



20 January 2023

Our reference: LEX 71199
LEX 70430

Jon Lawrence
By email: foi+request-9520-0679da5e@righttoknow.org.au

Dear Sir / Madam,

Freedom of Information Request – Internal Review Decision

I refer to your request for internal review of the Freedom of Information (FOI) decision made by an authorised decision maker of Services Australia (the Agency) on 22 December 2022 (LEX 70430).

Background

On 2 November 2022, you made a request under the *Freedom of Information Act 1982* (Cth) (FOI Act) in the following terms:

I request access to any documents relating to any cost-benefit analysis or privacy risk assessment relating to the decision to develop an in-house authentication app - myGov Code Generator.

On 22 December 2022, the Agency issued a decision to you refusing access to one document on the basis of section 42 and 47C of the FOI Act.

On 22 December 2022, you wrote to the Agency requesting internal review of the original decision as you did not believe that the decision was justified under the above sections of the FOI Act.

Internal review decision

I am authorised to make decisions under section 23(1) of the FOI Act, including internal review decisions under section 54C of the FOI Act. Consistent with the requirements of section 54C(2) of the FOI Act, I have made a fresh decision.

The Agency holds one document (12 pages) that meets the scope of your request.

I have decided to **refuse access** to the document on the basis that it contains material subject to legal professional privilege (section 42 exemption).

Please see the Schedule at **Attachment A** to this letter for a detailed list of the documents and the reasons for my decision, including relevant sections of the FOI Act.

Further assistance

If you have any further questions about your internal review, please email FOI.LEGAL.TEAM@servicesaustralia.gov.au.



Yours sincerely

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



SCHEDULE OF DOCUMENTS FOR RELEASE
LAWRENCE, Jon - LEX 71199

Doc No.	Pages	Date	Description	Initial Decision	Internal Review Decision	Comments
1.	1 - 12	20 October 2017	Privacy Assurance Advice – myGov MAP, WAP and Authentication App project	Exempt in full (s42 and s47C)	Exempt in full (s42)	Material subject to legal professional privilege



Attachment A

REASONS FOR DECISION

What you requested

On 2 November 2022, you requested:

I request access to any documents relating to any cost-benefit analysis or privacy risk assessment relating to the decision to develop an inhouse authentication app - myGov Code Generator. On 8 September 2022, the Agency contacted you about your original request. On 9 September 2022, you revised your original request and agreed to an extension of time by email.

The Agency issued you with the original decision on 22 December 2022 refusing access to the document on the basis it contains material subject to legal professional privilege, and deliberative material the disclosure of which would be against the public interest.

You applied for internal review on 22 December 2022, stating:

I am writing to request an internal review of Services Australia's handling of my FOI request 'Documents relating to cost-benefit analysis and privacy risk assessment of decision to develop an inhouse authentication app'.

Having reviewed the response I received on 22 December 2022 and the relevant sections of the Act that this response refers to in justifying the decision to refuse my request (s42 & s47C), I do not believe that this decision to refuse release of the document Privacy Assurance Advice from 20 October 2017 is in fact justified under those sections of the Act.

The Agency acknowledged your internal review request on 3 January 2023.

What I took into account

In reaching my decision I took into account:

- your original request dated 2 November 2022
- your request for internal review dated 22 December 2022
- correspondence with you
- the document that falls 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 section 93A of the FOI Act (the Guidelines), and
- the FOI Act.



Reasons for my decision

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

I have decided to refuse access to the document in full. My findings of fact and reasons for deciding the exemption applies to that document is discussed below.

Section 42 of the FOI Act – legal professional privilege

This section of the FOI Act allows the Agency to redact documents or parts of documents subject to legal professional privilege (LPP). I have applied this exemption to the document in full.

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.
- (3) A document is not an exempt document under subsection (1) by reason only that:
 - (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
 - (b) the information is operational information of an agency.

Paragraphs 5.128 and 5.129 of the Guidelines provide the following guidance in relation to the application of section 42:

LPP applies to some but not all communications between legal advisers and clients. The underlying policy basis for LPP is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative. The information in a document is relevant and may assist in determining the purpose of the communication, but the information in itself is not determinative.

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. (*internal references omitted*)

Did a legal adviser-client relationship exist?

The Guidelines provide the following in relation to in house lawyers at paragraph 5.131:

The following factors are relevant to establishing whether a legal adviser-client relationship exists:

- the legal adviser must be acting in his/her capacity as a professional legal adviser
- the giving of the advice must be attended by the necessary degree of independence
- the dominant purpose test must be satisfied
- the advice must be confidential



- the fact that the advice arose out of a statutory duty does not preclude the privilege from applying
- whether the lawyer is subject to professional standards can be relevant.

The document relevant to this matter contains professional legal advice that was developed and provided by qualified and practising lawyers in the Agency's Legal Services Division (the Division). The relevant branch within the Division has advised me that this type of document, a Privacy Assurance Advice, is legal advice provided to assist business areas when developing projects to ensure consistency with legislative requirements both in the *Privacy Act 1988* (Cth) and relevant programme legislation. I am of the view that the advice was provided as a result of a request for legal advice from the business area when developing the myGov MAP, WAP and Authentication App project.

The Agency's organisational structure affords independence to the Division, allowing its members to provide independent legal advice. I am satisfied that the authors were acting in their capacity as professional legal advisors and that the authors were legal practitioners subject to legal professional standards.

I am satisfied that the document is advice provided by a professional legal adviser acting with the required level of independence to the client, and that there was a clear adviser-client relationship.

Does the document attract privilege?

Paragraph 5.136 of the Guidelines provides:

Whether LPP attaches to a document depends on the purpose for which the communication in the document was created. The High Court has confirmed that the common law requires a dominant purpose test rather than a sole purpose test. The communication may have been brought into existence for more than one purpose but will be privileged if the main purpose of its creation was for giving or receiving legal advice or for use in actual or anticipated litigation. (*internal references omitted*)

For the reasons outlined above, I am satisfied that the document was created for the dominant purpose of providing legal advice to the branch responsible for the myGov MAP, WAP and Authentication App project, and was received by that branch. The advice was provided by a qualified lawyer acting with the requisite degree of independence.

Has privilege been waived?

Section 42(2) of the FOI Act provides a document is not exempt where LPP is waived.

I am satisfied that privilege has not been waived as the document has not been distributed further than is reasonably necessary for internal operational purposes. It is marked as legally sensitive and I am satisfied that the legal advice contained within the documents has not been used in any way which is inconsistent with maintaining its confidentiality.

Conclusion

I have decided to refuse you access to the document on the basis it is exempt in full under sections 42 of the FOI Act as it contains material subject to LPP.



INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Asking for a full explanation of a Freedom of Information (FOI) 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 a FOI decision

If you still believe a decision is incorrect, the FOI Act gives you the right to apply for a review of the decision. Under section 54L of the FOI Act, you can apply for a review of an FOI decision by the Australian Information Commissioner.

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 Agency's 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