



6 February 2023

Our reference: LEX 71197

Mr Rex Banner

Only by email: foi+request-9760-f01317c4@righttoknow.org.au

Dear Mr Banner

Decision on your Freedom of Information Request

I refer to your request, dated 22 December 2022 and received by Services Australia (the Agency) on 22 December 2022 for access under the *Freedom of Information Act 1982* (the FOI Act) to the following documents:

'the Privacy Impact Assessment (PIA) #48538 for the "COVID-19 Readiness Project – State and Territory Check-In Apps" under the Freedom of Information Act 1982 (Cth)'.

My decision

The Agency holds one document (totalling 48 pages) that relates to your request.

I have decided to:

- refuse access to one document (document 1).

I have decided that the document requested is exempt under the FOI Act, pursuant to the following sections of the FOI Act:

- the material contained within the document is subject to legal professional privilege (section 42) and
- deliberative matter, the disclosure of which would be contrary to the public interest (section 47C).

On 5 January 2023 the Agency acknowledged your request and advised you we would not include personal details about our staff (such as their names).

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

You can ask for a review of our 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 from within the Agency, or an external review by the Office of the Australian Information Commissioner. You do not have to pay for a review of the decision. See **Attachment B** for more information about how to request a review.

Further assistance

If you have any questions please email FOI.LEGAL.TEAM@servicesaustralia.gov.au.

Yours sincerely

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



SCHEDULE OF DOCUMENTS FOR RELEASE
BANNER, Rex (Right to Know) - LEX 71197

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
1.	1 - 48	28 September 2022	Supplementary Privacy Impact Assessment COVID-19 Readiness Project: State and territory check-in apps	Exempt in full	s42 s47C	Material subject to legal professional privilege Deliberative material



REASONS FOR DECISION

What you requested

On 22 December 2022, you requested:

'the Privacy Impact Assessment (PIA) #48538 for the "COVID-19 Readiness Project – State and Territory Check-In Apps" under the Freedom of Information Act 1982 (Cth)'.

You agreed to an extension of time for the Agency to process your request on 22 December 2022 and the Agency acknowledged your request on 5 January 2023.

What I took into account

In reaching my decision I took into account:

- your original request dated 22 December 2022
- correspondence with you
- the documents that fall 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;
 - 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 decisions

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

I have decided that the document that you requested is exempt in full under the FOI Act. My findings of fact and reasons for decision 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 5.129 of the Guidelines provides the following guidance in relation to the application of section 42:

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*)

The documents contain correspondence between the Agency and its external lawyers for the purposes of obtaining professional legal advice on the privacy issues pertaining to the COVID-19 digital certificate.

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

Further, I am satisfied that privilege in these communications has not been waived as the documents have not been distributed further than is reasonably necessary for internal operational purposes. I am also satisfied that the substance of the legal advice contained within the documents has not been used in any way which is inconsistent with the maintenance of the confidentiality of the advice.

I am of the view that the Agency's ability to obtain legal advice on issues (such as COVID-19 projects) would be substantially prejudiced if these documents were to be made publicly available through FOI processes. In my view, real harm is likely to result from release of the documents as doing so would waive privilege and disclose the particular legal provider's approach to the interpretation, analysis and application of legislation administered by the Agency. Consequently, the Agency's ability to obtain comprehensive legal advice in the future would be substantially prejudiced if external law firms become aware that the Agency is expressly waiving privilege in documents by making its legal advice publicly available via FOI processes.

For the reasons set out above, I am satisfied the documents are exempt under section 42 of the FOI Act.

Section 47C - deliberative matter

This section of the FOI Act allows the Agency to redact documents or parts of documents relating to opinion, advice, recommendation obtained, or deliberation for the purposes of the deliberative processes involved in the functions of the Agency. I have applied this exemption to the document in full.

Section 47C provides:

(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
- (c) the Government of the Commonwealth.

Exceptions

(2) Deliberative matter does not include either of the following:

- (a) operational information (see section 8A);
- (b) purely factual material.

(3) This section does not apply to any of the following:

- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an Agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
- (b) reports of a body or organisation, prescribed by the regulations, that is established within an Agency;
- (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

I am satisfied the document in issue contains deliberative matter, being advice and recommendations, which have been prepared by the Agency's legal services provider for the purpose of undertaking the COVID-19 related PIA. The information identifies privacy and secrecy compliance risks for the Agency and includes recommendations for managing or eliminating identified risks and maximising opportunities for enhancing privacy protection. As such, I am satisfied the documents are not operational information or purely factual information, and are otherwise not of a kind specifically excluded by the FOI Act.

Accordingly, I find that the documents are also conditionally exempt, in full, under section 47C(1) of the FOI Act.

Public interest considerations

Access to conditionally exempt material must be given unless I am satisfied it would not be in the public interest to do so.

I consider the disclosure of the material would generally promote the objects of the FOI Act, which is in the public interest. However, I also consider disclosure could reasonably be expected to prejudice the Agency's ability to obtain comprehensive legal advice in the future and would destroy or diminish the provider's PIA methodology and approach, ultimately impede the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice.

As such, I find the public interest factor in favour of disclosing the material is outweighed by the public interest factors against disclosure.

Conclusion

In summary, I am satisfied that parts of the document, as set out in the Schedule, is exempt under s42 and conditionally exempt under section 47C of the FOI Act. Furthermore, I have decided that on balance it would be contrary to the public interest to release this information. Accordingly, I have decided not to release the document to you.

Summary of my decision

In conclusion, I have decided to refuse your request for access to the document.



Attachment B

INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Asking for a full explanation of a Freedom of Information 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 an Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982 (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:

1. an Internal Review Officer in Services Australia (the **Agency**); and/or
2. the Australian Information Commissioner.

Note 1: There are no fees for these reviews.

Applying for an internal review by an Internal Review Officer

If you apply for internal review, a different decision maker to the Agency delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be:

- made in writing
- made within 30 days of receiving this letter
- sent to the address at the top of the first page of this letter.

Note 2: You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

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.

If you do not receive a decision from an Internal Review Officer in the Agency within 30 days of applying, you can ask the Australian Information Commissioner for a review of the original FOI decision.

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

Note 3: The Office of the Australian Information Commissioner generally prefers FOI applicants to seek internal review before applying for external review by the Australian Information Commissioner.

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 Services Australia 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

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.