described). This request is limited to Question Time briefs for the 47th Parliament (ie Question Time briefs prepared for 27 – 28 July and 1-4 August).

I also request a copy of the Department's current index of Question Time briefs.

Duplicate copies of the same document are not required, although different or updated versions of a document are. If a document contains tracked changes or comments, it is requested that the document be provided in a form where all tracked changes and comments are visible.

Names and contact details for departmental staff below the SES level are not required and can be treated as irrelevant under s22 of the Act for the purposes of this request.

On 19 August 2022, Finance sent you a request consultation notice, which set out that on the basis of your request including draft versions of QTB's that a practical refuse reason existed, being that the work involved in processing your request would substantially and unreasonably divert the resources of Finance from its other operations.

The same day you responded amending the scope of your request by removing draft documents.

Based upon the amended scope, I considered that the practical refusal reason no longer existed, and Finance could process your request.

The purpose of this letter is to provide you with notice of my decision under the FOI Act.

Decision

I have identified **35** documents as falling within the scope of your request.

I have decided to:

- release **12** documents,
- release **19** documents with irrelevant information redacted, and
- release **4** documents with irrelevant and exempt information redacted on the basis of the following exemptions being that the documents would reveal legally privileged material and would breach confidence.

The documents and redactions are identified in the Schedule at **Attachment A**.

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

- the terms of your FOI request;
- the content of the documents that fall within the scope of your request;
- consultations with third parties in accordance with the FOI Act and submissions made by those third parties;
- the relevant provisions of the FOI Act; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines).

Authorised decision-maker

I am authorised by the Secretary of Finance to grant or refuse access to documents.

Exempt or irrelevant matter removed from the documents

I have redacted irrelevant and exempt information from the documents and released the edited form of the documents to you.

Information removed as it contains legally privileged material

Section 42 of the FOI Act provides:

- (1) 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.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

The FOI Guidelines provide:

5.129 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
- whether the advice given is confidential.

Finance (through Comcover) manages certain types of claims against the Commonwealth on behalf of Fund Members. Comcover defends or settles claims informed by legal advice. Comcover manages all claims in a manner that is consistent with its obligations under the *Legal Services Directions 2017*, as administered by the Attorney-General's Department.

Finance obtained independent confidential legal advice from the Australian Government Solicitors (AGS) who are an external agency to Finance that provided high-quality legal advice.

In relation to Documents 19 and 26, Finance obtained legal advice from AGS. This legal advice was incorporated within the QTB's to provide the Minister with additional information regarding the progress of the matters.

The information was only disclosed to a limited audience, being the Minister for Finance and her Office, who had a mutual interest in the contents of the legal advice. The legal advice has not been circulated further than was necessary, and only a limited number of people have access to the documents. As such, I consider that Finance has acted consistently with the claim of confidentiality and have not waived our legal privilege.

I consider that the release of the sections redacted in Documents 19 and 26 would reveal material privileged from production in legal proceedings on the ground of legal professional privilege, and accordingly, that material is exempt from release under section 42 of the FOI Act.

Information removed as it contains confidential material

Subsection 45(1) of the FOI Act provides:

A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.

This exemption applies if a person who provided confidential information would be able to bring an action for breach of confidence to prevent disclosure, or to seek compensation for loss, or damage arising from disclosure.

The FOI Guidelines provide:

5.159 To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:

- it must be specifically identified
- it must have the necessary quality of confidentiality
- it must have been communicated and received on the basis of a mutual understanding of confidence
- it must have been disclosed or threatened to be disclosed, without authority
- unauthorised disclosure of the information has or will cause detriment.

Document 5

Document 5 contains a QTB on the Live Cattle Export Ban Class Action, which contains specifically identifiable information that was obtained as part of ongoing 'without prejudice' confidential discussions between the Commonwealth's legal representatives and claimants that was communicated and received on the basis of a mutual understanding of confidence. The information remains within the knowledge of only a limited group of people.

Document 7

ASC Pty Ltd (ASC) and the Commonwealth (represented by the Department of Defence) are contractually bound to not disclose commercial-in-confidence information, which specifically identifies pricing information, without the prior written consent of the other party, or otherwise in the limited circumstances set out in the contract, none of which are relevant to this request.

This pricing information has the necessary quality of confidentiality as it constitutes commercially sensitive information, which is classified under the contract as commercial in confidence information that must not be disclosed except as authorised. Neither ASC, nor the Commonwealth, have authorised the disclosure of the pricing information. ASC has expressly opposed such disclosure.

The pricing information has been communicated and received on a mutual understanding of confidence. Both parties have treated the information with the strictest confidence and not disclosed it, in accordance with the terms of the contract.

