



8 March 2023

Our reference: LEX 71764

Rex Banner

By email: [foi+request-9760-f01317c4@righttoknow.org.au](mailto:foi+request-9760-f01317c4@righttoknow.org.au)

Dear Mr Banner

### **Freedom of Information Request – Internal Review Decision**

I refer to your correspondence received by Services Australia (the Agency) on 6 February 2023, seeking an internal review of the decision made by the Agency on 6 February 2023 in relation to your request for access to a document under the *Freedom of Information Act 1982* (FOI Act).

#### **Background**

On 22 December 2022, you requested access under the FOI Act to the following document:

...the Privacy Impact Assessment (PIA) #48538 for the "COVID-19 Readiness Project – State and Territory Check-In Apps"

On 6 February 2023, the Agency notified you that it had decided to refuse your request as the requested material was exempt under the FOI Act (original decision).

On 6 February 2023, you requested an internal review of the original decision.

#### **Summary of my 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.

I have decided to **refuse** your request as it relates to material that is fully exempt under the FOI Act.

Please refer to **Attachment A** for further information regarding the reasons for my decision.

#### **You can ask for a review of our decision**

If you disagree with any part of the decision, you can ask for a review by the Australian Information Commissioner. See **Attachment B** for more information about how to request a review.

#### **Further assistance**

If you have any questions please email [freedomofinformation@servicesaustralia.gov.au](mailto:freedomofinformation@servicesaustralia.gov.au).



Yours sincerely

Damien  
Authorised FOI Decision Maker  
Freedom of Information Team  
FOI and Ombudsman Branch | Legal Services Division  
Services Australia



**SCHEDULE OF DOCUMENTS FOR RELEASE**

**BANNER, Rex - LEX 71764**

Doc No.	Pages	Date	Description	Decision	Exemption	Comments
1.	1 - 62	28 September 2022	Supplementary Privacy Impact Assessment  COVID-19 Readiness Project: State and territory check-in apps	Exempt in full	Section 42  Section 47C	The document is subject to legal professional privilege  The document comprises deliberative matter



## Attachment A

# 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"

On 6 February 2023, the Agency notified you that it had decided to refuse your request as the requested material was exempt under the FOI Act.

On 6 February 2023, you requested an internal review of the original decision, providing written submissions in which you argued that:

As I understand it, my request has been refused due to the document being exempt due to legal privilege.

"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. "

Is the entire document legally privileged, or just correspondence? Could you release a masked version of the PIA without the legally protected advice?

### What I took into account

In reaching my decision I took into account:

- your original request dated 22 December 2022
- your internal review request dated 6 February 2023
- other correspondence with you
- the document falling within the scope of your request
- whether the release of material would be in the public interest
- consultations with Agency officers about:
  - the nature of the document, 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, including internal review decisions under section 54C of the FOI Act.



I have decided to refuse access to the document in full. My findings of fact and reasons for deciding the exemptions apply to the document are discussed below.

#### Section 42 of the FOI Act – legal professional privilege

I have applied the exemption in section 42 of the FOI Act to the document in its entirety.

This section of the FOI Act allows the Agency to redact documents or parts of documents subject to legal professional privilege (LPP).

The FOI Act does not define LPP. However, courts have held that deciding 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.

The document you requested is a Privacy Impact Assessment (PIA) prepared by an independent external legal provider for the purpose of providing the Agency confidential professional legal advice in relation to the development of the COVID-19 Immunisation Readiness Project.

Accordingly, I am satisfied that LPP attaches to this document. I am also satisfied that LPP has not been waived, as the document has not been distributed further than reasonably necessary for internal operational purposes, and the substance of the legal advice contained in the document has not been used in any way which is inconsistent with the maintenance of the confidentiality of the advice.

Further, I am satisfied there is a possibility of real harm resulting from release of the document. In particular, I consider that the Agency's ability to obtain independent external legal advice on issues would be substantially prejudiced if it were to waive privilege over this document (which sets out the particular legal provider's PIA methodology, together with their approach to the interpretation, analysis and application of legislation, systems and processes administered by the Agency) and make it publicly available through FOI processes..

For the reasons set out above, I am satisfied the document is exempt in full under section 42 of the FOI Act.

#### Section 47C of the FOI Act – deliberative material

I have applied the conditional exemption in section 47C of the FOI Act to the document in its entirety.

This section of the FOI Act provides a document is conditionally exempt if it would disclose deliberative matter. Deliberative matter is an opinion, advice or recommendation, or a consultation or deliberation that has taken place in the course of, or for the purposes of, the deliberative processes of an agency. Material which is operational or purely factual information is not deliberative matter. The deliberative exemption also does not apply to reports of scientific or technical experts, reports of a body or organisation prescribed by the regulations, or a formal statement of reasons.



I am satisfied the document comprises deliberative matter, being advice and recommendations, which have been prepared by the Agency's legal services provider in the course of undertaking the PIA. The document 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. I am also satisfied the document is not operational information or purely factual information, and is otherwise not of a kind specifically excluded by the FOI Act.

Accordingly, I find that the document is 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.

When weighing up 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.

I have also considered relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure could reasonably be expected to:

- destroy or diminish the commercial value of the provider's PIA methodology approach
- impede the full and frank disclosure between a lawyer and client, which assists the effective administration of justice, and
- prejudice the Agency's ability to obtain comprehensive legal advice in the future.

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

I am satisfied that the document sought is conditionally exempt under section 47C of the FOI Act. Further, I have decided that on balance it would be contrary to the public interest to release the document.

#### **Summary of decision**

I have decided to refuse your request on the basis that:

- the document is subject to legal professional privilege and therefore exempt in full under section 42 of the FOI Act, and
- the document comprises deliberative material, and disclosure would be contrary to the public interest and the document is therefore exempt in full under section 47C of the FOI Act.



**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 internal review decision**

If you still believe a decision is incorrect, the FOI Act gives you the right to apply for a review of the internal review decision. Under section 54M of the FOI Act, you can apply for a review of an FOI decision by the Australian Information Commissioner. There are no fees for this review.

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](http://www.oaic.gov.au)  
Post: Australian Information Commissioner  
GPO Box 5218  
SYDNEY NSW 2001  
Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

**Important:**

- If you are applying online, the application form the 'Merits Review Form' is available at [www.oaic.gov.au](http://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](http://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](http://www.ombudsman.gov.au)

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