



20 February 2023

Our reference: LEX 71600

Rex Banner (Right to Know)

Only by email: foi+request-9853-ea0c8bf9@righttoknow.org.au

Dear Mr Banner

Decision on your Freedom of Information Request

I refer to your request dated and received by Services Australia (the Agency) on 27 January 2023 for access under the *Freedom of Information Act 1982* (the FOI Act) to the following document:

I request the Privacy Impact Assessment:

Reference Number: 38354

Title: myGov Enhancement – Analytics

Apologies the reference number should be 38355

My decision

The Agency holds one document (totalling 34 pages) that relates to your request.

I have decided to **refuse access** to this document in full on the basis that it contains:

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

Please see the schedule at **Attachment A** to this letter for a detailed list of the document 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. 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.

Yours sincerely

Elizabeth
FOI Practitioner
Freedom of Information Team
Freedom of Information and Ombudsman Branch | Legal Services Division
Services Australia



SCHEDULE OF DOCUMENTS
BANNER, Rex (Right to Know) - LEX 71600

| Doc No. | Pages | Date | Description | Decision | FOI Exemption | Comments |
|----------------|--------------|-----------------|--|-----------------|----------------------|---|
| 1. | 1-34 | 12 October 2020 | Privacy Impact Assessment – Enhanced myGov Analytics 38355 | Exempt in full | s 42 s 47C | Material subject to legal professional privilege Deliberative material |



REASONS FOR DECISION

What you requested

I request the Privacy Impact Assessment:
Reference Number: 38354
Title: myGov Enhancement – Analytics
Apologies the reference number should be 38355

What I took into account

In reaching my decision I took into account:

- your request dated 27 January 2023
- other discussions and 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 you requested is exempt in its entirety under sections 42 and 47C of the FOI Act. My findings of fact and reasons for deciding that the exemptions apply to the document are discussed below.

Legal professional privilege

I have applied the exemption in section 42 of the FOI Act to Document 1 in its entirety.

This section of the FOI Act allows the Agency to exempt a document from disclosure if it is subject to legal professional privilege (LPP).

The FOI Act does not define LPP. 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 is a Privacy Impact Assessment prepared by an external legal provider for the purpose of providing the Agency professional legal advice on specific matters. I am satisfied that privilege in this document has not been waived as the document has 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 document has not been used in any way which is inconsistent with the maintenance of the confidentiality of the advice.

Further, I am satisfied the Agency's ability to obtain legal advice on issues would be substantially prejudiced if this document were to be made publicly available through FOI processes. In my view, real harm is likely to result from release of the document as doing so would waive privilege and disclose the particular legal provider's approach to the interpretation, analysis and application of legislation, systems and processes 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

Deliberative matter

Section 47C 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 also conditionally exempt, in full, under section 47C(1) of the FOI Act.

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 commercial value of 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.

Summary of my decision

In conclusion, I have decided the document is exempt, in full, under sections 42, and 47C of the FOI Act, and disclosure of conditionally exempt material would be contrary to the public interest for the purposes of section 11A(5) 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 (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 an FOI 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.

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, and
- sent to the address at the top of the first page of this letter.

Note: 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: 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.