The disclosure of the information would be detrimental to ASC as pricing information is commercially sensitive and such disclosure would provide third parties with an unfair insight into ASC's pricing and assist third parties to compete against ASC for naval shipbuilding work.

Document 26

Document 26 contains a QTB on a Comcover claim made by Ms Rachelle Miller, formerly employed under the *Members of Parliament (Staff) Act 1982* (MOP(S) Act).

The information is specifically identifiable as it was obtained as part of ongoing confidential discussions between the Commonwealth's legal representatives and Ms Miller's lawyers and has been communicated and received on the basis of a mutual understanding of confidence.

Further, given the sensitivities involved in Comcover claims, I consider breaching Ms Miller's confidence would cause significant detriment to both her, and others claimants who have, or may in the future, provide information to the Commonwealth in relation to Comcover claim.

Disclosure

The Commonwealth breaching its obligations of confidentiality by releasing Documents 5, 7 or 26 would enable the other parties to bring an action for breach of confidence to prevent disclosure, or to seek compensation for loss, or damage arising from disclosure.

The information in all three documents was only disclosed to a limited audience, being the Minister for Finance and her Office, who are responsible for Finance's portfolio.

The release of the information redacted in Documents 5, 7 and 26 would found an action for breach of confidence, and accordingly, I consider that information is exempt from release under section 45 of the FOI Act.

Third party consultation

Finance consulted with ASC Pty Ltd, who objected to the disclosure of their pricing information contained in Document 7, under sections 45, 47 and 47G of the FOI Act.

Additional exemptions

I consider that the redacted material would also be exempt under sections 47, 47E(d), 47F, and 47G of the FOI Act. As I consider the material is already exempt under another exemption (i.e. section 42 or 45), it is not necessary for me to exempt the material under other sections of the FOI Act.

Charges

I have decided that a charge is not payable in this matter.

Review and appeal rights

You are entitled to request an internal review or an external review by the Office of the Australian Information Commissioner (OAIC) of my decision. The process for review and appeal rights is set out at **Attachment B**.

Publication

Finance will publish the documents released to you on our [Disclosure Log](#). Finance's policy is to publish the documents within one working day after they are released to you.

If you have any questions in regards to this request, please contact the FOI Team on the above contact details.

Yours sincerely,



Ian Nicholas
Assistant Secretary
Parliamentary and Corporate Engagement | Corporate Services
Department of Finance
4 October 2022

SCHEDULE OF DOCUMENTS RELEVANT TO FOI 22/57

Document No.	No. of Pages	Description of Document	Decision
1.	3	QTB Index	Release – irrelevant information (s22) redacted
2.	4	Advance to the Minister	
3.	7	AFP Matter	
4.	3	ASL – Election Commitment – Public Sector Staffing	Release
5.	7	Brett Cattle - Live Cattle Export Ban Class Action	Release – irrelevant information (s22) and exempt information (s45) redacted
6.	7	Buy Australia - Future Made in Australia Office	Release – irrelevant information (s22) redacted
7.	8	Collins Submarines – ASC: Life of Type Extension (LOTE) To the Collins Class Submarines	Release – exempt information (s45) redacted
8.	3	COVID-19 Advertising Campaign	Release
9.	5	COMCAR Fleet – Electric Vehicle Trial	Release – irrelevant information (s22) redacted
10.	3	MOP(S) Training and L&D – Parliamentarian and MOP(S) Act Employee learning and Development	
11.	2	Data Scheme – Implementing the Data Availability and Transparency Act 2022	
12.	6	Economic Conditions and Outlook	
13.	3	Parliamentary Expenses Management System (PDMS)	
14.	2	Review of the Parliamentary Business Resources Act and IPEA Act	Release
15.	9	Financial Reporting – Monthly Financial Statements – Year to Date Results	Release – irrelevant information (s22) redacted
16.	3	Future Fund ESG Issues	
17.	4	GRANTS – ANAO Report on the Building Better Regions Fund	Release
18.	4	Inland Rail – Australian Rail Track Corporation (ARTC)	Release – irrelevant information (s22) redacted
19.	4	Land Acquisition Matters	Release – exempt information (s42) redacted

20.	7	Machinery of Government Changes Implementation	Release
21.	4	National Intermodal – Development of Intermodal Terminals in Victoria and Queensland	Release – irrelevant information (s22) redacted
22.	4	NBN Co Current Issues	
23.	5	NEW SPRS – Updated Commonwealth Procurement Rules	
24.	3	QBT Wait Times and Delays	
25.	9	Quarantine – Purpose-Built Quarantine Centres	Release
26.	9	Claim from Rachelle Miller	Release – irrelevant information (s22) and exempt information (s42 and s45) redacted
27.	2	Regulatory Reform	Release – irrelevant information (s22) redacted
28.	10	Snowy Hydro Current Issues	
29.	16	Superannuation Salary – Rent Free Housing	Release
30.	3	Election Commitment – Audit of Wasteful Spending	
31.	4	Australian Naval Infrastructure (ANI) Current Issues	
32.	5	Judges Pensions Scheme	
33.	2	Demographic DATA for MOP(S) Act Employees	
34.	3	Parliamentarians’ Remuneration	Release – irrelevant information (s22) redacted
35.	1	New Zealand Citizens Voting in Australian Elections	Release



Australian Government

Department of Finance

Freedom of Information – Your Review Rights

If you disagree with a decision made by the Department of Finance (Finance) or the Minister for Finance (Minister) under the *Freedom of Information Act 1982* (the FOI Act) you can have the decision reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request, if you have made a contention against the release of the documents that has not been agreed to by Finance or the Minister, or if your application to have your personal information amended was not accepted. There are two ways you can seek a review of our decision: an internal review (IR) by Finance or the Minister, or an external review (ER) by the Australian Information Commissioner (IC).

Internal Review (IR)

If, Finance or the Minister (we/our), makes a Freedom of Information (FOI) decision that you disagree with, you can seek a review of the original decision. The review will be carried out by a different decision maker, usually someone at a more senior level.

You must apply for an IR within 30 calendar days of being notified of the decision or charge, unless we agree to extend your time. You should contact us if you wish to seek an extension.

We are required to make an IR decision within 30 calendar days of receiving your application. If we do not make an IR decision within this timeframe, then the original decision stands.

Review by the Australian Information Commissioner (IC)

The Office of the Australian Information Commissioner (OAIC) is an independent office who can undertake an ER of our decision under the FOI Act. The IC can review access refusal decisions, access grant decisions, refusals to extend the period for applying for an IR, and IR decisions.

If you are objecting to a decision to refuse access to a document, impose a charge, or a refusal to amend personal information, you must apply in writing to the IC within 60 calendar days of receiving our decision.

Third parties

If you are a third party objecting to a decision to grant someone else access to your information, you must apply to the IC within 30 calendar days of being notified of our decision to release your information. Further assistance is located [here](#).

Do I have to go through the internal review process?

No. You may apply directly to the OAIC for an ER by the IC.

If I apply for an internal review, do I lose the opportunity to apply for an external review?

No. You have the same ER rights of our IR decision as you do with our original decision. This means you can apply for an ER of the original decision or of the IR decision.

Do I have to pay for an internal review or external review?

No. Both the IR and ER are free.

How do I apply?

Internal review

To apply for an IR of the decision of either Finance or the Minister, you must send your review in writing. We both use the same contact details, and you must send your review request in writing.

In your written correspondence, please include the following:

- a statement that you are seeking a review of our decision;
- attach a copy of the decision you are seeking a review of; and
- state the reasons why you consider the original decision maker made the wrong decision.

Email: foi@finance.gov.au

Post: The FOI Coordinator
Legal and Assurance Branch
Department of Finance
One Canberra Avenue
FORREST ACT 2603

For further assistance contact the FOI team (02) 6215 1783.

External review (Information Commissioner Review)

For an ER, you must apply to the OAIC in writing. The OAIC ask that you commence a review by completing their online form [here](#).

Your application must include a copy of the notice of our decision that you are objecting to, and your contact details. You should also set out why you are objecting to the decision.

Email: FOIDR@oaic.gov.au

Post: Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

The IC's enquiries phone line is 1300 363 992.

Can I appeal the Information Commissioner's external review decision?

Yes. You can appeal the Information Commissioner's ER decision to the Administrative Appeals Tribunal (AAT).

There is a fee for lodging an AAT application (as at 1 June 2022 it is \$962).

Further information is accessible [here](#).

The AAT's number is 1800 228 333.

Complaints

Making a complaint to the Office of the Australian Information Commissioner

You may make a written complaint to the OAIC about actions taken by us in relation to your application.

Further information on lodging a complaint is accessible [here](#).

Investigation by the Commonwealth Ombudsman

The Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be, or has been, investigated by the IC, the Ombudsman will consult with the IC to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate the complaint, then they are to transfer all relevant documents and information to the IC.

The IC can also transfer a complaint to the Ombudsman where appropriate. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. You will be notified in writing if your complaint is transferred.

Complaints to the Ombudsman should be made online [here](#).

The Ombudsman's number is 1300 362 072.